National Tertiary Education Union

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11 March 2016

Commissioner Johns
Fair Work Commission

Dear Commissioner

RE: 4 yearly review of modern awards – Education group

Further to Amended Directions issued on 18 January 2016, enclosed are NTEU written outline of submissions, witness statements and documentary materials in support of variations in relation to the *Higher Education (Academic Staff) Award 2010* (AM2014/229) and the *Higher Education (General Staff) Award 2010* (AM2014/230).

Some points to note about the form of the submissions and materials:

- The **Outline of Submissions** is set out as one submission which covers both Awards. Parts A-D, H, K, and M relate to the *Higher Education (Academic Staff) Award 2010;* Parts E-G relate to the *Higher Education (General Staff) Award 2010;* and Parts I, J and L apply to both Awards.
- The parties will note that in relation to the applications regarding award coverage of Research Institutes, NTEU applies to reply in part upon the previous proceedings regarding this matter as part of the 2012 Award reviews, as set in Part L of the Outline.
- We seek to rely on all outlines, materials and witness statements, for all claims.
- Summaries of the findings of 2 key **surveys** are included (attached to statement of Ken McAlpine). The raw data for each of these surveys can be provided, but only upon request to the NTEU. Data will only then be provided on the express understanding that it will not be used without permission.
- To follow next week will be copies of **articles and reports** relied upon in the enclosed Literature Reviews (attached to statements of Professor Glenda Strachan and Dr. Robyn May). The Fair Work Commission will not necessarily have copyright permission to publish these on a public website, and for this reason, and out of respect for the academic authors, we propose NTEU does not have copyright permission to forward these documents and will therefore only provide them on USB memory sticks to the FWC, AHEIA and GO8 representatives and to any other party, upon request.
- The Commission and the parties' attention is particularly drawn to the fact that the proposed changes sought by NTEU vary, though not in substance, from the proposals submitted on 2 October 2015, in Part A and Part B.

Please contact myself at skenna@nteu.org.au or Renee Veal at rveal@nteu.org.au should you have any queries.

Yours sincerely

Susan Kenna
National Industrial Officer

NTEU Outline of Submissions

11 March 2016

Introduction

1. This outline of submissions is made pursuant to the Directions issued by the Fair Work Commission ("the Commission") on 27 November 2015 and Amended Directions on 18 January 2016, in these proceedings.
2. These submissions relate to the changes sought by the NTEU to the *Higher Education Academic Staff Award 2010* ('the Academic Award"), and the *Higher Education General Staff Award 2010* ('the General Staff Award").
3. The NTEU submits that the proper framework for consideration of these proposed changes is set out in the Full Bench Decision [2014] FWCFB 1788 (17 March 2014). The NTEU does not propose to set out in general form the legislative framework here, but will refer to that Decision, relevant parts of the *Fair Work Act 2009* ("the Act"), or previous Commission Decisions, as necessary.
4. In light of the Commission's approach set out by the Full Bench, NTEU presents an outline which, as far as possible set out with respect to each change sought:
    a. What the problem or mischief is which the change sought is seeking to address;
    b. Why the change sought is "necessary" within the meaning of the relevant legislative provisions;
    c. The extent to which our argument is based on arguments simply from principle, or is based on conclusions of fact which would either already be well-known to the Commission, or are to be drawn from evidence and other materials to which the Commission should have regard; and
    d. Where the argument is based at least in part upon contentions of fact, what those contentions of fact are.
5. We are also proceeding on the basis that the Commission is not limited to granting or refusing the "claims" of the parties. We submit that if the Commission forms the view that the problem is real and that regulation is necessary, but is not convinced of the merit of what the NTEU proposes, the Commission is obliged to formulate its own solution to that problem, preferably with the assistance of the participating parties.
6. The changes sought by the NTEU to the Awards dealt with in this Outline are as set out in the NTEU correspondence dated 2 October 2015, subject to the further comments included here. This Outline will now turn to each of these.

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

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

7. In October 2015, the NTEU submitted the following clause to replace the current clause 22 – Hours of work in the Academic Award:

> **22. Hours of work**
>
> ~~For the purpose of the NES, ordinary hours of work under this award are 38 per week.~~
>
> **22.1 Definitions and Application**
>
> For the purposes of this clause:
>
> **(a)** ***The relevant period of account*** shall mean each calendar year or such other period as is agreed in writing between the employer and the employee (not exceeding two years), or in the case of a fixed term contract engagement of less than eighteen months, the period of that engagement; or otherwise where the employment or part of the employment covers only part of a year, that part of the year.
>
> **(b)** ***required work*** shall mean:
>
> i. The specific duties and work allocated to an employee; and
>
> ii. To the extent these are not covered by i), any work necessary to meet performance standards expected of the employee; and
>
> iii. To the extent these are not covered by i) and ii), any work necessary to achieve any promotion expectations of the employer applicable to that employee.
>
> **(c)** In calculating hours of work, in addition to any required work performed on those days, each **public holiday** and each day of **leave** shall count as 7.6 hours of work.
>
> **(d)** In respect of **part time employees**, all specifications in this clause in relation to hours of work will be calculated pro rata to the fraction of employment.
>
> **(e)** This clause does not apply to **casual employees**, except that where a casual employee is engaged for more than 76 hours in any two-week period, then the payments otherwise due to that employee under this award will be increased by the percentages set out in sub-clause 22.4 below.
>
> **22.2** The maximum ordinary hours of work of an academic employee shall be an average of 38 hours per week over the relevant period of account.
>
> **22.3** Where the employee's actual hours of work are not recorded, Sub-clause 22.2 shall be deemed to have been complied with if the amount of required work is such that employees at the relevant academic level and discipline could with confidence be expected to perform that work in a competent and professional manner within an

average 38 hours per week, allowing for public holidays and leave taken, during the relevant period of account.

22.4 This sub-clause applies in circumstances where either the employee's hours of work are recorded and exceed 38, or where the required work could not with confidence be expected to be performed within an average of 38 hours per week during the relevant period of account.

22.5 Where the required work of the employee exceeds the amount specified in Clause 22.3 or where the employee's hours of work are recorded and exceed 38, the minimum rates of pay set out in this award shall be increased as follows (rounded to the nearest dollar):

Number of hours per week worked doing required work where the employee's hours of work are recorded; or number of hours per week within which employees at the relevant academic level and discipline could with confidence be expected to perform the required work at a competent and professional level, averaged across the period of account.	Increase in minimum rate of pay*
Between 38 and 40	0%
Between 40 and 42	7.895%
Between 42 and 44	13.158%
Between 44 and 46	21.053%
Between 46 and 48	28.947%
Between 48 and 50	36.842%
Above 50	36.842% plus 7.895% for each whole 2 hours by which 49 is exceeded.

** The value of the increase in rates of pay shall be calculated by reference to the rates of pay set out at clause 18.1, provided that for employees at Levels D and E, the value will be capped at the specified percentage in the table above applied to the rate of pay for Level C Step 6.*

It is recognised that many academic staff perform productive self-directed work which is not required work within the meaning of this clause. With respect to employees whose actual hours of work are not set by the employer, no employer shall be held to be in breach of this clause merely by virtue of the fact that an employee is working any number of hours in excess of those necessary to perform required work. Nor shall any employee be discriminated against or otherwise disadvantaged in their employment for reason that they have not worked hours in excess of those necessary to perform required work.

8. In the course of reflecting upon the proposed provision, the Union now proposes revised text to achieve the same outcome. The revised words, set out in paragraph 9 below, retain the basic schema proposed in the first submitted draft, but in wording which NTEU submits is logically tighter. The revised claim is on balance also narrower in scope than the original version.

9. The NTEU now proposes that the Commission should replace the existing Award words (those marked with strikethrough below) with a new more complete clause, as follows:

22. Hours of work

~~For the purpose of the NES, ordinary hours of work under this award are 38 per week.~~

22.1 Definitions and Application

For the purposes of this clause:

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

b. Required work shall mean:

i. The specific duties and work allocated to an employee; and

ii. To the extent these are not covered by i), any work necessary to meet performance standards expected of the employee; and

iii. To the extent these are not covered by i) and ii), any work necessary to achieve any promotion expectations of the employer applicable to that employee.

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

22.2 The maximum ordinary hours of work of an academic employee shall be an average of 38 hours per week over the relevant period of account. For this purpose, in addition to any required work performed on those days, each **public holiday** and each day of **leave** shall count as 7.6 hours of work.

22.3 Where the employee's actual hours of work are not set by the employer and recorded, maximum ordinary hours of work shall be deemed not to have been exceeded if the

amount of required work does not exceed ordinary-hours workload, or exceeds it by less than 1/19th part.

22.4 This sub-clause applies in circumstances where the employee's actual hours of work are set by the employer, are recorded and exceed an average of 38 over the period of account. In this case, the employee shall be entitled to be paid overtime at the ordinary hourly rate of pay for the first 5 additional hours per week (averaged over the period of account), and at 150% of the ordinary hourly rate of pay thereafter, provided that the rate of overtime loading for hours in excess of 5 per week shall be capped at 150% of the ordinary rate applicable to the sixth step of Level C.

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

a. The number of hours per week within which employees at the relevant academic level and discipline could with confidence be expected to perform the required work, as allocated to the employee, at a competent and professional level, as averaged across the period of account, shall be ascertained in hours per week ("ascertained hours");
b. Where the number of ascertained hours under a) is less than 40, no overtime loading shall be paid;
c. Where the number of ascertained hours under a) is at least 40 and less than 44, the overtime loading shall be equal to 1/38th of the minimum salary applicable to the employee for each whole hour by which the number of those ascertained hours exceeds 38;
d. Where the number of ascertained hours under a) is at least 44, the overtime loading shall be equal to 5/38ths of the minimum salary applicable to the employee, plus 3.947% for each whole additional hour in excess of 43, provided that the rate of overtime loading in respect of hours in excess of 43 shall be capped at the rate applicable to the sixth step of Level C.

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

22.7 The employer must advise the employee before the period of account, or for a new employee within 14 days of the commencement of the period of account, whether any overtime loading is payable, and if so the basis and amount of the loading. An employee is only entitled to an overtime loading in respect of days actually worked. Overtime loading may be averaged over the period of account and any periods of leave or public holidays, and may be paid, or part paid, at the end of a period of account. The employer shall be entitled to reduce or withdraw overtime loading where required work in fact does not justify the overtime loading as advised to the employee, and must increase the overtime loading in accordance with this clause if the employer increases the amount of required

work beyond that which was advised to the employee. No procedural requirement of Sub-clause 22.5 or this sub-clause need be complied with by any employer if the actual salary paid to the employee at all relevant times exceeds the sum of the minimum salary applicable under this Award and any overtime loading which would otherwise be payable.

22.8 It is recognised that many academic staff perform productive self-directed work which is not required work within the meaning of this clause. To avoid doubt, with respect to employees whose actual hours of work are not set by the employer, no employer shall be held to be in breach of this clause merely by virtue of the fact that an employee is actually working any number of hours. Nor shall any employee be discriminated against or otherwise disadvantaged in their employment for reason that they have not worked hours in excess of those necessary to perform required work in a competent and professional manner.

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

10. In brief, the NTEU submits that without a limitation in the Academic Award on the amount of hours which can be required of an academic employee, the Award does not operate as a fair and enforceable minimum safety net of terms and conditions, and cannot be a fair comparator for the better-off-overall test.

Contentions of Fact

11. The NTEU makes the following contentions of fact:

    a. In addition to the approximately 65,000 academic staff employed on an *hourly basis*, there are approximately 60,000 academic staff covered by the Academic Award, who are employed on a *salaried basis*. A clear majority of these are "full-time", and a significant minority are part-time. Around 40% of these salaried staff are employed on a fixed term basis. The Academic Award does not apply to language teachers or to general staff.

    [NOTE: Unless otherwise stated, all references to *employees* or *academics* in this Part refer only to salaried continuing or fixed term (non-casual) employees covered by the Academic Award.]

    b. In excess of 95% of employees are employed in the 37 public universities or the Batchelor Institute of Indigenous Tertiary Education (a public institution). There are also employees at University of Notre Dame Australia, Bond University, and a number of small private institutions.

c. Close to 97% of employees are covered by enterprise agreements, a higher proportion at the public universities.

d. Employees' contracts of employment are always or virtually always written and extensive. No or almost no contracts of employment specify maximum hours of work or provide for any right of employees to refuse allocated or required work, nor does the contract of employment provide for any limitation on the amount of work which can specifically be allocated to the employee nor limit the amount of work which can be required to meet any performance standard.

e. The work of academics as a class, consists of teaching or supervising and assessing students, the conduct of research and scholarship within one or across a number of academic disciplines, service to the institution for which they work, or to a profession or the community more generally, and the administration of matters connected with each of these activities.

f. Although a majority of academics (around 60%) over any given period will undertake each of these functions, the mix between them can vary considerably as between different academics, and indeed there is a minority (probably less than 10%) who are called *teaching-only* (meaning that their work is entirely or substantially limited to teaching, scholarship and administration). There is another minority (around 30%) which is called *research-only*, though some of these perform a wider range of duties. Despite this diversity, the essential character and purpose of each of the academic functions (teaching, research, etc.) is the same or similar for nearly all academic employees at all employers covered by this award, and indeed for academic employees of universities internationally.

g. With virtually no exceptions each of the following is true:

    i. no employees are instructed to work a particular number of hours in a week or in a year;

    ii. no employees are instructed to record the actual hours of work nor is the performance of any employee assessed on the basis of how many hours the employee has worked as such;

    iii. no employees are instructed to stop working when they have worked a particular number of hours in a week, month or year;

    iv. employees are not instructed how many hours to spend on a particular task.

h. The employers covered by this Award require that work be performed at a professional level, meaning a level which complies with the institution's mission to provide high quality teaching informed by current scholarship, and to conduct high quality research. It is inherent in the nature of the work and the mission of the institution. Performing work to this standard will, all other things being equal, take longer than performing work below these standards.

i. The requirements of an academic to perform work under her or his contract of employment arise in two ways:

   1. The academic is given *specific direction* (explicit) or requirements (implicit) to perform certain duties – for example *to conduct 26 lectures and 26 tutorials in Trusts and Succession* (a sometimes thankless task);
   2. The academic is given *objectives or outcomes* that he or she is expected to meet – for example *to make a significant contribution to knowledge in the discipline by publishing 3 significant articles in legal journals*, or *to obtain significant research grants from external granting bodies*.

   These two categories of work are different but not distinct. For example, an employee may have a performance standard stating that she should *achieve an average 7/10 student satisfaction score in student evaluations.* This is an *objective*, but it relates *to specifically directed work* (the teaching). It will also tend to increase the number of hours' work required.

j. The definition of *required work* proposed by the NTEU in our draft Clause 22. (1) (b) describes the requirements of academic employees to perform work under their contracts of employment.

k. Employers generally in this industry have established employee-direction and control procedures reflecting this way of assessing work. *Specific direction of duties* is addressed typically through a periodic documented workload allocation, work plan, teaching allocation or the like. Outcomes or objectives are established either on an individual basis by performance plans, work plans or other written documents which apply to an employee, typically over a period of a year, but sometimes over a different period. In addition to, or sometimes embedded in, these individual performance or work plans, there are typically generic *performance standards* or *performance expectations* which relate to some or all *research outputs* (publications, etc.), *grant or research income* and *student*

satisfaction scores, and sometimes other matters. These standards or expectations are nearly always generic in the sense that they apply to academic employees by classification and faculty or school.

l. Work allocations are most commonly done on an annual basis, though there are exceptions, while some performance expectations may be averaged over longer periods.

m. In a great majority of cases the employer has no choice but to rely upon the employee's professional judgment to determine how long needs be spent to perform an *individual* task in particular circumstances relevant to its performance (e.g. the supervision of a PhD student with limited English). The time required may vary from instance to instance.

n. Despite this, taking into account all of the employees' required duties over an extended period,

    1. It is possible to estimate, though not necessarily with great confidence, how many hours it would take for an individual employee to perform those ***required duties***. There would legitimately be some uncertainty based upon the individual capacities and modes of work of the individual academic, but;
    2. It is possible to estimate with reasonable confidence the amount of time which *competent employee*s should be expected to take to perform, at a professional level, the work they are required to perform by their employer, having regard to the discipline and classification of those employees.

o. The industry covered by this Award (higher education) is a $30 billion industry, with the great majority of employees being employed by employers with turnovers in excess of $500 million. Compared to most employers, universities have significant planning, human resources, and research and analysis capacity and collect detailed information about most aspects of their operations. However, the employers have not collected, or at least have not revealed, any significant data about how many hours academic employees are working, either in total hours or on required work.

p. Nevertheless, academic hours of work have been independently researched. The research and other data which is available leads, at a minimum, to the following conclusions being highly probable in respect of full-time employees:

1. Only a small minority of employees are working an average of a standard 38-hour week or close to that;
2. A majority of employees are working more than an average 45 hours per week;
3. A significant number of employees, which may be close to half, are working more than an average 50 hours per week.
4. Significant minorities of employees are working in excess of an average of 55 hours per week;
5. At least a few employees are working in excess of an average 60 hours per week.

q. Some proportion of academic work performed by employees is not "required work" in the terms described by the union's proposed Clause 22.1 b). Academic work is seen by many or most employees as a vocation as well as an occupation, and the interest or indeed passions of academic employees lead them to do additional work over and above the requirements of their employer. Two main types of this additional work are as follows:

1. Time spent on *required work* but which is over and above the time one might reasonably expect with confidence that a competent employee at a professional level might be expected to take to do that work, when this additional time is solely a choice arising from the professional autonomy of the academic; voluntarily going "above and beyond" what is required, in relation to required work. For example, an academic with a particular passion about pedagogy and audio visual presentation may wish to spend many additional hours preparing original videos for lectures, well over and above what would be considered *normal or necessary* time for lecture revision or preparation. This is undoubtedly work-time, but it is not *required work,* at least in the sense of proposed Clause 22.1 b).
2. There are activities which are separate from any required work, which are nevertheless academic work. For example, in addition to her specified research performance standards, an academic might be

spending an average 5 hours out of her 55 hours per week over 15 years writing a History of Australian Labour Law Enforcement. This work is intrinsically important to the academic concerned, and valuable to the discipline as a whole, but is either too long term to be counted as part of her research outputs, or does not meet the strategic research priorities of her employer. (Nevertheless, when the book is eventually published, the employer would always count it in any research-metrics exercise.)

r. With these exceptions, an academic does not get to control the volume of work he or she has to perform. It is true that an academic generally retains considerable autonomy about *how* required work is to be done. However this autonomy only to a very limited extent allows the employee to determine the number of hours which her or his required work will take. For required work to be performed competently and to a professional standard, hours adequate to achieving this must actually be worked. It follows therefore that academic employees have their actual *hours* of work (for required work) determined by their employer, through the employer's directions, workload allocations and performance expectations.

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

t. It is true either that academic workloads and working hours have increased steadily over the past 25 years, or that the level of autonomy and control with which academic employees are able to limit their working time has decreased over the same period, or both.

The nature of the regulation sought and its jurisdictional basis

12. The NTEU's proposed Clause 22 on Hours of Work is best described as a minimal and "light touch" regulatory approach which reflects the needs and character of the industry, and retains very great flexibility for the employer compared to other Awards.

13. Sub-clause 22.2 and 22.3 serve different functions but need to be read together. Sub-clause 22.2 says:

> ***22.2*** *The maximum ordinary hours of work of an academic employee shall be an average of 38 hours per week over the relevant period of account.*

14. Such a provision meets the requirement of Section 147 in that it sets ordinary hours of work and makes it possible to calculate certain entitlements under the National Employment Standards (NES). The *period of account* is a long period (by default a calendar year) as defined in 22.1 a).

15. It is conceivable, though unlikely, that an employer may run its business in the manner envisaged by 22.2 – to control work by reference simply to hours of work performed (the "Bundy Clock" approach). NTEU submits, however, that such an approach has never or very rarely occurred in relation to academic work, and that it is not suited to the efficient or effective performance of work in this industry. Such an approach would be opposed on professional (if not industrial) grounds by many employees and would also not be supported by employers.

16. For this reason it is necessary and fair to have a provision such as 22.3:

> ***22.3*** *Where the employee's actual hours of work are not set by the employer and recorded, maximum ordinary hours of work shall be deemed not to have been exceeded if the amount of required work does not exceed ordinary-hours workload, or exceeds it by less than 1/19th part.*

This Sub-clause provides the employer with conditional protection against prosecution under Sub-clause 22.2. Such protection is necessary in circumstances where working hours are not recorded and the employer cannot directly limit or know how long an employee has worked. However, such protection is not unconditional. It depends upon the *required work* [as defined in a clause 22.1 b)] being reasonably able to be performed by an average comparable employee within an average 38-hour week.

17. To put beyond doubt that it is only *required work* which counts under Sub-clause 22.3, Sub-clause 22.8 states:

> ***22.8*** *It is recognised that many academic staff perform productive self-directed work which is not required work within the meaning of this clause. To avoid doubt, with respect to employees whose actual hours of work are not set by the employer,* ***no employer shall be held to be in breach of this clause merely by virtue of the fact that an employee is actually working any number of hours.*** *Nor shall any employee be discriminated against or otherwise disadvantaged in their employment for reason that they have not worked hours in excess of those necessary to perform required work in a competent and professional manner. (emphasis added)*

This puts beyond doubt that "non-required work" performed by the employee, however extensive, does not put the employer in breach of its award obligation. On the other hand, nor can an employer directly or indirectly "require" that an employee do more than their required work.

18. Of Sub-clauses 22.2 and 22.3, it is only sub-clause 22.2. which creates an enforceable right as such. Only Sub-clause 22.2 can be breached by an employer. While 22.3 is *about* hours of work (a matter included in Section 139 (1) (c) of the Act), it is in fact merely a proviso on the operation of 22.2. Therefore, taken together (and with the second sentence of 22.8) the provision is nothing more or less than a qualified limitation on hours of work.

19. In the alternative, 22.3 is incidental to *hours of work* and essential to the Academic Award operating in a practical way (Section 142 of the Act), having regard to the contentions of fact set out above.

20. Taken alone, Sub-Clauses 22.2 and 22.3 set "maximum hours" over the *period of account*. If these clauses were the only ones which operated, any requirement for academic employees to work hours beyond an average of 38 would be prohibited by the Award. This is not realistic, given the pattern of work and staffing levels in this industry.

    Therefore proposed Sub-clauses 22.4 and 22.5 allow for additional workload, and therefore additional hours, to be required of an employee, subject to the payment of additional remuneration, called an *overtime loading*. Without additional remuneration being payable, the ordinary hours would serve no purpose but to provide for the basis of calculation of leave.

    Sub-clauses 22.4 and 22.5 provide for an overtime loading as follows:

    a. Subclause 22.4 allows an employer to adopt the approach of simply recording hours and paying a straightforward overtime rates for hours above 38, when averaged over the period of account. It is proposed that a 150% penalty rate not operate until an employee averages 38+5=43 hours a week over the period of account.

    b. In recognition of the fact that simple recording of hours is not well suited to academic work, Subclause 22.5 provides a way of calculating overtime payments based on a reasonable assessment of how long *competent employees would take*

to perform the work at a professional level, having regard to discipline and classification.

c. Under Subclause 22.5, payments are not made for each notional hour of additional workload. This level of precision would be impractical. Rather, stepped ranges are established. The employer is given considerable latitude, in that no overtime loading is payable at all until the hours estimated for average required work exceed 40 hours per week (that is, after approximately 92 hours "extra" work over a normal 46-week year).

d. The basis of the calculation of the loading in respect of each "range" of hours (40-42, 42-44, 44-46, and so on) is that the payment is that which would be payable at the mid-point of each range (respectively 41, 43, 45 hours and so on).

e. The amount payable is calculated using the *ordinary hourly rate* (with no penalty) in respect of average additional hours between 38 and 43 hours, which means no penalty loading attaches to the first 230 hours of overtime in a normal 46-week year.

f. Beyond those 230 hours over a normal year (43 hours per week) the overtime loading is calculated at 150% of the hourly rate applicable to the employee's classification. It should be noted that in practice, given the way the ranges are arranged no penalty loading is actually payable until the employee's workload exceeds the equivalent of 44 hours per week or 276 hours in a normal year.

21. Under Sub-clause 2.2 of the Award, monetary compensation such as the overtime loading is absorbable into any over-award payment. The final sentence of Subclause 22.7 also relieves the employer of any administrative burden under 22.5 or 22.7 if the overtime loading is fully absorbed.

22. The proposed award is flexible in that the manner of payment of the overtime allowance is pretty much at the discretion of the employer, and can be paid at the end of the period of account, or upon the termination of employment, or upon a change in the fraction of full-time employment of the employee. This is provided for in Sub-clause 22.7.

23. The concept of required work operates prospectively – work must be required before it is performed. (Ref Sub-clause 22.1.c). Nevertheless, any overtime loading payable is adjusted if the actual required work increases or decreases over the period of account

(Ref Sub-clause 22.7). This is why the Union's proposal allows for the payment of the overtime loading at the end of the period of account.

24. The rate of the overtime penalty loading is capped by reference to the rate applicable to the top of Level C.

Arguments of merit and principle in favour of the proposed clause

25. Paragraph 10 of the Commission's Decision in [2014] FWCFB 1788; *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* sets out the framework in which issues of merit need to be framed in these proceedings.

> ***[10]*** *In addition to s.156 a range of other provisions in the FW Act are relevant to the Review: s.3 (objects of the Act); s.55 (interaction with the National Employment Standards (NES)); Part 2-2 (the NES); s.134 (the modern awards objective); s.135 (special provisions relating to modern award minimum wages); Divisions 3 (terms of modern awards) and 6 (general provisions relating to modern award powers) of Part 2-3; s.284 (the minimum wages objective); s.577 (performance of functions and exercise of powers of the Commission); s.578 (matters the Commission must take into account in performing functions and exercising powers); and Division 3 of Part 5-1 (conduct of matters before the Commission).*

26. NTEU's primary submission is straightforward - that a 38 hour week is a widely accepted community standard to which academic employees should be entitled if they want it. The limitation of working hours has been an accepted community standard for employees since at least early in the last century. There have been certain occupations where for whatever reason, the representative associations of employees and employers, or the employees themselves, have seen no need for or expressed no desire for a "working time" provision in industrial regulation. The reasons for this can be readily imagined – the employees have a large degree of autonomy about when work is performed, how it is performed and how much work is to be done; or the actual market rates of pay in a profession or occupation are so high they see no need for "overtime" in an Award sense. Until around 20-25 years ago, most NTEU academic members considered that the regulation of working hours, or indeed workloads, was either unnecessary or undesirable, for a variety of reasons of the type described above. Indeed, some NTEU members considered that the adoption of awards covering such matters was an infringement of academic freedom.

27. Despite workloads being an increasingly central aspect of industrial contestation and disputation, NTEU has never sought in awards to limit the average working week of academic employees until now. The non-regulation of working time in relevant awards has been by historical and long-standing consent. In the NTEU's submission, the unusual absence of such basic regulation should only occur during the consent of the *"well-informed industrial parties"*. That consent no longer exists.
28. The withdrawal of that consent should be sufficient for the Commission to extend appropriate basic award regulation of working time to academic employees, or at the very least throws the onus on the employers to say why such standard protection should be denied to the employees covered by the Academic Award.
29. This primary submission does not require or to any significant degree rest upon the extensive evidence brought forward by the NTEU. Nevertheless, NTEU acknowledges that if the Commission accepts this primary submission, there are still very genuine issues about *how* any regulation should operate, which need to be carefully considered. However, there is no protection of employees unless by some means either:
    a. The working time of employees is limited to a ceiling by some means; or
    b. The award provides an appropriate regime for additional remuneration where more than a standard number of hours or workload is exceeded.
30. There can be no doubt that the existing Clause 22 of the Award:
    For the purpose of the NES, ordinary hours of work under this award are 38 per week. does neither of these. Indeed it provides no enforceable rights whatever in relation to working time. NTEU submits that in its current form it does not even comply with Section 147 of the Act which requires that ordinary hours be "prescribed" for each classification.
31. The national Awards for academic employees established in the Commission some 25 to 30 years ago provided for salaries and work-value level progression, redundancies and for a number of other matters important to the industrial parties, such as the core protections essential to academic freedom (dismissal only for cause, etc.), academic probation, and a few other matters. These, and the provisions later arbitrated in the *Higher Education Contract of Employment Award 1998*, constituted the industry-level framework of award regulation, which (to the extent that it covers matters which can now be included in an Award) in turn constitutes the basis of the present modern award. This framework did not include the regulation of working time limits for academic

employees. (It should be noted also, for the same types of reasons as are described above about working time, that a large minority of academic employees also had no award entitlement to annual leave.) Nevertheless, it is important that the Commission remember the context in which this regulatory regime existed. While working time was "unregulated", there were in existence industrial disputes with nearly all of the employers in the industry, the ambit of which covered workloads and working time. The union at all times retained the capacity to notify a dispute and seek arbitration to deal with a situation affecting the industry, an institution, or indeed an individual employee. This situation itself provided considerable protection to employees, and is fundamentally different from the position of an employee today.

32. Despite the absence of regulation in Awards, academic workload has clearly been a central issue in the industrial relations landscape since the late 1990s. This is reflected in enterprise agreements approved by the Commission.

33. The Academic Award does not operate as a fair and effective safety net of terms and conditions of employment, either in its own right or as a safety net for bargaining.

34. The Academic Award provides for minimum wages as envisaged by Section 134 of the Act. All awards do this. However in the case of the Academic Award, the amount is expressed as an annual salary. In each award an hourly rate of pay is either stated or implied. The salary rates reflect internal and external wage relativities established by the Commission.

35. It is clear that, irrespective of the hours worked, an employee covered by the Academic Award has no entitlement to additional pay under the Award. In this context, it is instructive to calculate the implied hourly rate under various scenarios of required work. The Table below shows the implied hourly rate of pay in respect of each of the classification steps within Levels A, B and C, under seven different scenarios.

    a. Columns 1, 4, 10, and 16 show the relevant award salaries, expressed as an hourly rate, by dividing that salary by the number of hours – 38, 45, 50 and 55.
    b. Columns 7, 13 and 19 do the same thing, but they show the calculation of the hourly rate worked out on the assumption that (as for most employees) additional hours were paid at 150% of the ordinary hourly rate.
    c. Columns 2, 5, 8, 11, 14, 17 and 20 show the relevant hourly rate as a percentage of the "C10" trades rate, and Columns 3, 6, 9, 12, 15 and 18 show the relevant hourly rate as a percentage of the Graduate Engineer (4-year degree) rate.

Academic Salaries			38 hrs	% of C10	% of Grad Eng	45 hrs	% of C10	% of Grad Eng	45 hrs with o/t at 150%	% of C10	% of Grad Eng	50 hrs	% of C10	% of Grad Eng	50 hrs with o/t at 150%	% of C10	% of Grad Eng	55 hrs	% of C10	% of Grad Eng	55 with o/t at 150%	% of C10	% of Grad Eng
		$	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21
Lev A	1	47,148	23.86	119	101	20.15	100	85	18.69	93	79	18.13	90	77	16.19	80	68	16.49	82	70	14.28	71	60
	2	49,037	24.82	123	105	20.96	104	88	19.44	97	82	18.86	94	80	16.84	84	71	17.15	85	72	14.85	74	63
	3	50,926	25.77	128	109	21.76	108	92	20.19	100	85	19.59	97	83	17.49	87	74	17.81	88	75	15.42	77	65
	4	52,697	26.67	132	113	22.52	112	95	20.89	104	88	20.27	101	86	18.10	90	76	18.43	92	78	15.96	79	67
	5	54,114	27.39	136	116	23.13	115	98	21.46	107	91	20.81	103	88	18.58	92	78	18.92	94	80	16.39	81	69
	6	55,649	28.16	140	119	23.78	118	100	22.07	110	93	21.40	106	90	19.11	95	81	19.46	97	82	16.85	84	71
	7	57,186	28.94	144	122	24.44	121	103	22.67	113	96	21.99	109	93	19.64	98	83	20.00	99	84	17.32	86	73
	8	58,720	29.72	148	125	25.09	125	106	23.28	116	98	22.58	112	95	20.16	100	85	20.53	102	87	17.78	88	75
Lev B	1	61,083	30.91	154	130	26.10	130	110	24.22	120	102	23.49	117	99	20.98	104	89	21.36	106	90	18.50	92	78
	2	62,855	31.81	158	134	26.86	133	113	24.92	124	105	24.18	120	102	21.58	107	91	21.98	109	93	19.04	95	80
	3	64,626	32.71	162	138	27.62	137	117	25.62	127	108	24.86	123	105	22.19	110	94	22.60	112	95	19.57	97	83
	4	66,401	33.60	167	142	28.38	141	120	26.33	131	111	25.54	127	108	22.80	113	96	23.22	115	98	20.11	100	85
	5	68,171	34.50	171	146	29.13	145	123	27.03	134	114	26.22	130	111	23.41	116	99	23.84	118	101	20.65	103	87
	6	69,944	35.40	176	149	29.89	148	126	27.73	138	117	26.90	134	114	24.02	119	101	24.46	121	103	21.18	105	89
Lev C	1	71,715	36.29	180	153	30.65	152	129	28.44	141	120	27.58	137	116	24.63	122	104	25.08	125	106	21.72	108	92
	2	73,487	37.19	185	157	31.40	156	133	29.14	145	123	28.26	140	119	25.24	125	106	25.69	128	108	22.26	111	94
	3	75,259	38.09	189	161	32.16	160	136	29.84	148	126	28.95	144	122	25.84	128	109	26.31	131	111	22.79	113	96

	4	77,031	38.98	194	164	32.92	164	139	30.54	152	129	29.63	147	125	26.45	131	112	26.93	134	114	23.33	116	98
	5	78,803	39.88	198	168	33.68	167	142	31.25	155	132	30.31	151	128	27.06	134	114	27.55	137	116	23.87	119	101
	6	80,575	40.78	203	172	34.43	171	145	31.95	159	135	30.99	154	131	27.67	137	117	28.17	140	119	24.40	121	103

36. For most real-world employees in this industry, it is risible to suggest that the minimum ***rate of pay*** - the monetary reward for time worked, is a fair minimum. Some of the more obvious points which can be drawn from the Table are as follows:
37. For employees working 45 hours per week, with no payment for hours above 38, (column 4), the actual hourly rate of pay at Lecturer Level A Step 1 when spread across 45 hours is $20.15, the same as the C10 trade rate in the Manufacturing Award. If an overtime rate of only 150% is applied to the hours between 38 and 45 to determine the number of notional hours worked, but still with no additional payment for hours above 38 (column 7), the resulting implied hourly rate of $18.69 is only 93% of the trades' rate.
38. For employees working 55 hours per week, with no payment for hours above 38, (column 16), the resultant hourly rate at the first two steps of Level A is below the adult minimum wage ($17.29). For an employee with a PhD (Level A, Step 6) , with an overtime rate of only 150% used to determine the number of notional hours worked between 38 and 55 (column 19), the implied hourly rate of $16.85 is well below the adult minimum wage. A Level C, Step 1 employee (for example the academic responsible for coordinating the whole undergraduate Law Programme at a University) in the same circumstances, is getting 8% *less per hour* than a four year graduate with no experience under the Manufacturing Award.
39. The available evidence about academic working hours will demonstrate that there are a significant number of employees who are in practice required by their employer to work 45, 50 or even 55 hours of work per week averaged over the year. In these circumstances, the Academic Award quite simply fails to provide a *fair and enforceable safety net.*
40. There is no effective rate of pay. In the absence of culturally or organisationally accepted practices or even contracts of employment which operate to effectively limit or standardise working hours in practice, an employee subject to the Academic Award has no enforceable right to a rate of pay which even meets the adult minimum wage, let alone represents a fair minimum having regard to the skills and responsibilities which the rates and relativities are intended to embody. This must be addressed.
41. When this salary structure was adopted in 1991, the Unions at that time were still able to call upon the general powers of the Commission to settle disputes if a problem arose

about the employer excessively taking advantage of unregulated working hours. Those powers have gone. Therefore, unlike the position when these rates were established, there is not only no regulation of hours for these employees in the safety net (except for the purposes of the NES), there is no *capacity* for regulation except through this Review.

42. NTEU now turns to the National Employment Standards (NES). The *modern awards objective* in Section 134 (1) of the Act states in part that "*The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions. . .*"

43. NTEU accepts that the NES provides employees with some rights in relation to hours of work, under Section 62. However there are a number of points which need to be noted about the NES.

44. First, the NES does not provide for additional remuneration as such. It simply limits the amount of additional hours that an employer can require the employee to work. The problem in this industry is not that additional hours are *unreasonable per se*, but that so long as they remain unpaid, they undermine the safety net of rates of pay. The provisions of Section 62 of the Act are no substitute for a "*simple, easy to understand*" modern award.

45. Second, an additional complication for employees covered by this Award is that they are not "*request[ed] or require[d]" to* work any particular number of *hours* as such (Section 62). They are simply given work and told to do it, and given minimum performance standards and told to achieve them. The Union supports this approach in-principle as compared to the Bundy Clock, but it does add a significant if not insurmountable complication to an entitlement under Section 62. Making the changes to the Award which are sought by the NTEU would make dealing with any dispute over Section 62 a much simpler matter, even where employees were covered by enterprise agreements.

46. However, the single greatest argument of merit in favour of the NTEU proposal is that, in principle and in practice, the absence of working hours regulation means that the *better-off-overall-test* (BOOT test) fails to operate in a fair or practical way. This can be explained with a simple example. Consider an enterprise agreement covering academics which comes before the Commission, and that agreement has two relevant provisions:

    i. A provision that all employees will be paid 1% more than the Award rate of pay

ii. A provision that all employees could be required to work a 50-hour week.

47. Such an agreement would on its face, *pass* the BOOT test when measured against the current Academic Award. The fact that employees were required to work an additional 12 hours (32%) above "standard" hours would count for nothing because, under the Award, such employees can already be required to do this. It is obvious that the problem here is with the comparator safety net.

48. It is acknowledged that in this industry, all enterprise agreements currently provide for salaries significantly higher than the Award. Analysis of enterprise agreements by the NTEU shows that salaries in those agreements (weighted for the number of employees) are on average about 54% higher than the Academic Award minimum. The extremes (at public universities) are around 28% (Level A, Step 1 at Federation University) and 87% (Level E at University of Sydney). However, the majority of employees fall within the range from 50% to 60% above the Award. Moreover, actual salaries at other employers are comparable to those in public universities. It might be argued that in most cases academic employees are receiving sufficient actual salaries to compensate them for the additional hours. Even if that were the case, it must be entirely irrelevant to the matter before the Commission.

49. If the real question is what a fair safety net is, the question is not:
"Are employees getting enough under their EBAs to compensate for their onerous working hours?"
That might be a question to be asked when the BOOT test is to be applied.
The question which is posed by the statutory scheme is whether there is a fair and enforceable safety net of terms and conditions *in the Award*. In this case the question is:
Would an employee working for the award salary who can be directed to work 45 or 55 hours per week, have a fair and enforceable safety net?
Manifestly, the answer is no.

50. The Union's proposed Award provision, for that overwhelming majority of employees covered by enterprise agreements, would have no direct operation. Rather, it would be relevant for the BOOT test. It would require the parties seeking approval of an agreement, and the Commission, to compare remuneration under the proposed agreement, with the total remuneration to which employees would be entitled under the agreement, but , for the first time, doing so having regard to the working hours (or workload) requirements in both. It will be up the bargaining parties to determine how to

craft agreements, but they would need for example to be able to answer the following example questions:

Can an employee be given a workload that we can expect would take 55 hours to perform?

If the answer to that is "yes", would the employee at least receive the Award rate of pay for that number of hours worked?

At the moment those questions would be irrelevant as the Award rate of pay does not change regardless of the hours worked.

51. The NTEU contends that the salaries in enterprise agreements, and to a large extent those paid to the small number of employees not covered by enterprise agreements, are significantly higher than the salaries in the Academic Award. At the time the Award rates were set, the Award was expressed to be a minimum rates award, but the great majority of employees received the actual award rate of pay. The ravages of flat-rate adjustments to Award rates, market factors and the success of NTEU salary bargaining have combined to ensure that "going rates" are now far in excess of Award rates. This means that to a large extent, any increase in remuneration due under the NTEU's proposal would largely be absorbed into over-award payments. Of course, for those employees covered by enterprise agreements, there will be no effect whatever until a new agreement is to be approved.

52. NTEU has prepared Tables to indicate the notional impact of its proposed Award changes, and the effect of additional hours worked on the hourly rate. In the Table below, the first column indicates the amount of over-award pay in the relevant enterprise agreement rate, as a percentage of the Award rate. For each of these over-award rates, the second to seventh columns show the extent to which the agreement rate remains above the award rate when considered as an *hourly rate* for an employee working each of 42, 45 , 48, 50, 52 and 60 hours, at each level of over-award payment. So, for example, an employee with an agreement-rate at 135% of the Award rate, who is working 55 hours per week is actually receiving only 89.8% of the minimum hourly rate under the Award as it provides for an employee working a 38 hour week. In the right hand column is shown the number of hours per week an employee needs to be working (at the relevant over-award rate indicated) to be receiving exactly the Award minimum rate of pay per hour.

EBA	**Effective hourly EBA rate as % of Award rate for 38 hour week.**	**"Break**

salary as % of Award salary	**42 hours worked**	**45 hours worked**	**48 hours worked**	**50 hours worked**	**55 hours worked**	**60 hours worked**	**even" hours if employee on only award rate.**
130%	117.6	109.8	102.9	98.8	89.8	82.3	**49.4**
135%	122.1	114.0	106.9	102.6	93.3	85.5	**51.3**
140%	126.7	118.2	110.8	106.4	96.7	88.7	**53.2**
145%	131.2	122.4	114.8	110.2	100.2	91.8	**55.1**
150%	135.7	126.7	118.8	114.0	103.6	95.0	**57.0**
155%	140.2	130.9	122.7	117.8	107.1	98.2	**58.9**
160%	144.8	135.1	126.7	121.6	110.5	101.3	**60.8**
165%	149.3	139.3	130.6	125.4	114.0	104.5	**62.7**

53. All the calculations in the table above show a straight hour-for-hour calculation of rates, rather than rates calculated on the basis of an hourly rate including a penalty.

54. The next Table shows the same set of data, but with one significant change. The table below shows the implied hourly rate as a percentage of the Award rate, for different levels of over-award payments, but this time applying the formula which applies to the *overtime loading* in the NTEU's proposed clause – 100% up to 43 hours per week, and 150% thereafter.

EBA salary as % of Award Salary	**Effective hourly EBA rate as % of Award rate for 38 hour week**										**"Break even" hours if employee on only award rate.**
	41 hrs worked	**43 hrs worked**	**45 hrs worked**	**47 hrs worked**	**49 hrs worked**	**51 hrs worked**	**53 hrs worked**	**55 hrs worked**	**57 hrs worked**	**59 hrs worked**	
130	120.5	114.9	107.4	100.8	95.0	89.8	85.2	81.0	77.2	73.7	**47.2**
135	125.1	119.3	111.5	104.7	98.7	93.3	88.4	84.1	80.2	76.6	**48.6**
140	129.7	123.7	115.7	108.6	102.3	96.7	91.7	87.2	83.1	79.4	**49.8**
145	134.4	128.1	119.8	112.4	106.0	100.2	95.0	90.3	86.1	82.2	**51.1**
150	139.0	132.6	123.9	116.3	109.6	103.6	98.3	93.4	89.1	85.1	**52.5**
155	143.7	137.0	128.0	120.2	113.3	107.1	101.6	96.6	92.0	87.9	**53.6**
160	148.3	141.4	132.2	124.1	116.9	110.5	104.8	99.7	95.0	90.7	**55.0**
165	152.9	145.8	136.3	128.0	120.6	114.0	108.1	102.8	98.0	93.6	**56.3**

55. So, under the NTEU's proposal, the award-rate, would not "pierce" the enterprise agreement rate for an employee on a salary with a 50% "EB premium" (i.e. below

average in this industry), until the employee was working approximately 52.5 hours per week. Even at the extreme low end of over-ward payments in this industry – 35% -- an employee would have to have a required workload equivalent to an average 48.6 hours per week before their employer became liable for any additional payment.

56. The NTEU does not resile from the real possibility that there may be some "cost" to some employers arising from its proposal, in the sense that, in order to meet the BOOT test the employers will have to do some combination of two things:

    i. Reduce the volume of work required of some employees such that it could be competently performed by employees at a professional level in fewer hours per week than the extremes which currently pierce the agreement rates;
    ii. Make additional payments to some employees to make up the gap between the EB/over-award premium and the amount which would be due under the Award.

57. From the NTEU's perspective, the former would be the best outcome, but in any case the negotiating parties would have to address workloads, and how they were going to be dealt with, at the very least in a way which met the requirements of the BOOT test. In the latter case – additional payments for overtime – the practical reality is that any additional payments would be fairly small. This is demonstrated by the following example:

    Mary is employed at Level B, Step 1, as a Lecturer in Human Rights Law at the University of Queensland. Her Award base rate of pay is $61,083 p.a. Her actual hours of work are between 60 and 65 per week on average, as she does extensive pro bono legal advice for the International Commission of Jurists and tends towards perfectionism in her work. However, her required work is properly assessed to take competent employees only 55 hours to perform at a professional level, having regard the discipline and classification – still a very heavy workload equal to 144% of a full-time job. Under the Union's proposal she is entitled to a loading for additional workload equal to 60.564% of her salary. This would bring her Award pay entitlement to $61,083 x 1.60564, or $98,077. Her (current) entitlement to salary at UQ (a slightly below average payer) is $89,459 p.a. Mary must be paid only an additional $8,618 in salary (all other things being equal) for an enterprise agreement to pass the BOOT test, assuming it came up for approval on the current rates.

58. Therefore it can be seen that even at this (arguably unsafe) level of work requirement, the *overtime loading* payable under the Award ($36,994), would be 77% absorbed by the existing agreement rate. The cost to the employers cannot be an argument against the establishment of a fair safety net. Nevertheless, this example shows that even at very high levels of required work, and taken on an individual basis, the cost is relatively low. Of course it would be lower still if the employer took measures to reduce Mary's required workload.

59. Since the commencement of enterprise bargaining, the absence of any limit on working time has meant that academic employees, and the NTEU on their behalf have with increasing despair, *been bargaining for a safety net, not from a safety net.* Hundreds, perhaps thousands, of highly skilled employees are working hours which mean that if they were employed on the Award salary, they would be getting less *per hour* than the adult minimum wage. Thousands of employees receiving an "EB-over-award" salary 40% or 50% above the Award salary, are nevertheless receiving less than the Award safety net rate of pay *per hour*. Some of the additional hours being worked by some employees may be due to inefficiency on the part of the employees, excessive perfectionism, or the passion of individual employees for particular projects. (That is why the Union has framed narrowly and strictly the concept of required work.) Even when these factors are excluded, many thousands of employees are nevertheless working excessive hours because, and only because, of the directions and requirements of their employer, sometimes exacerbated by bad management practices, inadequate technology or lack of support. The employer has no incentive to greater labour productivity, in part because the working lives of academics are like Mary Poppins' bag, into which any number of items may be stuffed, without the bag – or in this case, the cost of wages – getting any bigger.

60. The results of the research – the evidence from academic research and from surveys conducted by the NTEU – show that direct and required working hours are excessive for at least a significant minority of employees. The absence of any effective working time regulation in the safety net empowers the employers at the bargaining table, and perverts the course of bargaining towards what can readily be obtained – higher salaries, rather than addressing issues of safe work hours and work/life balance.

61. In the NTEU's respectful submission, the Commission must act.

Note regarding what the proposed overtime allowance is in compensation for

62. As part of this safety net review, and considering the general pattern of work and autonomy of academic most academic employees, NTEU is not seeking any allowance or payment in respect of the matters set out in Section 139 (1) (e), namely:

> *(e) penalty rates, including for any of the following:*
>
> *(i) employees working unsocial, irregular or unpredictable hours;*
>
> *(ii) employees working on weekends or public holidays;*
>
> *(iii) shift workers.*

63. While academic employees are required to work at specified times, especially in the delivery of timetabled classes, much of their work is done at times of their own choosing. Some of the hours academics perform required work can properly be described as unsocial, irregular, or unpredictable, and include weekends and sometimes public holidays. Nevertheless, NTEU accepts that there remains considerable flexibility about when work is performed, and that university teaching and research remain primarily five-day operations.

64. While this remains the case, NTEU makes no claim about the matters set out in Section 139 (1) (e). It is important, nevertheless, that the Union also makes it very clear that the present claim relates only to additional workload/hours and does not rely on, or base itself upon, factors to do with when work is required to be performed. Should the patterns of work change significantly, the Union would reserve its rights on this matter.

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

Payment for Policy Familiarisation and Professional and Discipline Currency

1. The proposal is that the Academic Award would provide to limited classes of casual academic teaching employees, in certain circumstances, all-up payments to compensate the employee for work inherent to, or necessary for, the performance of that teaching work, being familiarisation with employer policies, and the maintenance of academic and pedagogical currency in the employee's academic discipline.
2. The proposal is set out below. NTEU is now proposing two variations from the text proposed in October 2015. Neither of these substantially changes the substance of the proposal. In both proposed 13.3 (a) (iii) and 13.3 (b) (v), the text submitted in 2015 is shown underlined. The text proposed to supersede that is shown in **bold**.

13.3 Payment for Policy Familiarisation and Professional and Discipline Currency

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

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

(i) Where an eligible employee is re-engaged by the same employer, no fresh entitlement to this payment will arise unless the break between engagements was longer than twelve months; and

(ii) Where the employer provides paid formal induction the payment under this sub-clause will be reduced by the number of hours' paid to that employee for formal induction; and

(iii) **Where the employer expressly directs an employee to undertake more than the hours of work, for which payments are provided by this Sub-clause, on work in becoming informed of relevant workplace policies, procedures and academic obligations applicable to the employee's duties, the employee will be paid for**

all the time so directed. Otherwise, the employer shall have no liability for payment beyond the requirements of this Sub-clause in respect of such work.

(iii) Where the employer expressly directs an employee to undertake more than 10 hours of work in such work, the employee will be paid for all the time so directed.

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

(i) The maximum payable under this sub-clause to an employee in any calendar year shall be 40 hours' pay; and

(ii) Where the employer has paid the employee to attend staff development, academic or professional conferences or like activities, the allowance payable under this sub-clause will be reduced by the number of hours' paid to the employee for attending those activities; and

(iii) Payment in accordance with this sub-clause will not apply in respect of the delivery of tutorials or lectures which relate directly to the practice of a profession in which the employee is engaged as their primary employment or occupation; and

(iv) Payment in accordance with this sub-clause will not apply to the extent that a payment has been made to the employee under this sub-clause by another employer in respect of that discipline or a cognate discipline (An employer may ask an employee to substantiate that they have not already received payment in accordance with this sub-clause from another employer.)

(v) **Where the employer expressly directs an employee to undertake more than the hours of work, for which payments are provided by this Sub-clause, on work in maintaining currency in the employee's discipline and relevant pedagogy, and remaining informed of workplace policies, procedures and academic obligations, the employee will be paid for all the time so directed. Otherwise, the employer shall have no liability for payment beyond the requirements of this Sub-clause in respect of such work.**

(v) Where the employer expressly directs an employee to undertake more than 10 hours of work in maintaining currency in such work, procedures and academic obligations, the employee will be paid for all the time so directed.

Relevant contentions of fact

3. There are in the order of sixty or seventy thousand employees employed as casual academic staff covered by the Award. Although the Commonwealth compiles reports for casual employment based on full-time-equivalence (FTE), there is no single reliable source for actual numbers of casual employees. However, it is highly probable that a majority of academic staff employed under this Award are casual hourly paid staff, and that a majority or around half of teaching contact hours are worked by casual employees. Casual employees are central to the workforce, not peripheral.
4. Academic teaching at university level is a highly skilled professional occupation.
5. Only a small number of employees paid by-the-hour are casuals in the genuine sense. Most employment is not to meet short term ad hoc or occasional need. Most casuals are engaged in core ongoing functions. Most casual academic engagements involve a specific commitment to work specified hours of teaching work at specified times, over a semester or a whole year. Many or most academic "casuals" are in fact career academics or at least expect to be employed for a number of years. A large majority of casual staff are qualified to be employed as full-time academic staff, and many already hold a PhD.
6. There are no exact figures on the break-down of types of work done by casual academic staff. There is a small but not insignificant minority of employees not engaged directly to teach at all. This includes probably a few thousand employees who are employed in research (e.g. casual research assistants), and a small number employed in curriculum design or other support roles. There are also a small number of employees who are paid to assess students' work but do not teach those students. These categories of staff are entitled, like other casuals in the workforce, to be paid for the actual hours worked (under the Award and virtually all enterprise agreements).
7. Among those who are engaged to teach, there are those (sometimes undergraduates) who are engaged as demonstrators, typically in the sciences or medicine. This would (in money terms) be only small minority of casual academic employment. These casuals are also entitled to be paid for hours actually worked under the Award or agreements.

8. The unusual feature of most academic casual employment is that, in respect of the majority of work – lecturing and tutoring - payment is not made for the hours actually worked. It has been accepted by the industrial parties that this principle is appropriate to this work; refer para 36 below.
9. In some cases, employers use casual academic employment to obtain special skills which cannot be gained from their usual workforce. Moreover, casual employment is also used to provide research students with income and some developmental opportunities. However, the casualisation of great areas of l ongoing teaching work is generally undertaken to reduce costs.

Understanding Employer Policies

10. It is inherent in the nature of academic work, and to the requirements of the employer, that employees with professional responsibility for the teaching, assessment and support of students, have an obligation to those students (ethical) and an obligation to the employer (contractual) to be aware of significant policies of the employer which affect their work.
11. When full-time academic staff are reading and familiarising themselves with relevant university policies they are engaged in work for their employer and are being paid for that work. Such employees are not instructed to refrain from such familiarisation as part of their work. In many cases the requirement to abide by policies of the employer is stated explicitly as a term of the employment.
12. Universities have extensive policies and procedures, running to hundreds and sometimes thousands of pages of text. A large part of this is relevant to the responsibilities of academic staff.

Maintaining discipline currency

13. It is inherent in the nature of academic work, and required by the employer, that academic employees responsible for providing quality higher education to students through teaching, assessing and supporting those students, have an obligation to those students (ethical) and an obligation to the employer (contractual) to maintain adequately up-to-date knowledge of the academic discipline or disciplines relevant to that teaching. It could be argued that this is also a professional obligation.
14. When full-time academic staff are maintaining adequately up-to-date knowledge of the academic discipline or disciplines relevant to their teaching work, they are engaged in work for their employer and are being paid for that work. Such employees are not

instructed to refrain from such work. To not maintain adequately up-to-date knowledge of the academic discipline or disciplines relevant to their teaching work is unsatisfactory performance.

15. The obligations (as a question of fact) to be aware of university policies and to maintain discipline currency applies to all ongoing employees, whether full-time or casual.

Time required

16. The 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.

17. The amount of time which might realistically be required for an academic to maintain adequately up-to-date knowledge of the academic discipline or disciplines relevant to their teaching work will vary significantly from employee to employee and discipline to discipline and will in part depend on the nature of the teaching duties undertaken. However, a reasonable estimate can be made, indicating the order of magnitude. A very typical example of such an estimate is as follows:

    An academic in industrial relations, might spend about 10 hours per week pursuing her general academic interests. This might be more than would be strictly necessary to maintain the discipline currency to support the teaching in Industrial Relations and Human Resources Law. However, she could not competently teach within the discipline, without doing the following over a 12 month period:

    - *Reading two new books in the field (30 hours)*
    - *Reading one journal article in most weeks, (say) 40 per year (30 hours)*
    - *Reading Workplace Express for half an hour per week (25 hours)*
    - *Reading one major Court, FWC or other leading decision, and commentaries, per fortnight (10 hours)*
    - *Attendances at Conferences or Seminars for two days (15 hours)*

    Total: 120 hours

18. Most or all academics engaged as full-time or part-time salaried employees to undertake both teaching and research, will to some or a large extent, maintain discipline-currency as an incident of undertaking research within their academic discipline. However, for academic staff not employed to do research, the maintenance of discipline currency (scholarship) must be done by the employee as a distinct and necessary activity.

19. It will only be in unusual circumstances that an academic employee engaged only to teach (but not to do research) would need to work for less than 40 hours to maintain up-to-date knowledge of an academic discipline.

Commonwealth Requirements

20. The Commonwealth Government has primary responsibility for the regulation of standards in the higher education industry. Among the regulatory instruments applicable to employers covered by this Award, are the *Higher Education Standards Framework (Threshold Standards) 2011* made under the *Tertiary Education Quality and Standards Agency Act 2011*. These impose standards upon higher education providers, including universities.

21. They can be found at: https://www.legislation.gov.au/Details/F2013C00169/Html/Text#_Toc330548940

22. These standards impose conditions upon universities in respect of their staff. These conditions, not only impose obligations relating to the qualifications of those staff, but also about:

1.1 The higher education provider meets the Threshold Standards and offers at least one accredited course of study.

1.2 The higher education provider has a clearly articulated higher education purpose that includes a commitment to and support for free intellectual inquiry in its academic endeavours.

1.3 The higher education provider delivers teaching and learning that engage with advanced knowledge and inquiry.

1.4 The higher education provider's academic staff are active in scholarship that informs their teaching, and are active in research when engaged in research student supervision.

. . . . .

4.2 The higher education provider ensures that staff who teach students in the course of study:

- *are appropriately qualified in the relevant discipline for their level of teaching (qualified to at least one AQF qualification level higher than the course of study being taught or with equivalent professional experience);*
- *in the case of supervision of students in a course of study that leads to a Doctoral Degree (Professional) award located at level 10 of the AQF, are qualified at level 10 of the AQF or have equivalent professional experience;*

- *in the case of supervision of students in a course of study that leads to a Doctoral Degree (Research) award located at level 10 of the AQF, are qualified at Doctoral Degree (Research) level or have equivalent research experience;*
- *have a sound understanding of current scholarship and/or professional practice in the discipline that they teach;*
- *have an understanding of pedagogical and/or adult learning principles relevant to the student cohort being taught;*
- *engage students in intellectual inquiry appropriate to the level of the course of study and unit being taught; and,*
- *are advised of student and other feedback on the quality of their teaching and have opportunities to improve their teaching. [emphasis added]*

23. Members of the NTEU have had their jobs threatened or terminated for reasons which include the failure of those members to meet the requirements set out in the *Standards.*

24. Casual employees are academic staff, and the expectations upon universities relate to these staff. This was confirmed at a hearing of the Senate Education and Employment Legislation Committee on 25 February 2015, by the Chair of the *Tertiary Education Quality and Standards Agency*, Professor Saunders, as follows:

> **Senator RHIANNON:** Okay, I will have a think about that one. Are these standards meant to apply to all staff, including those employed on a casual basis?
>
> **Prof. Saunders:** Yes, they are. But one has to be realistic—for example, students studying in professional courses, say, in the health sciences, will often be tutored in the clinical experience by tutors who do not have postgraduate qualifications but have lots of professional experience.

25. The full transcript of the hearing is at: http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/58734856-0690-4249-98de-de5d3ce7d191/toc_pdf/Education%20and%20Employment%20Legislation%20Committee_2015_02_25_3231_Official.pdf;fileType=application%2Fpdf#search=%22committees/estimate/58734856-0690-4249-98de-de5d3ce7d191/0001%22

Employees not paid for the work they do

26. As stated above it is an inherent requirement of the employment that employees actually perform the work described in the proposed award variation.

27. Employees are rarely or never paid for such work, and when they are paid, the payments are small and inadequate in nearly all cases. Employees have never or virtually never been advised that such work is able to be paid for, nor do employers have any facility or procedures to ensure that employees claim for this work. Employees have never, or very rarely, claimed for such work.

28. Relevantly, these employees are mostly low-paid, with average incomes from their employment less than $20,000 p.a. Casual academics, despite often being long-term employees, are highly vulnerable with no job-security protections, and a system of seasonal engagement which simply means that the employee may have worked for example, for in 14 consecutive years, from March to November, but may simply not be offered further work in the fifteenth year, entirely at the discretion of the employer.

Explanation of the operation of the proposed Sub-clause

29. The essential intention of the provision is as follows:

30. In relation to familiarisation with policies of the employer, the proposal in 13.3 (a) is that an employee be entitled to a one-off all-up payment of ten hours pay in the employee's first year of employment. This would allow the employee some minimal compensation for this work. The payment is limited to the first year of employment, and is never payable again by the same employer, unless the employee has a 12-month break.

31. The payment is not due unless the employee is responsible for presenting a series of six related tutorials or lectures, so therefore excludes guest lecturers, occasional lecturers, and "emergency teachers" employed to cover a short term illness. The payment due under 13.3 (a) is reducible by the amount of paid induction provided to the employee in that first year of employment.

32. It is recognised that casual employees have an ongoing obligation to keep up with *changes* in policies over the years of their employment. However this obligation is dealt with in 13.3 (b).

33. The second obligation of the employer is under 13.3 (b). This obligation is subject to the same minimum work threshold (6 classes). It provides for a payment of one hour's pay for every four hours of class delivery time, for *the employee's work in maintaining currency in the employee's discipline and relevant pedagogy, and remaining informed of workplace policies, procedures and academic obligations.* This payment is reducible by any periods of staff development, academic or professional conferences or like activities, provided by the employer. The payment can also be reduced to the extent it has already been made by another employer in that year – an employee cannot "double-dip". Most employees are paid for 3 or 4 hours for each hour of class delivery, or for two hours when a class is a "repeat" of a class earlier presented. So for example, a typical employee might be paid in a year as follows:

Classes actually delivered	**Hours of payment**
22 Standard Lectures, including preparation, student consultation and any associated marking.	88
22 Tutorials, including preparation, student consultation and any associated marking.	66
22 Repeat tutorials, including student consultation and any associated marking.	44
Total = 66 hours of classes.	Total = 198 hours of pay

34. In this example, the employee would be entitled, under 13.3 (b) - *discipline and policy currency* - to an additional payment of 16 hours' pay (less than 8% of total pay). An employee would have to be teaching in 160 classes or more to qualify for the maximum 40 hours' payment. If such an employee were in her first year of employment, she would also qualify for 10 hours' pay under 13.3 (a), to the extent that paid induction were not provided.

35. In relation to payments under 13.3 (a) and 13.3 (b), payment under this clause will be deemed to be complete payment for the activities concerned, unless the employer explicitly directs an employee to attend work for these activities for a longer period.

Arguments of merit and principle in support of the proposal

36. The Award provides, in effect for quasi-piece-work rates for the core activities of casual academic staff – lecturing and tutoring. This is an unusual practice for casual employees, but is appropriate given the nature of the work. Employees are paid a fixed amount which is intended to cover *directly associated non-contact duties in the nature of preparation, reasonably contemporaneous marking and student consultation.*

37. The industrial parties have supported this approach. The *quid pro quo* involved is that the employee needs to spend as long as is necessary on the directly associated duties, in order to meet their contractual obligations to the employer. In turn, this is left to the employee's professional judgement rather than being determined in advance by the employer, and does not have to be accounted for, except in the quality of the employee's work. The payment for hours-worked is entirely notional.

38. The Full Bench which made Award provisions, in A0378 The *Australian Universities Academic and Related Staff (Salaries) Award 1987*, established the following payment structure in that Award, which remains essentially unchanged in the Modern Award:

Australian Universities Academic and Related Staff (Salaries) Award 1987, Clauses 4 (b)and (c)

(b) Lecturing

(i) A part-time (non-fractional) employee required to deliver a lecture (or equivalent delivery through other than face to face teaching mode) of a specified duration and relatedly provide directly associated ***non contact duties in the nature of preparation, reasonably contemporaneous marking student consultation*** *shall be paid at a rate for each hour of lecture delivered, according to the following table:*

Type of lecturing and associated working time assumed	*Minimum salary per hour of lecture delivered*
	$
Basic lecture (1 hour of delivery and 2 hours associated working time)	*79.29*
Developed lecture (1 hour of delivery and 3 hours associated working time)	*105.72*
Specialised lecture (1 hour of delivery and 4 hours associated working time)	*132.15*
Repeat lecture (1 hour of delivery and 1 hour associated working time)	*52.86*

(ii) The hourly rate in a repeat lecture applies to a second or subsequent delivery of substantially the same lecture in the same subject matter within a period of 7 days, and any marking and student consultation reasonably contemporaneous with it.

(iii) For the purposes of this award, the term "lecture" means any education delivery described as a lecture in a course or unit outline, or in an official timetable issued by the employer.

(c) Tutoring

(i) A part-time (non-fractional) employee required to deliver or present a tutorial (or equivalent delivery through other than face to face teaching mode) of a specified duration and ***relatedly provide directly associated non contact duties in the nature of preparation, reasonably contemporaneous marking and student consultation****, shall be paid at a rate for each hour of tutorial delivered or presented, according to the following table:*

Type of tutoring and associated working time assumed	*Minimum salary per hour of tutorial delivered*	*Minimum salary per hour of tutorial delivered where 4(a)(ii) applies*
	$	*$*

Tutorial (1 hour of delivery and 2 hours associated working time)	*56.79*	*67.74*
Repeat tutorial (1 hour of delivery and 1 hour associated working time)	*37.86*	*45.16*

(ii) The hourly rate in a repeat tutorial applies to a second or subsequent delivery of substantially the same tutorial in the same subject matter within a period of 7 days, and any marking and student consultation reasonably contemporaneous with it.

(iii) For the purposes of this award, the term "tutorial" means any education delivery described as a tutorial in a course or unit outline, or in an official timetable issued by the employer.

39. Given the contentions of fact and the evidence adduced to support those, it is manifestly clear that an employee is required to acquaint him or herself with the employer's extensive policies and maintain discipline currency as part of the work performed under the contract of employment.

40. The Modern Award is a cut-down version of the provision set by the full-bench in 1997; [Print P0289]. That provision, also from the Australian *Universities Academic and Related Staff (Salaries) Award 1987,* Clause 4 (g), also stated:

(g) <u>Other Required Academic Activity</u>

(i) A part-time (non-fractional) employee required to perform any other required academic activity as defined in subclause 4(g)(ii) of this clause shall be paid at an hourly rate of $18.93, or $22.58 if they hold a relevant doctoral qualification or are required to perform full subject coordination duties, for each hour of such activity delivered as required and demonstrated to have been performed.

(ii) For the purposes of this clause, "other required academic activity" shall include work that a person, acting as or on behalf of the employer of a part-time (non-fractional) employee, requires the employee to perform and that is performed in accordance with any such requirement, being work of the following nature:

- *the conduct of practical classes, demonstrations, workshops, student field excursions;*
- *the conduct of clinical sessions other than clinical nurse education;*
- *the conduct of performance and visual art studio sessions;*
- *musical coaching, repetiteurship, and musical accompanying other than with special educational service;*
- *development of teaching and subject materials such as the preparation of subject guides and reading lists and basic activities associated with subject coordination;*
- *consultation with students;*
- *supervision; and*
- *attendance at departmental and or faculty meetings as required.*

The above list is not intended to be exhaustive, but is provided by way of examples and guidance.

41. This is reflected, if glibly, in the Modern Award, Clause 18.2, which states:

Other required academic activity

If academic does not hold doctoral qualification or perform full subject coordination duties *30.91*

If academic holds doctoral qualification or performs full subject coordination duties *35.10*

42. It might be argued that maintaining discipline currency and acquainting oneself with essential employer policies, are "Other required academic activity". Two things need to be said about that. First, given these activities are required academic activities, the obvious question might be asked as to why they are never paid for or even claimed. Clearly, if the employee is entitled to be paid for required academic activity, the Award is not operating in a practical way. Second, given the prevalence of the "piece-rate" system of payment in this industry, it is easy to see why this work is not paid for. Much work done is not "paid for" in that sense.
43. The Award should provide for payment for work performed, especially to low-paid vulnerable employees. The Award, in practice, does not do so. A change to the Award is essential to the achievement of the modern award objective.
44. NTEU contends that it is not realistically possible for an employer to determine for each employee how much time is required to maintain discipline currency and become familiar with policies. This will vary between individuals and disciplines. On the other hand, it would be unfair to an *employer* if an employee, after the event, sent the employer a claim for work performed, saying *"I spent 200 hours on these required activities, please pay me"*.
45. Therefore NTEU submits that an all-up rate (as applies with preparation, student consultation) is appropriate. The proposed amounts are very much at the low end of what would actually be required, and are arguably inadequate. Their cost, however is not great, and with very few exceptions, enterprise agreement rates are prevalent and well above the amounts contemplated should the Union's claim be granted.
46. What is certain is that without the claim (or something similar) being granted, the modern award does not operate as a fair and enforceable safety net of terms and conditions, and in many cases, would leave employees on the Award rates being paid

less than trade (C10) rates for their required work, performed by employees with a PhD.

47. Nonetheless, casual and sessional staff, particularly tutors, are commonly paid only for the teaching hours performed and specific, but limited, associated activities, with the full scope of all their duties built into their hourly rate. The Sheridan & Litchfield (2008) review, drawing on research undertaken by Junor (2004), Brown, Goodman & Yasukawa (2006) questions whether the total paid workload casual academics undertake covers all activities essential to the services sessional teachers now provide. An example of the type of work provided by casuals quite outside the set hourly rate, is the provision of student access and support outside teaching hours, commonly via email. Other unpaid duties proposed by the Sheridan and Litchfield (2008) review include reading time, in part to ensure suitable preparation for classes, and the use of facilities such as photocopiers and computers.

48. In order to understand the basis of the Union's claim, reference to a Judgement by Chief Justice Dixon of the High Court in 1961 is helpful: *FCT v Finn* (1961) 106 CLR 60 at 69. While the Judgement sets out the circumstances in which self-education expenses are allowable as deductions for individuals under the Income Tax Assessment Act 1936 (ITAA 1936) and the Income Tax Assessment Act 1997 (ITAA 1997), of interest is His Honour's finding dismissing the argument put forward by the Commissioner of Taxation, that expenditure on gaining improved and up-to date knowledge was of a capital nature, and therefore not allowable under s 51(1) of The Act. Dixon, CJ, said:

> *'You cannot treat an improvement of knowledge in a professional man as the equivalent of the extension of plant in a factory. Unfortunately, skill and knowledge of most arts and sciences are not permanent possessions: they fade and become useless unless the art or the science is constantly pursued or, to change the metaphor, nourished and revived. They do not endure like bricks and mortar'. FCT v Finn* (1961) 106 CLR 60 at 69.

49. In this case, His Honour determined that:

> *'The money was laid out by the taxpayer in the acquisition of better knowledge of a skilled profession. The pursuit of information concerning the modernization or improvements in an art is part of the constant process of keeping up to date which skilled professions call upon those who practise them to pursue, though sometimes in vain.'*

Note about nature of the claim

50. NTEU believes that the hourly rates established for lecturing, tutoring and other casual academic work, does not reflect the work value of the work performed, and does not adequately compensate casual employees for the work required in delivery of classes and associated preparation, student consultation, and marking. However, those contentions make up no part of this case, and the Union does not rely on those arguments in support of this case, as we would wish to present those matters at a future review.

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

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

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

18. Classification of academic staff

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

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

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

Contentions of fact

3. Academic staff are employed under a five-level (Level A to Level E) career structure, as set out in the Award. At only a few institutions covered by this Award, and then very largely only in matters of detail, the structure itself is replicated in enterprise agreements, applying across the sector.
4. All or nearly all employers covered by this Award have systems of academic promotion based on broadly defined academic merit, and consistent in general terms with the Minimum Standards for Academic Levels, which are set out in the Award as Schedule A.
5. The system of academic promotion is supported as the means, or dominant means, of progression within the Award-based career structure. Academic promotion based on academic merit represents the preferred manner of judging work-value for academic staff, provided it is rigorous and has appropriate elements of peer review. This preference is shared by the industrial parties. The determinations made in the promotion process about the academic standing of the employee's teaching, service and research (academic merit) require real academic judgement of the work *actually being performed by the employee*, rather than the "duties" of a particular "position". In this sense, the great majority of academic staff do not have a "position" in reference to a particular classification. Academics who apply for promotion are not applying for a different job, but for recognition and appropriate recognition (in the Award sense) of the work already being performed by the employee. This means that academic promotion is fundamentally different to conventional promotion, where the employee applies for and obtains a higher classified position.
6. Academic promotion is not directly prescribed by any enterprise agreements in this industry. A few agreements cross-reference a promotion policy, and some of those set out general standards that policy must meet.
7. All or virtually all employers have promotion policies, which are extensive. Some of these policies exclude some classes of employees from promotion, on a variety of grounds.
8. The Australian Industrial Relation Commission (AIRC) approved an Award Restructuring Agreement in 1991/1992. This provided for the establishment of Position Classification Standards (the predecessor of the MSALs) but these were not then included in the Award. The AIRC further considered the question of whether the

PCS/MSALs should be included in the Award in several Decisions in 2001 and 2002. The AIRC found that the MSALs should be included in the Award in a revised form, and included agreed MSALs for Research Staff. [AIRC Prints PR901141; PR910932; PR925533]. The Commission's Decisions are reflected in the current Modern Award Clause 18 and Schedule A.

Purpose and effect of the change proposed by the Union

9. The words proposed to be added to Clause 18 would, in the current circumstances, leave the position unchanged for the great majority of employees. Employees who had access to a bona fide promotion scheme based upon academic merit, as a means to advance their classification based on work value, would be unaffected.
10. The proposed change would have two effects; one immediate and actual; the other would be only a potential future change.
11. First, those employees who are denied access to promotion (which is at the discretion of the employer under university policies) would now have the same right as virtually all other award-covered employees to have their classification determined according to objective criteria based on work value.
12. Second, if an employer decided at some future point, as a cost-cutting measure or an industrial tactic, to cease operating a bona fide academic promotion system, the employees would then acquire the right to have their job classified according to the work performed.
13. The proposed text would allow in either of those circumstances, the employee to insist to the employer, and if necessary enforce, that the employee be paid according the classification which corresponded to the work value of the work he or she performs.

Arguments of merit and principle in support of the claim

14. According to the modern award objective, the modern awards are supposed to provide a fair and enforceable safety net of terms and conditions. (Section 134 of the Act).
15. Moreover Section 3 of the Act says in part that an object of the Act as a whole is

    (b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders;
16. It is hard to imagine a more fundamental feature of a fair and enforceable safety net than that an employee is entitled to be paid in the classification which corresponds to the work they perform for the employer. Any system which allows the management of

an employer unilaterally to determine the classification and remuneration of an employee irrespective of the nature of the work, the levels of skills or responsibility involved, is manifestly not a fair and enforceable safety net.

17. The current Award would allow an employer to appoint an employee at Level A, and never run a promotion round or give the employee any other opportunity to progress through the classification structure, irrespective of her academic achievements, or responsibilities. Such an employee may have cured malaria, solved the contradictions of string theory, won the Nobel Prize and Pulitzer and Man Booker prizes for her poetry and novels, and even redesigned the content of Property Law to make it interesting. The university may even decide to title her "professor" and put her in charge of a Faculty. However, under this Award, such an employee would have no recourse whatever to any remedy if she were still classified at Level A, after achieving all these things during her 30 years of employment. In light of this, any suggestion that the Award currently provides a fair and enforceable safety net is ludicrous.

18. It is important to understand that the existing provision is only ludicrous in the context where the Modern Award operates as a safety net in circumstances quite different from when the Award provision was made in 2002. Despite the terms of the Award (which precluded an employee from seeking reclassification under the terms of the Award), in 2002 the AIRC retained a general capacity to deal with industrial disputes *per se*, under Section 89A of the *Workplace Relations Act 1996.*

19. Section 89A (2) gave the Commission a general power to deal with an industrial dispute *inter alia* about *'classifications of employees and skill-based career paths' (89A (2) (a)).* Moreover, the then certified agreements in force at the time did not generally deal with how employees were to be classified or promoted. In this context, it is important to note that such agreements did not operate to the exclusion of Awards Section 170LY of the Act stated:

> ***170LY Effect of a certified agreement in relation to awards and other certified agreements***
>
> *(1) While a certified agreement is in operation:*
>
> *(a) subject to this section, it prevails over an award or order of the Commission, to the extent of any inconsistency with the award or order; and*

20. In that context, the provision relating to academic classification operated under the general capacity of the Commission to deal with disputes. Had a university decided to abandon access to promotion, the Commission could have altered the Award or issued an order. That power no longer exists, and the terms of the Award as it currently stands - *MSAL will not be used as a basis for claims for reclassification by an employee* – effectively closes off access to any dispute settling procedures.

21. Moreover, during the operation of an enterprise agreement there is now no access to seek the correct classification under the Award. This leads to the next important point. The BOOT test cannot operate effectively if employees are not entitled to an enforceable rate of pay. An enterprise agreement which replicated the Award, provided for $1/week more than the Award, but stated that *"There will be a promotion freeze during the operation of this Agreement"* would pass the BOOT test, because "under the Award" there is no entitlement to promotion, and employees rarely have any contractual entitlement to promotion.

Part D – *[AM2014/229 Item 1, Drafting errors re casual Academic rates of pay]*

Correcting characterisation of PhD point and descriptions of some rates.

1. The NTEU seeks variation to sub-clause 18.2 Casual rates of the Academic Award, in order to correct minor drafting errors.

Summary of variations sought: the "PhD point"

2. In the Award, the sixth of eight steps in Level A is identified as being the minimum salary payable to any Level A academic "required to carry out full subject coordination duties as part of his or her normal duties or who upon appointment holds or during appointment gains a relevant doctoral qualification". Step 6 of Level A is anecdotally known as "the PhD point", although it can be triggered as a minimum rate either by the holding of a PhD or by the performance of subject coordination duties.
3. The casual rates in the *Higher Education – Academic Staff – Award 2010* reflect the existence of the PhD point in the full time salary structure: all of the casual rates drawn from Level A include a casual rate drawn from Level A Step 2 (for those without a PhD or full subject coordination duties) and a casual rate drawn from Level A Step 6 (for those with a PhD or full subject coordination duties). This is set out at 18.2 of the Award.
4. This intent is also indicated by note at Level A Step 6, at sub-clause 18.1 Rates of pay that states:

   **Any level A academic required to carry out full subject coordination duties as part of his or her normal duties or who upon appointment holds or during appointment gains a relevant doctoral qualification will be paid a salary no lower than this salary point.*
5. The purpose of the NTEU application is not to disturb this schema, but merely to amend wording in other parts of the Award which does not currently express the schema clearly.
6. This is achieved through amending the notes to several casual rates of pay for academic teachers to more clearly express the specified circumstances. At the moment the relevant note generally reads "(where academic holds Doctorate)". The NTEU proposes to change that in each instance to "(where academic holds Doctorate or performs full

subject coordination duties)" which more accurately describes the relevant circumstance.

7. NTEU submits that a casual academic engaged under this Award is clearly entitled to a higher hourly rate of pay if they hold a Doctorate or are responsible for the coordination of a subject or unit.

8. While as the Award currently stands, this entitlement would be enforceable due to the asterisked note to the full time Level A rates at Sub-clause 18.1, the fact that it is fully expressed in some parts of the casual rates (eg "Other required academic activity") but not in other parts, gives rise to confusion and uncertainty.

9. In the casual rates for marking, the rates are drawn from three salary points in the full time rates – Level A Step 2, Level A Step 6, and Level B Step 2. The rate for "Marking as a supervising examiner, or marking requiring a significant exercise of academic judgement appropriate to an academic at level B status" is drawn from Level B Step 2. Therefore the PhD point is irrelevant to payment for that class of marking, since it is already paid at a higher rate than the PhD point. This is evident from the two times the rate is expressed in the current Award, which both attract the same rate of pay. Therefore, although we did not include this in our October 2015 submission, the NTEU now proposes that the second iteration of "Marking as a supervising examiner, etc" be removed in its entirety, as follows:

Marking rate	**Per hour (including the casual loading)** **$**
Standard marking	30.91
Marking as a supervising examiner, or marking requiring a significant exercise of academic judgment appropriate to an academic at level B status	39.64
Standard marking (where academic holds Doctorate **or performs full subject coordination duties**)	35.10
~~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)~~	~~39.64~~

Summary of variations sought: better descriptions for casual rates

10. The award sets out casual rates of pay for several specific categories of academic duty: lecturing, tutoring, musical accompanying, undergraduate clinical nurse education, and marking. All other paid duties are paid as "other required academic activity". For each of lecturing, tutoring, musical accompanying and undergraduate clinical nurse education, a variety of rates are set out which provide for payments calculated on the basis that for each hour of educational delivery there is an assumed amount of "associated working time".
11. These calculations, which variously assume 2 hours, 1 hour or half an hour or "associated working time" for each hour of "delivery" have a long history in the pre-reform awards. They were described in such a way as to clarify that an employer could treat some duties as encompassed within such a payment, but not others. The words which previously delimited the "associated working time" were "…and relatedly provide directly associated non-contact duties in the nature of preparation, reasonably contemporaneous marking and student consultation."
12. In the absence of these delimiting words, there is no restraint on the range of duties an employer might say are already paid for within the payment for (eg) a tutorial, other than the much less specific word "associated". This unfairly changes the effect of the provision, in a manner which was not argued for or even discussed by the parties at the time the present words were inserted.
13. For both lecturing and tutoring, there is a rate of pay for a "repeat" lecture or tutorial, which carries one hour less payment than that for an original lecture or tutorial. The history of this provision is that it applied to "a second or subsequent delivery of substantially the same lecture [or tutorial] in the same subject matter within a period of seven days." Without those words to limit the circumstances in which a class can be said to be a "repeat" of a class already delivered, employees are not able to enforce the correct payment for lectures or tutorials "repeated" after a longer lapse of time – perhaps in the subsequent semester or even in the next year.
14. In addition, the pre-reform Award had definitions of lecture, tutorial and musical accompanying with special educational service, which served to protect casual academics from having classes arbitrarily re-designated to a label attracting a lower rate of pay; [Print P0289].

15. The NTEU proposes reinsertion of the clarifying words in each case in the same terms as they appeared in the pre-reform Award, as well as minor tidying up of the column headings in the casual rates tables. In our submission, the effect is to better reflect the understanding the parties have always brought to the operation of these and predecessor provisions, rather than to establish new rights.

16. The entirety of the changes proposed to Sub-clause 18.2 is as follows (with new words in **bold and underlined**)

18.2 The following will apply to casual academics for work performed:

Lecturing

A casual academic required to deliver a lecture (or equivalent delivery through other than face to face teaching mode) of a specified duration and relatedly provide direct associated non-contact duties in the nature of preparation, reasonably contemporaneous marking and student consultation will be paid for at a rate for each hour of lecture delivered, according to the following table:

Type of lecture and associated working time assumed	**Per hour (including the casual loading)** **$**
Basic lecture (1 hour of delivery and 2 hours of associated working time)	118.90
Developed lecture (1 hour of delivery and 3 hours associated working time)	158.55
Specialised lecture (1 hour of delivery and 4 hours associated working time)	198.18
Repeat lecture (1 hour of delivery and 1 hour associated working time)	79.26

The hourly rate in a repeat lecture applies to a second or subsequent delivery of substantially the same lecture in the same subject matter within a period of seven days and any marking and student consultation reasonably contemporaneous with it. For the purposes of this award, the term lecture means any education delivery described as a lecture in a course or unit outline, or in an official timetable issued by the University.

Tutoring

A casual academic required to deliver or present a tutorial (or equivalent delivery through other than face to face teaching mode) of a specified duration and relatedly provide directly associated non-contact duties in the nature of preparation,

reasonably contemporaneous marking and student consultation, will be paid at a rate for each hour of tutorial delivered or presented, according to the following table:

Type of tutoring and associated working time assumed	**Per hour (including the casual loading)** **$**
Tutorial (1 hour of delivery and 2 hours associated working time)	92.77
Repeat tutorial (1 hour of delivery and 1 hour associated working time)	61.84
Tutorial (1 hour of delivery and 2 hours associated working time) (where academic holds Doctorate **or performs full subject coordination duties**)	105.29
Repeat tutorial (1 hour of delivery and 1 hour associated working time) (where academic holds Doctorate **or performs full subject coordination duties**)	70.18

The hourly rate in a repeat tutorial applies to a second or subsequent delivery of substantially the same tutorial in the same subject matter within a period of seven days and any marking and student consultation reasonably contemporaneous with it. For the purposes of this award the term tutorial means any education delivery described as a tutorial in a course or unit outline, or in an official timetable issued by the University.

Musical accompanying with special educational services

For musical accompanying with special educational services, the casual academic will be paid for each hour of accompanying as well as for one hour of preparation time for each hour of accompanying delivered:

Musical accompanying with special educational services	**Per hour (including the casual loading)** **$**
Musical accompanying (1 hour of delivery and 1 hour preparation time)	61.84
Musical accompanying (1 hour of delivery and 1 hour preparation time) (where academic holds Doctorate **or performs full subject coordination duties**)	70.18

For the purposes of this subclause, the term musical accompanying with special educational service means the provision of musical accompaniment to one or more students or staff in the course of teaching by another member of the academic staff in circumstances where the accompanist deploys educational expertise in repertoire development or expression for student concert or examination purposes, but does not include concert accompanying, vocal coaching or musical directing.

Undergraduate ~~clinical~~ nurse education in a clinical setting

A casual academic required to provide undergraduate nurse education in a clinical setting will be paid for each hour of clinical education delivered, together with directly associated non-contact duties in the nature of preparation, reasonably contemporaneous marking and student consultation according to the following table:

Undergraduate ~~clinical~~ nurse education in a clinical setting	**Per hour (including the casual loading)** **$**
Little preparation required (1 hour of delivery and 0.5 hours associated working time)	46.39
Normal preparation time (1 hour of delivery and 1 hour associated working time)	61.84
Little preparation required (1 hour of delivery and 0.5 hours associated working time) (where academic holds Doctorate **or performs full subject coordination duties**)	52.64
Normal preparation time (1 hour of delivery and 1 hour associated working time) (where academic holds Doctorate **or performs full subject coordination duties**)	70.18

Marking rate	**Per hour (including the casual loading)** **$**
Standard marking	30.91
Marking as a supervising examiner, or marking requiring a significant exercise of academic judgment appropriate to an academic at level B status	39.64
Standard marking (where academic holds Doctorate **or performs full subject coordination duties**)	35.10

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 **or performs full subject coordination duties**)	39.64
Other required academic activity	**Per hour (including the casual loading)** **$**
If academic does not hold doctoral qualification or perform full subject coordination duties	30.91
If academic holds doctoral qualification or performs full subject coordination duties	35.10

Background

17. In researching the history of the Modern Award, NTEU has found that the relevant words were omitted at the time of the making of the Award in 2008 (AM2008/3; [PR985116], 19 December 2008).

Compliance with Award modernisation principles

18. In 2014 the Full Bench established a framework for the 4 year review as part of their *Preliminary Jurisdictional Issues decision.*[1]
19. The Bench noted that the modern awards objective applied to the exercise of the Fair Work Commission's 'modern award powers' in relation to the Review [@ 29].
20. Section 134 of the *Fair Work Act* sets out the modern awards objective.
21. As NTEU is not arguing for any new entitlement in this submission, our comments on how this application meets the applicable elements of the modern awards objective are brief.
22. The *Higher Education (Academic Staff) Award 2010* was made by a Full Bench of the Industrial Relations Commission, and was operative from 1 January 2010. The Commission considered the appropriate award safety net coverage for the academic staff covered by the Award.
23. The rates of pay and Minimum Standards for Academic Levels (MSALs) – Schedule A, were derived from the relevant predecessor awards. The higher level skills which can

[1] [2014] FWCFB 1788, 17 March 2014.

be attributed to achievement of a Doctorate or the coordination of a subject or unit, are recognised in the Award.

24. The variations sought in this application do not change any rates of pay, nor change who is entitled to the benefit of those rates. Rather, it clarifies the existing provisions, providing consistent wording throughout the various parts of the Award which deal with the PhD point and the framework for the casual rates, and providing more clarity about the duties encompassed within the assumed time of various casual rates, avoiding potential future confusion or disputation about their operation.

25. In granting this variation, the Commission would not be adding to the employment costs of casual academics covered by this Award. However we say this variation will ensure compliance with modern award objective s.134 (g) in clarifying the entitlements of casual academics. Casual or sessional staff are reliant on being paid an hourly rate *for the work that they do* and at the appropriate work value and this is in line with s. 134 (e), the principle of equal remuneration for work of equal or comparable value.

Part E – *[AM2014/230 Item 11 General Staff working hours and overtime]*

That employers be obliged to take active steps to prevent the working of uncompensated additional hours

1. The main purpose of this proposed change is to deal with a practice that is widespread, if not pervasive, in this industry among general staff, other than casual staff. That practice can be described simply as employers taking advantage of the award requirement for overtime to be authorised, whereby significant amounts of necessary and productive work is done by general staff which would qualify as overtime except that it has not been authorised. This occurs in circumstances where the employees need to perform this work to meet the requirements of their job, and where the employers know or ought to know that the work is being done, and benefit from the performance of this work. The proposal to deal with this problem is the new sub-clause 23.2.
2. The second, and related purpose of the proposed change is to recognise the nature of modern higher education workplaces, by appropriately limiting the employer's liability to compensate for overtime in certain defined circumstances, to allow occasional and voluntary out-of-hours work to occur, to meet the need for efficiency and flexibility. The relevant proposal is Sub-clause 23.3.
3. NTEU is also seeking the tightening of the opening sentence of paragraph 21, but only to make the text more clearly consistent with the existing purpose and intention, so that it can be more readily understood by the lay reader.
4. The changes sought are as follows, with the **bold and underlined** words indicating new words proposed:

   At the commencement of clause 21:

   > **21. Ordinary hours and spread of ordinary hours**
   >
   > **The maximum ordinary hours of work, and the spread of hours during which (other than for shift workers) ordinary hours can be worked, shall be as set out in the following table, provided that o**rdinary hours may be worked in a manner agreed over a four week cycle.

   At clause 23:

   > **23. Overtime**
   >
   > **23.1** An employee will be paid overtime for all authorised work performed outside of, or in excess of, the ordinary or rostered hours as follows:

Time worked	Overtime rate
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.

Note on use of terms

5. Unless otherwise indicated, references to *employees*, *staff* and *general staff* in this Part refers only to non-casual general staff.

6. The use of terms concerning hours of work, especially additional hours of work, can vary across industries and, indeed between and within different institutions. This can create confusion. NTEU will in presenting its case, use the following terms, and define them as follows:

[Note: These definitions relate to employees other than shift workers]

Span of hours: A specified range of hours (e.g. 8a.m.-6p.m.) or days (Monday to Friday) or more usually a combination of both, defined such that work performed outside those hours are not *ordinary hours of work.*
Ordinary hours of work: That work which is both performed within the *span of hours* and which does not exceed the total number of hours permitted to count as ordinary hours within the prescribed period of account, most commonly weekly, fortnightly or four-weekly.

Flexible Arrangement of Ordinary hours of work within a period of account (Flexitime): An arrangement or practice where the employee works *Ordinary hours of work* in a manner which means that different numbers of hours (or sometimes no hours) can be worked on particular days provided that the total number of hours worked within the prescribed period of account does not exceed the number of hours prescribed as ordinary hours for that period.
Overtime: Overtime consists of all working time which is not ordinary hours of work, and includes • any work performed outside the span of hours; and • any work performed during the span of hours, which exceeds the total number of ordinary hours during a prescribed period of account.
Paid Overtime: Overtime for which the compensation is the payment of money to the employee, additional to the employee's basic salary, paid specifically for the performance of that work, at a rate of pay equal to or (more commonly) greater than the employee's ordinary rate of pay.
Time-Off–in-Lieu of Paid Overtime: Time within an employee's *ordinary hours of work* but not actually worked, taken off as compensation in lieu of an entitlement to *paid overtime,* or in circumstances where the award or agreement only provides for this.
Uncompensated overtime: Those hours of work performed which are not ordinary hours of work, but for which the employee receives neither *paid overtime* nor *Time-Off–in-Lieu of Paid Overtime*

Contentions of fact

7. The NTEU relies on the following contentions of fact in support of its proposed changes:

    a. In addition to the perhaps 30,000 hourly paid employees, there are approximately 68,000 employees employed full-time or part time as general staff within the coverage of this Award. A large majority of these employees are full time, but a significant minority is part time. The average fraction of all general staff in public universities is close to 0.85 FTE. Approximately 30% of

general staff (excluding casuals) are employed in precarious employment, in the form of a fixed-term contract. Around 65% of employees are women.

b. In excess of 95% of employees are employed in the 37 public universities or the Batchelor Institute of Indigenous Tertiary Education (a public institution). There are also employees at University of Notre Dame Australia, Bond University, and a number of small private institutions, as well as student unions.

c. The Award classifies all employees in one or other of ten levels as set out in the Award. The approximate distribution of employees between the classifications (in public universities) is as follows:

Classification	% of all general staff
HEW 1	0.3%
HEW 2	1%
HEW 3	4.7%
HEW 4	13.1%
HEW 5	21.9%
HEW 6	20.2%
HEW 7	16.6%
HEW 8	12.2%
HEW 9	6.2%
HEW 10	3.6%

d. The great majority of employees are described as professional, administrative, clerical, computing or technical staff. According to traditional labels, the largest group of staff would be described as clerical/administrative, but there is a large proportion in professional occupations (e.g. Librarians, Accountants, and Lawyers) as well as a large number of managerial, technical, scientific and information technology staff. There is a small number of staff employed in trades, services and physical grades (e.g. gardeners, parking attendants, security staff). There are around three thousand general staff who are classified as research-only staff.

e. Only a small minority of employees are employed as shift workers, and a big majority of staff are engaged in areas which can best be described as five-day (Monday to Friday) operations.

f. Except perhaps for shift workers and some trades and services staff, the official recording of actual working time (i.e. actual starting and finishing times) of employees varies greatly in terms of what practices are adopted. For many staff in many areas, any recording is either informal or unknown, or is done only by the employee, with no record required to be kept by anyone in supervision or management. A culture has existed in universities which is resistant to time clocks, even for general staff. There are instances where a formal system exists which prevents the accurate recording of hours worked.

g. Although there are some senior management employees covered by this Award, and most employees exercise considerable autonomy over the way in which work is performed, the great majority of employees, including a big majority of employees at Levels HEW 8 and 9, do not have the capacity to determine how much work they have to perform or to control to a great extent the amount of time it will take to do that work.

h. A large proportion of general staff will have one supervisor, but two, three or more sources of workload quite distinct from their supervisor, and significant numbers of other stakeholders within the organisation who depend directly on the employee for the timeliness or quality of the work, largely unmediated by the supervisor.

i. Surveys and research conducted over a number of years indicate that a large proportion of employees is working more hours per week, in most or all weeks of the year, than the standard provided for in the applicable enterprise agreement, and at least a significant minority of employees are working in excess of 45 or 50 hours per week on average.

j. Payment of money for *overtime* worked, in many work areas, is not the most common practice. Where compensation is given for *overtime*, the granting of *time-off–in-lieu of paid overtime,* is more common.

k. The widespread use of *time-off–in-lieu of paid overtime,* especially but not only in circumstances where this is not centrally recorded, facilitates the loss of compensatory entitlements in circumstances such as termination, redeployment,

the appointment of a new manager, or even the pressures of work meaning the disappearance of claims for time off because they are "too old".

l. In a significant number of cases, employees are working additional hours in order to meet the inherent requirements of their job, as set by the employer, and not receiving either *paid overtime* or *time-off–in-lieu of paid overtime.* This is *uncompensated overtime*.

m. In many cases, uncompensated overtime is a direct response to temporary or chronic staff shortages. The great majority of *uncompensated overtime* is not voluntary in any genuine sense. It is necessary to meet the performance requirements of the employer.

n. Uncompensated overtime occurs both within the span of hours, when an employee works additional hours but is not compensated in accordance with the agreement, and outside the span of hours, where employees work (say) beyond the 6.00 p.m. end of the span in which ordinary hours can be worked. Much of the uncompensated overtime occurs at nights, and on weekends, outside the span of hours for the great majority of employees covered by the Award, and much of this is unobserved.

o. Employers benefit significantly from the performance of *uncompensated overtime*. Employers know, or ought to know, that *uncompensated overtime* is being worked. Employers rely in part upon the requirement that overtime has to be *"authorised"* to absolve themselves of responsibility for compensating the employee.

p. The working of uncompensated overtime in large part is a result of workload pressures, the professionalism of staff and an expression of self-organisation and autonomy. The additional hours performed by employees in uncompensated overtime are both a way in which employees *cope* with workplace stress caused by excessive workloads, and a *cause* of workplace stress.

q. With few exceptions, employers in this industry have no policies or practices aimed at ensuring that employees do not work uncompensated overtime, nor are supervisors trained or instructed to ensure that employees are not working uncompensated overtime.

r. The avoidance of payment for uncompensated overtime is worth more than $100 million, and perhaps $200 million or more per year to the employers. This

is the equivalent of between approximately 800 and 1600 full-time jobs. Hundreds, and probably more than a thousand, general staff have been declared redundant at Australian universities in the last five years.

s. Employers facilitate the performance of unpaid overtime by providing most employees with after-hours access to workplaces, and providing remote access to university computer systems. Employers facilitate the performance of unpaid overtime by decentralising the administration of hours, such that the extent of compensation for additional hours rests upon the personal work relationship between the employee, her or his colleagues, and the supervisor.

t. The nature of much general staff work is specialised or geographically or organisationally isolated. For a large proportion of employees, the work is not performed in close proximity to, or in some cases even at the same time, as the employee's supervisor, and work or working time is not closely monitored. This facilitates the possibility of both unauthorised overtime and uncompensated overtime.

u. The advent of new technologies since the 1990s means that a significant number of employees perform work outside normal hours from a remote location, such as their residence. In some cases this work is genuinely voluntary, brief and occasional, and imposes no great burden upon the employee, and contributes to the efficient and productive performance of work.

v. The patterns of working hours and additional hours in higher education are not primarily the product of the specific industrial regulation. Rather, they arise from the organisational culture engendered in part at least by the fact that academics do not have hours of work, let alone overtime, and partly by the pressures of work.

w. Nearly all employees covered by this Award are covered by current enterprise agreements, which provide for over-award payments of base salary. For the great majority of the employees, the value of that (in the absence of other trade-offs or benefits) is in the range of 25% to 55% of the Award rate. Rates payable under the agreement for full-time employees range from around $42,000 p.a. (for HEW 1 at the lowest-paying universities) to around $125,000 p.a., (for Level 10 at the best-paying universities) with the average (an employee at HEW

6) receiving around full-time adult average weekly ordinary time earnings - $78,000 p.a.(ABS ; Nov 2015; 6302.0).

x. The great majority of enterprise agreements applying to the employees, reflect the substance of the procedural requirement in the Award, meaning not simply that overtime needs to be worked, and of value to or known to the employer, but that it must also be "authorised" or there is no entitlement to additional remuneration.

Explanation of the Proposed Changes

8. The proposed change to the opening sentence of Clause 21 of the Award is to add the text in bold and underlined:

> ***<u>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 o</u>****rdinary hours may be worked in a manner agreed over a four week cycle.*

As stated above, this is intended to make the text more clearly consistent with the existing purpose and intention, so that it can be more readily understood by the lay reader. The NTEU does not rely on any specific evidence as such to support this proposal.

9. The proposed addition at Sub-clause 23.2 is in *italic*:

> **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:

Time worked	Overtime rate
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.*

10. NTEU is proposing to retain the requirement that overtime be authorised, and that an entitlement to overtime attaches not merely to the *performance* of additional productive, or even necessary work outside the span of hours or in excess of the maximum ordinary hours of work.
11. However, the *quid pro quo* for this requirement is added in the new Clause 23.2. This would require the employer to take *reasonable steps* to ensure that unauthorised (and therefore uncompensated) overtime is not being performed by employees. This requirement in effect applies to the extent that, if the additional work were authorised, it would attract some compensation under Clauses 23, 24 or 25, and therefore, the work to which it applies must be read down by the other provisions .
12. The new Sub-clause creates no entitlement to be paid for unauthorised overtime, nor does it make the performance of unauthorised overtime by the *employee* in any particular instance a breach of the Award by the *employer*.
13. Nevertheless, it is the intention of the proposed sub-clause that while the *reasonable steps* which are required are to be determined by the employer and judged objectively, their purpose is to *ensure* that additional work is not being performed. The word *"ensure"* is deliberately chosen, meaning *"to make secure or certain to come"* (Macquarie Dictionary). In proposing this formulation, NTEU intends not that the test is whether *no* uncompensated work is occurring. Rather, the test is to be whether reasonable steps are being taken to make sure that such work is not being done.
14. The NTEU also seeks the insertion of a new, following, Sub-clause 23.3, to qualify and limit entitlements to overtime:

> *23.3 An employee at Level 6 or above who responds to or uses email or phone messaging beyond or outside the ordinary hours of work for brief periods, and only occasionally, to meet the needs of the employer, will not be deemed to be performing work beyond or outside the ordinary hours of work, provided that the sending or responding to such email messages at that time is not part of their assigned duties, contract or conditions of employment, has not been directed and is in all other senses voluntary.*

15. NTEU hopes that the effect of the changes to the previous Sub-clause considered (23.2) will be to largely eliminate the practice of unauthorised overtime. However, there are current widespread practices of employees using information and communication technology systems such as phone messaging, email and remote access to email

university computer systems, to get small amounts of work done from home or elsewhere outside the normal span of hours.

16. The purpose of this clause is to complement that by ensuring that certain limited classes of out-of-hours' work undertaken by middle-level and senior employees neither require the payment of overtime under Clause 24 (which involves two hours minimum payment), nor need to be eliminated by virtue of the proposed new Sub-clause 23.2.

Arguments of merit and principle in favour of the NTEU's proposals

Employer to take reasonable steps to ensure work which is not authorised and compensated is not done (proposed Sub-clause 23.2)

17. In addition to those elements of the legislative framework cited in the introduction to the Union's submissions, the NTEU sees the modern award objective as the main point of departure in considerations of merit.

18. *The Fair Work Act* 2009 ("the Act"), includes the modern award objective, which has at its core the following

> *(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account* [various matters set out].

19. Moreover, Section 134 (1), the matters to be taken into account include the new words which have been added since the Award was made:

> *(da) the need to provide additional remuneration for:*
>
> *(i) employees working overtime; or*
>
> *(ii) employees working unsocial, irregular or unpredictable hours; or*
>
> *(iii) employees working on weekends or public holidays; or*

Irrespective of any other considerations, this means that if it is put in issue, the adequacy of the Award in respect of overtime has to be considered afresh in light of the change in the statutory regime.

20. The proposed Sub-clause 23.2 is manifestly about a matter which can be included in a modern award. In the terms of Section 139 of the Act, it is either *about arrangements for when work is performed,* or it is about *overtime*, or both.

21. Even if this were not the case, for the reasons which follow, it is also incidental to both of those subject-matters and essential for the terms about overtime in this Award to operate in a practical way (Section 142).
22. There are certain types of work, such as academic or judicial work, where the hours during which work is performed, and the total numbers of hours which are actually being worked in any week or month are, at least in part, not directly within the control of the employer. Where this is the case, the employer legitimately can eschew responsibility, at least in part, for these matters.
23. However, the employer cannot avoid these responsibilities in a conventional workplace environment where maximum working hours are regulated – for example general staff in a university. The scheme of this Award is that working hours are limited, and that additional work carries an entitlement to overtime. Any informed observer, taking a purposive approach to the reading of the Award's Hours of Work and Overtime provisions, would draw this conclusion.
24. In such a context, the employer is responsible for the management and organisation of work. The employer is prima facie responsible for knowing how many working hours are being performed by its employees and when those working hours are being performed.
25. Employers should not have to compensate the employee (by payment or time-off) for time worked by the employee where such work is genuinely *un*authorised. For example, if the employer has issued a direction, either specifically or generally, that an employee is not to work beyond or outside ordinary hours, and has shown by its behaviour that it is serious about *enforcing* such directions, then an employee who, without the employer's prior knowledge, works back until 10 p.m. *prima facie* should not be entitled to payment. Such conduct could also be a form of misconduct by the employee, and the failure of a supervisor to do something about it might be misconduct by that supervisor.
26. On the other hand, the employer who sets a deadline or allocates a workload which it knows or ought to know will not be able to be met within ordinary hours, should not escape liability merely because the employer knows, or ought to know, that the employee will not *ask* for authorisation.
27. The solution proposed by the Union in this case is not that unauthorised overtime should be paid. For the reasons set out above, this would not be fair to the employer.

NTEU, on balance supports the retention of the requirement for *authorisation* as a pre-requisite to compensation for additional hours, in the context of higher education employment. This is because, as a practical question, most employees have after-hours access to the workplace, work can and is performed at home, some supervisors and managers have limited geographic interaction with their subordinates, and generally there are many staff who work without close supervision. This is quite different from (say) a call-centre where the employer can control the time at which work is performed and closely monitors and manages those times.

28. Therefore, rather than suggesting that overtime that has not been authorised should be paid, NTEU proposes that the employer retains the right to prior authorisation (or in some cases and at its discretion, *ex post facto* authorisation), but that it exercise the reasonable corollary of this, which is to ensure (by taking *reasonable steps*) that employees are not working additional hours *without authorisation or compensation.*

29. There is a legitimate question as to what might constitute the taking of *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* (in the terms of the proposal). NTEU believes this should be left to the employer and does not wish to have the Award micro-manage this. It is reasonable that the employer be able to exercise the choice about what it considers to be the most effective, and cost-effective things to do. What might be necessary to overcome an entrenched long-unpaid-hours culture in one work area might be overkill in another where there has been no problem. To specify a list of things the employer must do would be an unreasonable burden on the employer. More importantly, from the NTEU's perspective at least, the reasonable steps actually taken by the employer need to have *"a rational or natural tendency"* to *ensure* that work is not being done which is uncompensated. A ritualistic statement on a university website, or a personnel policy stored in central administration, as admirable as these might be, might not be sufficient.

30. With that large qualification, and without actually suggesting what employers should do, the *reasonable steps* which could readily be imagined, include the following:

- 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;
- The re-organisation of work-flows to deal with bottlenecks;

- 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.

31. In preliminary discussions with employer representatives about the NTEU's proposals, it has been suggested that any problem being raised by the Union is really just an issue of enforcement. That this is not so, is readily demonstrated with two hypothetical examples:

> Mary *is employed as an Administrative Officer (HEW 5) in the Law Faculty. Three large tasks arrive on her desk on Wednesday, and they are all urgent – needing to be done by Friday, and they total about 20 hours' work. Mary already has 7 hours committed for training in the new IT system for Thursday. She emails her Head of School - her supervisor Mark, who is at a Conference in New Zealand to ask what she should do and that she does not think they can all be completed by Friday. Mark does not respond except to agree all the tasks are urgent, and to specify the order in which they should be done. Mary is precariously employed, being on a fixed term contract, so she feels unwilling to raise the issue of overtime, so she takes the work home and works at home until 11 p.m. both Wednesday and Thursday to get the necessary work done. No claim is made, no authorised overtime is worked. The employer – the corporation called the university – has no knowledge of the extra work. The employer when challenged, points out correctly that under the Award she has no entitlement.*
>
> Jack *is employed as a Technical Assistant (HEW 4) in the busy Teaching Laboratories. In addition to other duties, his job is to be in laboratories when practical classes are occurring to ensure safe practices and protection of equipment. The nature of the work is such that he also has to set up for classes (which start at 8.30 a.m.) and clean up after the classes (which finish at 5.00 p.m.), although he has never been instructed to set up or clean up, and his letter of appointment says he works from 8.45 to 5.06 with an hour for lunch. Each day there are classes, he works an additional 45 minutes time, though he has never been instructed to do so, and knows the other 4 Laboratory staff also work late. He knows his School has no significant budget for paid overtime, so he simply records the additional hours. After a year, Jack has*

> *worked 75 additional hours (worth about $2,000). Jack resigns shortly thereafter, and is told that he cannot claim payment for those hours because it they were not authorised in accordance with university policy, which requires that arrangements for taking time-off-in-lieu require authorisation before the work is done. The employer when challenged, points out correctly that under the Award he clearly has no entitlement.*

Jack might be thought of as unwise for not raising the issue rather earlier, or for not having read the policy. Mary might be thought of as insufficiently assertive for doing the work without pressing the point with her boss about what she should do. But in both cases, two things are abundantly clear:

- Neither Jack nor Mary has any entitlement to payment under the Award;
- The employer has received a whole lot of absolutely necessary labour for free.

32. NTEU contends that the suggestion that the problem is one of *enforcement* is not to be taken seriously.

33. It is to be emphasised that under the NTEU's proposal, neither "Mary" nor "Jack" would become entitled to overtime payments. What would change, however, is the employer's capacity to abrogate the responsibilities of management, or to engage in wilful but very lucrative blindness. The attitude of the employer's to this problem is reminiscent of these lines from Casablanca;

> *Rick: How can you close me up? On what grounds?*
>
> *Captain Renault: I'm shocked, shocked to find that gambling is going on in here!*
>
> *[a croupier hands Renault a pile of money]*
>
> *Croupier: Your winnings, sir.*
>
> *Captain Renault: [sotto voce] Oh, thank you very much.*

34. Under the "Mary" scenario described above, if NTEU's proposal were adopted, the university would have to decide between the following instructions:

> *I agree that this work cannot be done, so some of it will have to be delayed beyond Friday if you cannot get it finished.*

or

> *This work is actually urgent, and I authorise overtime to get it done.*

35. Under the "Jack" scenario, if NTEU's proposal were adopted, someone would have had to:

Make it clear to him that he is not to work beyond 5 p.m. without prior authority.

or

Question him at some stage about why he is working beyond his finishing time without authority.

or

Authorise some standing overtime approval to ensure he can do his job.

36. This may seem like obvious common sense, the very basics of competent management, and indeed essential to a fair and enforceable safety net.

37. A safety net of this type can only be "fair and enforceable" if it has two complementary components:

- First, overtime must be authorised by the employer; and
- Second, if the work is not authorised, it should not be worked.

38. As stated above, in this industry at least, the absence of the first may not be fair to employers. However the first component is already incorporated in the award. The absence of the second component is manifestly unfair to employees. There is nothing in the Award which in-principle or, in this industry in practice, stops the working of unpaid overtime. The absence of the second means that an employee being paid the award rate of pay could, in fact, be receiving 10% or even 20% less than the award hourly rate of pay, taking into account all the actual work the employee is doing, usually to "keep the ship afloat". In the absence of the provision proposed by the NTEU, there manifestly cannot be a fair safety net.

39. Nevertheless, there could be little doubt that there are some cases where employees are working large amounts of unauthorised overtime in an attempt to cover their own inefficiency, or the inefficiency of technology or work or management practices. As such, the existing award regulation, which allows a *"blind eye"* to be turned to such arrangements by employees and employers, is conducive to inefficient, unproductive workplaces, and therefore inconsistent with the modern award objective in Section 134 (1) (d):

> *(d) the need to promote flexible modern work practices and the efficient and productive performance of work;*

40. If the Union's proposal is adopted in the Award, there may be many other means by which the industrial parties might deal with the question of working time and its

remuneration, which would meet the requirements of the better-off-overall-test (BOOT test).

41. The working of unpaid overtime must have a natural tendency to discriminate against employees with caring responsibilities in any circumstances where employees have their performance judged by their work outputs.

Limitation on Liability for intermittent or occasional voluntary or remote work

42. The union recognises that the effect of its proposed Sub-clause 23.2 would impose a more onerous, if justified, obligation upon the employer to ensure that employees do not work uncompensated overtime.

43. On the other hand, the Union recognises that the changes in technology which have steadily occurred over the past two decades mean that many employees contribute to the efficient and productive performance of work by using remote and mobile devices to respond to urgent emails or requests after hours. This is the reality of a modern university workplace, and for employees in middle and senior positions (level 6 and above) can often be a way to prevent or diffuse problems. Employees may "after-hours" get or send an email or SMS such as;

- *Did you manage to postpone that meeting or do I need to come in at 8am?*
- *Did those students put in their show-cause documents today, or do I need to get onto them tonight?*
- *You never came back to the office, so I have loaded those documents for you in the P Drive, as I will be on leave tomorrow.*

NTEU in most circumstances has no objection to this work being done, even when it is as a result of a direct request from the employee's supervisor.

44. That is why the union is proposing a new Sub-clause 22.3 to read;

> *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.*

45. It should be emphasised that this proposal is not proposed or supported in any way except in conjunction with the proposed Sub-clause 22.2 as discussed above. NTEU believes the two clauses in combination will provide a fair and enforceable safety net, and encourage the productive and efficient performance of work.

Part F – *[AM2014/230 Item 8, link wages to classifications]*

That an express link be reinserted between the rates of pay and the classification definitions

1. This part of the NTEU application seeks to restore a link within the body of the Award to the Classification Definitions set out at Schedule B of the Award.
2. We seek to include a new **clause 15.3** in the *General Staff Award* as follows:

   15.3 Classification Levels

   The Higher Education Worker Level classifications standards set out in Schedule B – Classification Definitions shall be the primary determinant of the classifications of general staff positions. Positions will be classified at the level which most accurately reflects the work performed by the employee as required by the employer, taking into account the skill and responsibilities required to perform that work.
3. These words were left out of the final version of the *Higher Education (General Staff) Award 2010* as issued by the Commission on 19 March 2010 [PR994510]. This was despite the NTEU Submission on the Exposure Draft of the Award issued on 12 September 2008 (para 22ff), which had brought the omission to the Commission's attention.[2]
4. The words were prescribed in the Award Simplification Order[3] for the predecessor award to the modern General Staff Award, the *Higher Education General and Salaried Staff (Interim) Award 1989*, [AW815928], SDP Duncan, 16 May 2002 at sub-clause 6.4.
5. These words had been agreed by the parties to the Award Simplification matter concerning the Award, and this agreement is set out (amongst other matters) in the decision of SDP Duncan, [PR924691], 15 November 2002, at [1] *Agreed matters*, para. 4.

[2] NTEU Submission, Award Modernisation, 10 October 2008.
[3] pursuant to item 51 of Part 2 of Schedule 5 of the *Workplace Relations and Other Legislation Amendment Act 1996*

Why this variation is necessary

6. This variation seeks to address an oversight and anomaly from the award modernisation process and it clearly reflects the intent and agreement of the parties.
7. The variation is necessary as without it, the Classification Definitions (known in the industry as the "Descriptors") at Schedule B have no work to do *in determining the relevant minimum pay rate for employees.*
8. Section 139 (a) (i) of the *Fair Work Act* prescribes that skills based classification and career structures are terms that may be included in modern awards. At present there are minimum wages set out 10 levels (sub-clause 15.1) and Classification Definitions set out at Schedule B, but these two provisions do not create a skills based classification and career structure unless they are linked in some way.
9. Without the required words, there is no link between the pay ascribed to each HEW Level (at sub-clause 15.1), and the Classification Definitions at Schedule B; technically, *no actual classification of employees is required* in accordance with the Descriptors at Schedule B or any other process. This is absurd and was not the intent of the parties.
10. The Modern Award must continue to provide a 'fair and relevant safety net of terms and conditions' [s.134] and the minimum wage objective prescribes that a 'safety net of fair minimum wages' must be established and maintained [s.284]. Currently the *Higher Education (General Staff) Award 2010* provides a 10 level pay structure of HEW levels (15.1) and Classification Definitions (Schedule B) but no mechanism for ensuring that classification occurs, let alone that it occurs in relation to 'fair minimum wages'; there is simply no way of knowing what to pay employees. This was not the intent of the parties and nor is this condoned by the *Fair Work Act.*
11. The amendment sought by NTEU is necessary to the effective operation of the Award.

Part G – *[AM2014/230 Item 13, minor updates to classification definitions]*

Amendments to the general staff classification definitions in Schedule B

1. The NTEU seeks amendments to Schedule B – Classification Definitions in the *Higher Education General Staff Award 2010* ("the Award").

Formal Position of the NTEU

2. Set out further below are contentions in support of the proposed changes to Schedule B. Stated briefly NTEU believes that the descriptors' purpose in the modern award is not to prescribe how work is performed, but to ensure that the descriptors operate as part of a fair and enforceable safety net. This requires that as far as possible, they assist employees and employers to correctly determine which classification applies to particular work, and therefore which pay rate is the clear minimum which applies. Even in the context of widespread enterprise bargaining, the existing descriptors have largely endured, making the application of the BOOT test straightforward. However, the Award descriptors are important for those places where the different descriptors prevail, and where the BOOT test requires consideration of how each rate of pay relates to the Award structures. The Commission needs to be satisfied that the descriptors can constitute a fair and enforceable safety net.
3. NTEU has proposed relatively minor changes, mainly on the grounds that some particular text or form of words is no longer up-to-date. In doing so, the Union has not sought to change the work-value attaching to particular rates of pay. It may be that further changes are in fact necessary.
4. However, if the employer parties, and the CPSU are of the view that the descriptors remain up-to-date and relevant such that they do not require attention as part of this 4-yearly review, the NTEU would not wish to press the matter to a full hearing in this review. We say this in part out of consideration to other parties, so they might not prepare extensive submissions and other materials unnecessarily.
5. NTEU would propose, however, that if the Commission or the employers consider that the descriptors do need revision, then rather than considering the specific proposals put

forward in this Outline, the Commission should direct the parties to establish a Working Party to examine and revise the descriptors, with a view to having a revised set of agreed or mostly agreed descriptors to present by the end of 2016. This is similar to the procedure adopted in 2002, when the descriptors were last revised.

Proposed changes - explanation and reasons

6. The whole of Schedule B is not reproduced below. Instead, only those parts which the NTEU has identified as requiring changes are included, with underlined text indicating proposed additional words, ~~struck through~~ words indicating words proposed to be deleted, and everything else being the existing text. A brief explanation appears in *italic text* after each proposed change.

HIGHER EDUCATION WORKER LEVEL 2

Occupational equivalent

Mailroom attendant/assistant, loans & shelving assistant, print services assistant, grounds assistant (unqualified), grounds person (unqualified), gardener (unqualified), cleaner, storeroom assistant/attendant, ~~Administrative assistant,~~ security patrol officer.

***Explanation**: The position of "administrative assistant" at Level 2 is now rare or non-existent. The administrative work at this level has largely been automated and subsumed in this automated form into the duties of higher classified staff or academic staff.*

HIGHER EDUCATION WORKER LEVEL 3

Occupational equivalent

Tradesperson, technical assistant/technical trainee, administrative assistant, finance services assistant, library assistant, student services assistant, mailroom clerk.

Level of supervision

In technical positions, routine supervision, moving to general direction with experience. In other positions, general direction. This is the first level where the provision of guidance and direction to ~~the supervision~~ of other employees may be required.

***Explanation**: The Union proposes a wider range of mainstream examples of jobs at Level 3. The changes to the concept of "supervision" mean that actual supervision – responsibility for OHS, EEO – is rare or unknown at this level.*

HIGHER EDUCATION WORKER LEVEL 4

Occupational equivalent

Newly qualified trades-based technical~~Technical~~ officer or technician, administrative role above Level 3 (eg. in student inquiries, admissions or records), advanced tradespersons.

***Explanation**: Over the past two decades, there has developed two types of "technical officer". The traditional idea of the technical officer with trade qualifications and usually some other qualification or considerable experience persists. However, there is also the degree (typically in Science or Engineering) based technical officer, which is more common. NTEU considers that there should be this distinction made, as between the former (at Level 4) and the latter (at Level 5). NTEU proposes the additional occupations also be added to the relatively useless "administrative above Level 3".*

Typical activities

In trades positions:

- work on complex engineering or interconnected electrical circuits; and/or
- exercise high precision trades skills using various materials and/or specialised techniques.

In technical positions:

- develop new equipment to criteria developed and specified by others;
- under routine direction, assist in the conduct of major experiments and research programs and/or in setting up complex or unusual equipment for a range of experiments and demonstrations; and/or
- demonstrate the use of equipment and prepare reports of a technical nature as directed.

In library technician positions:

- undertake copy cataloguing;

- use a range of bibliographic databases and library management systems;

***Explanation**: The additional of library management systems, which is typical of jobs at this level in the library, simply up-dates the example.*

- undertake acquisitions; and/or
- respond to straight forward reference inquiries.

***Explanation**: The new technologies in reference enquiries mean that these can now be more complex. This change is to limit the complexity of what is referred to.*

In administrative positions:

- may use a full range of desktop based programs, including word processing packages, mathematical formulae and symbols, manipulation of text and layout in desktop publishing and/or web software, and management information systems;
- plan and set up spreadsheets or database applications;
- be responsible for preparing high quality correspondence for senior staff ~~providing a full range of secretarial services~~, e.g. in a school, centre or faculty;

***Explanation**: The changes in work organisation mean the "the full range of secretarial duties" is a term not used or widely understood. A better and more substantive example referring to high quality correspondence is inserted, and given it is the task not the organisational unit that matters here, the addition of "school" and "centre" are appropriate.*

- provide advice to students on enrolment procedures and requirements; and/or
- administer enrolment and course progression records.

HIGHER EDUCATION WORKER LEVEL 5

Occupational equivalent

Graduate (i.e. degree) or professional, without subsequent work experience on entry (including inexperienced computer systems officer, graduate technical officer and graduate research assistant), graduate or experienced

administrative officer or coordinator ~~administrator~~ with responsibility for advice and determinations, experienced trades-based technical officer.

***Explanation**: The addition of the graduate technical officer, and experienced trades-based technical officer reflects the comments above about technical officers at Level 4. Graduate recruitment has made Level 5 an important entry level, and these examples reflect this.*

Typical activities

In technical positions:

- develop new equipment to general specifications;
- under general direction, assist in the conduct of major experiments and research programs and/or in setting up complex or unusual equipment for a range of experiments and demonstrations;
- under broad direction, set up, monitor and demonstrate standard experiments and equipment use; and/or
- prepare reports of a technical nature.

In library technician positions:

- perform at a higher level than Level 4, including:
- assist with reader education programs and more complex bibliographic, library management systems and acquisition services; and/or

***Explanation**: The addition library management systems is more up-to-date.*

- operate a discrete unit within a library which may involve significant supervision or be the senior employee in an out-posted service.

In administrative positions:

- responsible for the explanation and ~~administration~~ coordination of an administrative function, e.g. HECS advice, records, determinations and payments, a centralised enrolment function, the organisation and administration of exams at a small campus.

In professional positions and under professional supervision:

- In research positions, undertake research support, such as data analysis and compilation, applying skill obtained from relevant under-graduate degree and work as part of a research team in a support role;

***Explanation**: The addition of these words clarifies the type and level of work which is meant by the current words "in a support role".*

- provide a range of library services including bibliographic assistance, original cataloguing and reader education in library and reference services; and/or
  - provide counselling services.

HIGHER EDUCATION WORKER LEVEL 6

Occupational equivalent

Graduate or professional with subsequent relevant work experience (including a computer systems officer with some experience), research assistant with relevant work experience, line manager, experienced administrative officer/coordinator, experienced technical specialist and/or technical supervisor.

***Explanation**: The addition of these occupations, especially the research position, provides a more up-to-date list.*

Typical activities

In technical positions:

manage a teaching or research laboratory or a field station;

provide highly specialised technical services;

set up complex experiments;

design and construct complex or unusual equipment to general specifications;

assist honours and postgraduate students with their laboratory requirements; and/or

install, repair, provide and demonstrate computer services in laboratories.

In administrative positions:

provide financial, policy and planning information, referral and advice in accordance with relevant policy and guidance;

***Explanation**: The proposed words provides much more explanation about actual level of this work.*

service a range of administrative and academic committees, including preparation of agendas, papers, minutes and correspondence; and/or

monitor income and expenditure against budget in a school or small faculty.

In professional positions:

~~work as part of a research team~~ undertake a range of research functions, such as literature reviews, statistical analysis, database maintenance and preparation of reports as part of a research team;

***Explanation**: The proposed words provides much more explanation about the type of work which is actually required at this level.*

provide a range of library services, including bibliographic assistance, original cataloguing and reader education in library and reference services;

provide counselling services;

undertake a range of computer programming tasks;

provide documentation and assistance to computer users; and/or

analyse less complex user and system requirements.

HIGHER EDUCATION WORKER LEVEL 7

Occupational equivalent

Senior librarian, technical manager, senior research assistant/officer, professional or scientific officer, learning and teaching advisor, international recruitment advisor, senior administrator in a small less complex faculty.

***Explanation**: The proposed additional occupational groups are important typical jobs at this level.*

Task level

Independently relate existing policy to work assignments or rethink the way a specific body of knowledge is applied in order to solve problems. In professional or technical positions, may be a recognised authority in a specialised area. In administrative positions, apply extensive experience and relevant expertise in a specialised area. In research and learning and teaching positions, apply expertise and relevant experience in a specialised area, derived from the completion of a higher degree

***Explanation**: The proposed words provides much more explanation about the type of work which is actually required at this level.*

Typical activities

In a library, combine specialist expertise and responsibilities for managing a library function.

In student services, the training and supervision of other professional employees combined with policy development responsibilities which may include research and publication.

In technical manager positions, the management of teaching and research facilities for a department or school.

In research positions, provide acknowledged expertise in a specialised area or a combination of technical management and specialised research.

***Explanation**: Active voice.*

In learning and teaching support positions, collaborate with staff to provide learning and teaching development, services and programs.

***Explanation**: This is an important activity at this level, and this relatively new type of work is not otherwise mentioned in the descriptors.*

In administrative positions, provide less senior administrative support to relatively small and less complex faculties or equivalent.

HIGHER EDUCATION WORKER LEVEL 8

Occupational equivalent

Manager (including administrative, research, professional or scientific), senior school or faculty administrator, senior researcher, senior advisor, e-learning & educational designer.

***Explanation**: These changes make for a clearer hierarchy of jobs within the whole structure. A "researcher" at this level should be senior.*

Part H – *[AM2014/229 Item 5, Bond University Academic Staff Association proposal]*

That the Award restrictions on the use of fixed term contract employment apply to Bond University

1. NTEU strongly supports either the change to Sub-clause 10.2 of the *Higher Education Academic Staff Award 2010*, proposed by the Bond University Academic Staff Association ("BUASA"), or the deletion of the Sub-Clause 10.2 in its entirety. The initial submission outlining the proposed change can be found at: https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM2014229-sub-BU-200415.pdf
2. The provisions of Clause 10 have their origins in one of the few major arbitrated full-bench cases in higher education, which led to the making of the *Higher Education Contract of Employment Award 1998* ("HECE Award").
3. That Award sought to balance the needs of employers for flexibility with the need to eliminate widespread abuse of fixed term employment, some of which was long term fixed term employment consisting of many annual contracts to perform work for which the employer had an ongoing and indefinite need.
4. The use of fixed term employment effectively denies employees access to the unfair dismissal jurisdiction and to redundancy benefits. Without the HECE Award provisions, an employee can be employed on annual contracts for 15, 20 or 25 years, to perform ongoing work, and can then be advised, the day before the contract is to expire, that he or she is to be terminated (by not having his or her contract renewed), for example because the supervisor disagrees with the employee's academic opinions or publication, because the supervisor wants to give the job to her brother, or indeed for any reason at all (with a few exception relating to discrimination or adverse action).
5. In the context of this industry, such an arrangement cannot be a fair safety net. Even under the HECE Award provisions there is widespread abuse and mistreatment of fixed tem employees.
6. The *HECE Award*, however, provided some limitations on the use of fixed term employment, and limited some of the worst of those abuses.

7. The *HECE Award* is not a one-size-fits-all form of regulation, and its impact depends upon the circumstances of each employer. For example, under the HECE-Award framework an institution with a small number of research-only or external-grant-funded employees, such as Bond University or University of Notre Dame Australia, should be expected to have much lower levels of fixed term employment than an institution with a very high proportion of employees who are research-only or grant-funded, such as the Universities of Queensland or Sydney. This is because these are the main actual category of "allowable" fixed term contracts.
8. The HECE Award makes clear that where positions are funded by either operating funding from government or fees paid by or on behalf of students, than except in certain specified circumstances, such positions are not to be fixed term. Bond University has no proper basis for exclusion from the Award.
9. Moreover, the Commission is required under the modern award objective, and the objects of the Act, to have regard to the following considerations:
    - take into account Australia's international labour obligations; (Section 3.(a) of the Act);
    - promote productivity and economic growth for Australia's future economic prosperity (Section 3 (a)
    - ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions (3 (b))
    - the efficient and productive performance of work (134 (1) (d))
10. All of these considerations come together if the Commission has proper regard to the relevant international instrument affecting university teaching staff (and by deemed definition, research staff), as set out in the international instrument; The *UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel (1997),* adopted by The General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO), meeting in Paris from 21 October to 12 November 1997, at its 29th session. ("The Recommendation"). A copy is **attached** to this Outline.
11. In the Preamble of the Recommendation, the State parties recite the importance of the contribution of higher education to the development of modern society, and the advancement of knowledge and science, and they also note:

the need to reshape higher education to meet social and economic changes and for higher education teaching personnel to participate in this process,

12. In this context, the State parties then go on to emphasise the significance of academic freedom to the achievement of the goals of higher education. The Recommendation states inter alia in this regard:

> *27. The maintaining of the above international [human rights] standards should be upheld in the interest of higher education internationally and within the country. To do so, the principle of academic freedom should be scrupulously observed. Higher-education teaching personnel are entitled to the maintaining of academic freedom, that is to say, the right, without constriction by prescribed doctrine, to freedom of teaching and discussion, freedom in carrying out research and disseminating and publishing the results thereof, freedom to express freely their opinion about the institution or system in which they work, freedom from institutional censorship and freedom to participate in professional or representative academic bodies. All higher-education teaching personnel should have the right to fulfil their functions without discrimination of any kind and without fear of repression by the state or any other source. Higher-education teaching personnel can effectively do justice to this principle if the environment in which they operate is conducive, which requires a democratic atmosphere; hence the challenge for all of developing a democratic society.*
>
> *28. Higher-education teaching personnel have the right to teach without any interference, subject to accepted professional principles including professional responsibility and intellectual rigour with regard to standards and methods of teaching. Higher-education teaching personnel should not be forced to instruct against their own best knowledge and conscience or be forced to use curricula and methods contrary to national and international human rights standards. Higher education teaching personnel should play a significant role in determining the curriculum.*
>
> *29. Higher-education teaching personnel have a right to carry out research work without any interference, or any suppression, in accordance with their*

professional responsibility and subject to nationally and internationally recognized professional principles of intellectual rigour, scientific inquiry and research ethics. They should also have the right to publish and communicate the conclusions of the research of which they are authors or co-authors, as stated in paragraph 12 of this Recommendation.

13. The relevance of this for these proceedings, however, arises in Part B of Article IX of the Recommendation, which states in part:

B. Security of employment

45. Tenure or its functional equivalent, where applicable, constitutes one of the major procedural safeguards of academic freedom and against arbitrary decisions. It also encourages individual responsibility and the retention of talented higher-education teaching personnel.

46. Security of employment in the profession, including tenure or its functional equivalent, where applicable, should be safeguarded as it is essential to the interests of higher education as well as those of higher-education teaching personnel. It ensures that higher-education teaching personnel who secure continuing employment following rigorous evaluation can only be dismissed on professional grounds and in accordance with due process. They may also be released for bona fide financial reasons, provided that all the financial accounts are open to public inspection, that the institution has taken all reasonable alternative steps to prevent termination of employment, and that there are legal safeguards against bias in any termination of employment procedure. Tenure or its functional equivalent, where applicable, should be safeguarded as far as possible even when changes in the organization of or within a higher education institution or system are made, and should be granted, after a reasonable period of probation, to those who meet stated objective criteria in teaching, and/or scholarship, and/or research to the satisfaction of an academic body, and/or extension work to the satisfaction of the institution of higher education.

14. A user's guide to the Recommendation can be found at;
http://unesdoc.unesco.org/images/0016/001604/160495e.pdf

and that document states in part the means by which the Recommendation constitutes part of Australia's international labour standards obligations:

> *The UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel was adopted by the General Conference of UNESCO in 1997, following years of preparatory work between UNESCO and the ILO. This standard is a set of recommended practices covering all higher-education teaching personnel. It is designed to complement the 1966 Recommendation, and is promoted and its implementation monitored by UNESCO in cooperation with the ILO, notably through the Joint ILO/UNESCO Committee of Experts on the Application of the Recommendations concerning Teaching Personnel (CEART)*

15. The Commission should be mindful of the principles embodied in the Recommendation. The HECE Award seeks to balance the needs for flexibility with the importance of secure employment as a fundamental basis on which the quality of higher education rests. Productive and efficient higher education workplaces rest upon the foundation of academic freedom. Indeed if one were concerned to *promote productivity and economic growth for Australia's future economic prosperity* (From the objects of the Act in Section 3), one would be very keen to promote "tenure", as an as far as the Act permits. The HECE Award, along with the those gains made in enterprise agreements, are the only enforceable protections for academic freedom, which according to the relevant international norms, are so essential to the quality of higher education and its contribution to productivity and economic growth.
16. In particular, a University such as Bond, which aspires to the highest academic standards, should welcome the Submissions of BUASA as advancing its academic mission.

Part I – *[AM2014/229 Item 6, & /230 Item 5, "Full time" or "continuing" employment]*

That the words in clause 10 of the General Staff Award and Clause 11 of the Academic Award be clarified.

1. The words in question are identical in the two awards. These submissions apply to both.
2. The schema of the employment categories as set out in both Awards dates back to the arbitrated Full Bench decision (Print P4083) to create the *Higher Education Contract of Employment (HECE) Award 1998* [AW784204]. In that schema, employment must be offered as either continuing/ongoing, fixed term contract or casual. There are then a variety of incidents of employment which attach to each of those types of employment, including significant restrictions on the circumstances in which fixed term contract employment may be offered.
3. The introductory definitions which set the parameters for that schema, however, are not set out in the same way. The principal distinction set out is between "full time", "part time", "fixed term" and "casual". This mixes categories, since each of full time and part time employment can be ongoing, fixed term or casual. That there is category error involved is demonstrated by the opening words of the current definition (in each award) of "Full time" employment:

   > ***"Full Time employment** means all employment other than fixed-term, part-time, or casual."*

4. A literal reading of that provision implies that Full-time employment and fixed-term employment are mutually exclusive. This would be absurd, as most fixed-term employment, like most ongoing employment, is in fact full time.
5. NTEU submits that the better construction, and one which better reflects the intention of the HECE decision, is to vary the opening definition in each case to be a definition for "Continuing" employment, with consequential amendments to the wording of each of "full time" and "part time" definitions.
6. NTEU is content for the current wording to stand, as the parties have operated since 1998 with a common sense approach to the construction. However if the words are to be amended – a proposal raised by the employers – NTEU submits that the amendments proposed by NTEU better eliminate the infelicitous wording in the current

Award, without introducing any substantive changes to the interaction of the employment types.

Part J – *[AM2014/229 Item 6, & /230 Item 12, ICT Allowance]*

A new allowance for personal ICT expenses incurred for work.

1. The proposed words to be inserted in the *Higher Education General Staff Award 2010* in Schedule C (Allowances) are as follows:

Information Technology	Reimbursement of the actual costs incurred, up to the value of the monthly subscription cost of the cheapest service package (sufficient to provide the level data connection required for the performance of the work) that is readily available in the location (whether that is a bundled package or not), payable for each month of employment	Where an employee is required by the nature of their work, including by custom and practice, to use any of the following services for work purposes other than at the workplace: (a) A telephone connection; (b) Email access; (c) An internet connection; (d) Any like data connection or account; and the employer has not provided that service at no cost to the employee.

2. The proposed new Schedule C would be inserted in the *Higher Education Academic Staff Award 2010,* to read as follows (with the superfluous wording included in the earlier draft (lodged in the FWC on 2 October, 2015) to be removed and shown here struck-through):

Schedule C—Allowances

C.1. Information Technology Allowance

C.1.1 Where an employee is required to use any of the following for work purposes other than at the workplace:

(a) A telephone connection;

(b) Email access;

(c) An internet connection;

(d) Any like data connection or account;

the employer shall either provide that connection at no cost to the employee, or shall pay an allowance to the employee in accordance with this clause.

C.1.2 The value of the allowance shall be reimbursement of the actual cost incurred by the employee, up to the value of the monthly subscription cost of the cheapest service package (sufficient to provide the level data connection required for the performance of the work) that is readily available in the location (whether that is a bundled package or not), and is payable ***for*** ~~*for*~~ *with respect to each month of employment after the first month.*

C.1.3 For the purposes of sub-clause C.1.1, an employee is required to use any of the services itemised in that sub-clause for work purposes if that use is required by the nature of their work, including by custom and practice, unless they are directed in writing not to perform any work requiring any of those services when away from the workplace.

Relevant contentions of fact

3. Most academic staff and many general staff routinely use internet and phone connections, and in particular email connections, from their place of residence, or from a mobile device, to perform their ordinary work. This phenomenon has developed gradually since the mid-1990s.
4. For many casual staff – in particular casual academic staff – the use of such facilities is the only practical means they have of performing their work.
5. The use of such facilities and devices greatly enhances productivity and the efficient performance of work.
6. Nearly all the employees who use such connections or facilities pay for these themselves, and do use them for private as well as work purposes.
7. It is rare that employers have explicitly directed employees to use these connections or facilities.

Arguments of merit and principle in support of the proposed changes

8. NTEU submits that employees in this industry are currently providing a large subsidy to the employers through the use of home and mobile phone and internet.

9. The nature of employment in higher education requires that the efficient performance of work, at least for many employees, is not limited to "normal working hours". Many academic and general staff are required to travel for their work, whether interstate, or locally away from their normal work station. Employees are contacted by managers and by co-workers on a regular basis at home or on mobile devices during working hours.
10. NTEU recognises and in most circumstances does not object to such arrangements. They are a part of modern working life. They are also considered part of the "performance of work". For example, there could be little doubt that if the NTEU directed its members not to answer their phones or emails away from work, the employer would consider this to be unprotected industrial action.
11. As with the performance of uncompensated overtime, the employers take advantage of the fact that employees will use their home or personal communication devices in order to get their jobs done efficiently. Employees are rarely directed to do this work, nevertheless it is inherently required by the work they are given to perform, for example the answering of student enquiries.
12. The regulatory approach proposed by the Union is both moderate and reasonable. The employer can avoid ever having to pay the proposed Allowance by directing the employee not to use their own communication devices for work purposes. As an alternative, the employer can provide whatever devices and connections it thinks necessary to the employee and pay for these.
13. The proposed allowance is limited to the cheapest available connection necessary to the performance of the employee's work. This would nearly always be the cheapest internet connection, as would be necessary to send emails and a few attached documents. The employee might in fact have a home account with huge capacity, to play movies and games. However, the employer would only be liable up to the amount of the cheapest connection readily available in the relevant area.
14. The intention is that the "cheapest connection" is limited to the cost of an internet or phone connection where the employee owns the relevant device. Therefore, the NTEU's proposal leaves the employee still paying for the capital cost of the relevant devices (whether notional, in the sense that they are "bundled" into more expensive monthly packaged, or actual).
15. The proposal by the NTEU does not include a specified amount of allowance, as NTEU submits that the actual amount payable would vary in different parts of Australia, and

that connection costs of this type may be subject to erratic change in coming years, rather than being stable such that CPI indexation would be appropriate. (In fact, it might be expected that costs in this area will fall in real terms over time).

16. The NTEU's proposal does not require the regulatory burden of a reimbursement model, where the employee would have to submit receipts. Moreover, NTEU has limited the payment to employees in their second or subsequent month. This would ensure that the payment of the allowance would not need to be made for employees who, for example gave a guest lecture, or worked on an orientation event for one week.

17. Particularly for some tens of thousands of casual employees who are provided with limited or in some cases no adequate ICT facilities by their employers, yet cannot do their jobs without such a connection, this should be considered an essential part of a fair and enforceable set of minimum terms and conditions.

Part K: *[AM2014/229 Item 1, change "context" to "content"]*

Correct a longstanding typographical error in the Academic Redundancy provisions.

1. The NTEU proposes to amend one word in Sub-clause 17.1 of the Academic Award to correct a longstanding typographical error. The change proposed is to replace the word "context" in 17.1(b)(ii) with the word "content", as follows:

17. Industry specific redundancy provisions

17.1 This clause applies to any institution which:

(a) was bound by the *Universities and Post Compulsory Academic Conditions Award 1999* [AP801516] at 12 September 2008; and

(b) has decided to terminate the employment of one or more academic employees for reasons of an economic, technological, structural or similar nature, including:

(i) a decrease in student demand or enrolments in any academic course or subject or combination or mix of courses or subjects conducted on one or more campuses;

(ii) a decision to cease offering or to vary the academic ~~context~~ **content** of any course or subject or combination or mix of courses or subjects conducted on one or more campuses;

(iii) financial exigency within an organisational unit or cost centre; or

(iv) changes in technology or work methods.

2. This "typo" has been present in the Award and its predecessors from the first inclusion of the redundancy provisions by decision of Commissioner Baird in 1989.
3. In Print H6821, Baird, C, decided the question of principle that provisions should be inserted into the Academic award providing for the involuntary redundancy of academic staff in "rare and unusual" circumstances. The question of principle having been resolved, the industrial parties were directed to prepare draft award provisions to give effect to the decision.
4. The parties were able to reach consent on large parts of the proposed provisions, and the remaining issues in dispute were brought back to Baird, C, for determination in

Print J0176. That decision details the matters which were determined by arbitration. The wording that is now 17.1(b)(ii) was not among the matters arbitrated.

5. The drafts submitted by both the NTEU's predecessors (FAUSA and UACA) and the AHEIA and GO8's predecessors (AUIA and AAEIA) in that arbitration all used the word "content". The wording was based on drafts submitted by the parties, and the Order setting out the resulting award variation, Print J0207, reflected the consent position of the parties:

> (e) "Surplus" indicates that an academic position is no longer required, or belongs to a class of positions not all of which are required, because of:
>
> (i) a decrease in the student demand or enrolments for any course or courses;
>
> (ii) a decision by the institution to:
>
> (1) cease offering a course or courses; or
>
> (2) vary the academic **content** of a course or courses to such an extent that one or more positions are not required;
>
> Taken in accordance with the academic procedures applicable from time to time at the institution.
>
> (iii) institutional financial exigency; or
>
> (iv) substantial changes in work methods adopted as a result of organisational or technological change.
>
> (iv) provided that the following matters shall not be the basis for a position being surplus:
>
> (1) opinions held or expressed by an employee or his or her refusal to express any particular opinion;
>
> (2) matters relating to the methods of teaching and research used by an employee;
>
> (3) any matter properly dealt with as a case of serious misconduct or unsatisfactory performance.
>
> *(emphasis added)*

6. In 1994 and 1995, the redundancy provisions were the subject of further arbitration. Commissioner Bryant undertook a process of final offer arbitration. The word "content" was not at issue in those proceedings, although other aspects of the redundancy clause were (for example, the original reference to "institutional financial

exigency" was changed to "financial exigency within an organisational unit or cost centre").

7. In Print L9844, the relevant sub-clause is expressed using the word "context" instead of "content". This change did not arise from any argument put forward by the parties or canvassed by the tribunal itself. The word "context" appears to have entered the final award as a result of a transcription error.
8. The different word was not the subject of particular notice by the union until a recent proposed redundancy of a Professor at Monash University (Professor Komesaroff) where one of the issues in dispute was whether moving the delivery of a unit on professional ethics – a program in the development and delivery of which Professor Komesaroff had been closely involved for a number of years – from one school to another, without any substantive change in the content of the unit, was sufficient to constitute a change in the "academic context" and therefore provide a basis for involuntary redundancy.
9. The proposition that a university varies the ***content*** of a subject or subjects to the extent that an academic whose teaching fields were particularly in the area of ***content*** that was being eliminated, might be redundant, is logical. The proposition that by moving a subject or subjects from one organisational unit to another, or from one degree program to another – that is, changing the ***context*** without changing the ***content***, could justify declaring the staff teaching in that subject or subjects redundant, is far less obvious.
10. NTEU submits that the original intent of the parties, as well as the more logical and just formulation, should be reflected in the words of the Award, and therefore that the amendment proposed by the NTEU should be made.

Part L: *[AM2014/229, Item 2, & /230 Item 2, Medical Research Institutes]*

That the definitions and coverage clauses of both Awards be amended to include Research Institutes

1. NTEU sought Award coverage for research, general and technical staff working in medical research institutes- under the *Higher Education (Academic Staff) Award 2010* and the *Higher Education (General Staff) Award, 2010,* as part of the 2-yearly Review of modern awards, in 2012; (AM2012/187).
2. Deputy President Smith determined that the 2-year Review[4] did not provide adequate scope for him to determine the matter on merit ([2013] FWC 7947, para [49], 14 October 2013).
   https://www.fwc.gov.au/documents/decisionssigned/html/2013FWC7947.htm
3. NTEU has made application for coverage of the relevant staff as part of this 4- yearly Review.
4. We rely on:
   - All previous submissions
   - All evidence and
   - All other materials, including transcript of the case
     29 April, 2013;
     https://www.fwc.gov.au/documents/documents/Transcripts/290413am2012187.htm
     30 April, 2013;
     https://www.fwc.gov.au/documents/documents/Transcripts/300413am2012187.htm
     1 May 2013
     https://www.fwc.gov.au/documents/documents/Transcripts/010513am2012187.htm
     and 25 June, 2013 *(attached)*

   to support this application.
5. In addition, we submit:
   - **Witness statement of Mr. Roy Sneddon**

[4] *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* Sch. 5, Item 6

- **Witness statement of Dr. Peter Higgs (updated).** The previous version of this statement was marked NTEU#6 when admitted in to evidence on 29 April 2013 (along with attachments and Supplementary Statement).
- **Witness statement of Mr David Travaks (updated).**

Part M: *[AM2014/229 Item 9, Academic Casual Conversion]*

A new provision for the conversion of certain casual academic work

1. This claim will be scheduled and addressed after the conclusion of the Common issue – AM2014/197. Therefore the NTEU has not addressed it in these submissions and reserves our position until such time as it is listed for consideration.

Recommendation concerning the Status of Higher-Education Teaching Personnel

11 November 1997

Preamble

The General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO), meeting in Paris from 21 October to 12 November 1997, at its 29th session, Conscious of the responsibility of states for the provision of education for all in fulfilment of Article 26 of the Universal Declaration of Human Rights (1948),

Recalling in particular the responsibility of the states for the provision of higher education in fulfilment of Article 13, paragraph 1(c), of the International Covenant on Economic, Social and Cultural Rights (1966),

Conscious that higher education and research are instrumental in the pursuit, advancement and transfer of knowledge and constitute an exceptionally rich cultural and scientific asset,

Also conscious that governments and important social groups, such as students, industry and labour, are vitally interested in and benefit from the services and outputs of the higher education systems,

Recognizing the decisive role of higher education teaching personnel in the advancement of higher education, and the importance of their contribution to the development of humanity and modern society,

Convinced that higher-education teaching personnel, like all other citizens, are expected to endeavour to enhance the observance in society of the cultural, economic, social, civil and political rights of all peoples,

Aware of the need to reshape higher education to meet social and economic changes and for higher education teaching personnel to participate in this process,

Expressing concern regarding the vulnerability of the academic community to untoward political pressures which could undermine academic freedom,

Considering that the right to education, teaching and research can only be fully enjoyed in an atmosphere of academic freedom and autonomy for institutions of higher education and that the open communication of findings, hypotheses and opinions lies at the very heart of higher education and provides the strongest guarantee of the accuracy and objectivity of scholarship and research,

Concerned to ensure that higher-education teaching personnel enjoy the status commensurate with this role, Recognizing the diversity of cultures in the world,

Taking into account the great diversity of the laws, regulations, practices and traditions which, in different countries, determine the patterns and organization of higher education,

Mindful of the diversity of arrangements which apply to higher-education teaching personnel in different countries, in particular according to whether the regulations concerning the public service apply to them,

Convinced nevertheless that similar questions arise in all countries with regard to the status of higher education teaching personnel and that these questions call for the adoption of common approaches and so far as practicable the application of common standards which it is the purpose of this Recommendation to set out,

Bearing in mind such instruments as the UNESCO Convention against Discrimination in Education (1960), which recognizes that UNESCO has a duty not only to proscribe any form of discrimination in education, but also to promote equality of opportunity and treatment for all in education at all levels, including the conditions under which it is given, as well as the Recommendation concerning the Status of Teachers (1966) and the UNESCO Recommendation on the Status of Scientific Researchers (1974), as well as the instruments of the International Labour Organization on freedom of association and the right to organize and to collective bargaining and on equality of opportunity and treatment,

Desiring to complement existing conventions, covenants and recommendations contained in international standards set out in the appendix with provisions relating to problems of particular concern to higher education institutions and their teaching and research personnel,

Adopts the present Recommendation on 11 November 1997

I. Definitions

1. For the purpose of this Recommendation:

(a) 'higher education' means programmes of study, training or training for research at the post-secondary level provided by universities or other educational establishments that are approved as institutions of higher education by the competent state authorities, and/or through recognized accreditation systems;

(b) 'research', within the context of higher education, means original scientific, technological and engineering, medical, cultural, social and human science or educational research which implies careful, critical, disciplined inquiry, varying in technique and method according to the nature and conditions of the problems identified, directed towards the clarification and/or resolution of the problems, and when within an institutional framework, supported by an appropriate infrastructure;

(c) 'scholarship' means the processes by which higher-education teaching personnel keep up to date with their subject, engage in scholarly editing, disseminate their work and improve their pedagogical skills as teachers in their discipline and upgrade their academic credentials;

(d) 'extension work' means a service by which the resources of an educational institution are extended beyond its confines to serve a widely diversified community within the state or region regarded as the constituent area of the institution, so long as this work does not contradict the mission of the institution. In teaching it may include a wide range of activities such as extramural, lifelong and distance education delivered through evening classes, short courses, seminars and institutes. In research it may lead to the provision of expertise to the public, private and non-profit sectors, various types of consultation, and participation in applied research and in implementing research results;

(e) 'institutions of higher education' means universities, other educational establishments, centres and structures of higher education, and centres of research and culture associated with any of the above, public or private, that are approved as such either through recognized accreditation systems or by the competent state authorities;

(f) 'higher-education teaching personnel' means all those persons in institutions or programmes of higher education who are engaged to teach and/or to undertake scholarship and/or to undertake research and/or to provide educational services to students or to the community at large.

II. Scope

2.This Recommendation applies to all higher education teaching personnel.

III. Guiding principles

3. The global objectives of international peace, understanding, co-operation and sustainable development pursued by each Member State and by the United Nations require, inter alia, education for peace and in the culture of peace, as defined by UNESCO, as well as qualified and cultivated graduates of higher education institutions, capable of serving the community as responsible citizens and undertaking effective scholarship and advanced research and, as a consequence, a corps of talented and highly qualified higher-education teaching personnel.

4. Institutions of higher education, and more particularly universities, are communities of scholars preserving, disseminating and expressing freely their opinions on traditional knowledge and culture, and pursuing new knowledge without constriction by prescribed doctrines. The pursuit of new knowledge and its application lie at the heart of the mandate of such institutions of higher education. In higher education institutions where original research is not required, higher-education teaching personnel should maintain and develop knowledge of their subject through scholarship and improved pedagogical skills.

5. Advances in higher education, scholarship and research depend largely on infrastructure and resources, both human and material, and on the qualifications and expertise of higher-education teaching personnel as well as on their human, pedagogical and technical qualities, underpinned by academic freedom, professional responsibility, collegiality and institutional autonomy.

6. Teaching in higher education is a profession: it is a form of public service that requires of higher education personnel expert knowledge and specialized skills acquired and maintained through rigorous and lifelong study and research; it also calls for a sense of personal and institutional responsibility for the education and welfare of students and of the community at large and for a commitment to high professional standards in scholarship and research.

7. Working conditions for higher-education teaching personnel should be such as will best promote effective teaching, scholarship, research and extension work and enable higher-education teaching personnel to carry out their professional tasks.

8. Organizations which represent higher-education teaching personnel should be considered and recognized as a force which can contribute greatly to educational advancement and which should, therefore, be involved, together with other stakeholders and interested parties, in the determination of higher education policy.

9. Respect should be shown for the diversity of higher education institution systems in each Member State in accordance with its national laws and practices as well as with international standards.

IV. Educational objectives and policies

10. At all appropriate stages of their national planning in general, and of their planning for higher education in particular, Member States should take all necessary measures to ensure that:

(a) higher education is directed to human development and to the progress of society;

(b) higher education contributes to the achievement of the goals of lifelong learning and to the development of other forms and levels of education;

(c) where public funds are appropriated for higher education institutions, such funds are treated as a public investment, subject to effective public accountability;

(d) the funding of higher education is treated as a form of public investment the returns on which are, for the most part, necessarily long term, subject to government and public priorities;

(e) the justification for public funding is held constantly before public opinion.

11. Higher-education teaching personnel should have access to libraries which have up-to-date collections reflecting diverse sides of an issue, and whose holdings are not subject to censorship or other forms of intellectual interference. They should also have access, without censorship, to international computer systems, satellite programmes and

databases required for their teaching, scholarship or research.

12. The publication and dissemination of the research results obtained by higher-education teaching personnel should be encouraged and facilitated with a view to assisting them to acquire the reputation which they merit, as well as with a view to promoting the advancement of science, technology, education and culture generally. To this end, higher-education teaching personnel should be free to publish the results of research and scholarship in books, journals and databases of their own choice and under their own names, provided they are the authors or co-authors of the above scholarly works. The intellectual property of higher-education teaching personnel should benefit from appropriate legal protection, and in particular the protection afforded by national and international copyright law.

13. The interplay of ideas and information among higher-education teaching personnel throughout the world is vital to the healthy development of higher education and research and should be actively promoted. To this end higher-education teaching personnel should be enabled throughout their careers to participate in international gatherings on higher education or research, to travel abroad without political restrictions and to use the Internet or video-conferencing for these purposes.

14. Programmes providing for the broadest exchange of higher-education teaching personnel between institutions, both nationally and internationally, including the organization of symposia, seminars and collaborative projects, and the exchange of educational and scholarly information should be developed and encouraged. The extension of communications and direct contacts between universities, research institutions and associations as well as among scientists and research workers should be facilitated, as should access by higher education teaching personnel from other states to open information material in public archives, libraries, research institutes and similar bodies.

15. Member States and higher education institutions should, nevertheless, be conscious of the exodus of higher-education teaching personnel from the developing countries and, in particular, the least developed ones. They should, therefore, encourage aid programmes to the developing countries to help sustain an academic environment which offers satisfactory conditions of work for higher-education teaching personnel in those countries, so that this exodus may be contained and ultimately reversed.

16. Fair, just and reasonable national policies and practices for the recognition of degrees and of credentials for the practice of the higher education profession from other states should be established that are consistent with the UNESCO Recommendation on the Recognition of Studies and Qualifications in Higher Education of 1993.

V. Institutional rights, duties and responsibilities

A. Institutional autonomy

17. The proper enjoyment of academic freedom and compliance with the duties and responsibilities listed below require the autonomy of institutions of higher education. Autonomy is that degree of self-governance necessary for effective decision making by institutions of higher education regarding their academic work, standards, management and related activities consistent with systems of public accountability, especially in respect of funding provided by the state, and respect for academic freedom and human rights. However, the nature of institutional autonomy may differ according to the type of establishment involved.

18. Autonomy is the institutional form of academic freedom and a necessary precondition to guarantee the proper fulfilment of the functions entrusted to higher-education teaching personnel and institutions.

19. Member States are under an obligation to protect higher education institutions from threats to their autonomy coming from any source.

20. Autonomy should not be used by higher education institutions as a pretext to limit the rights of higher-education teaching personnel provided for in this Recommendation or in other international standards set out in the appendix.

21. Self-governance, collegiality and appropriate academic leadership are essential components of meaningful autonomy for institutions of higher education.

B. Institutional accountability

22. In view of the substantial financial investments made, Member States and higher education institutions should ensure a proper balance between the level of autonomy enjoyed by higher education institutions and their systems of accountability. Higher education institutions should endeavour to open their governance in order to be accountable. They should be accountable for:

(a) effective communication to the public concerning the nature of their educational mission;

(b) a commitment to quality and excellence in their teaching, scholarship and research functions, and an obligation to protect and ensure the integrity of their teaching, scholarship and research against intrusions inconsistent with their academic missions;

(c) effective support of academic freedom and fundamental human rights;

(d) ensuring high quality education for as many academically qualified individuals as possible subject to the constraints of the resources available to them;

(e) a commitment to the provision of opportunities for lifelong learning, consistent with the mission of the institution and the resources provided;

(f) ensuring that students are treated fairly and justly, and without discrimination;

(g) adopting policies and procedures to ensure the equitable treatment of women and minorities and to eliminate sexual and racial harassment;

(h) ensuring that higher education personnel are not impeded in their work in the classroom or in their research capacity by violence, intimidation or harassment;

(i) honest and open accounting;

(j) efficient use of resources;

(k) the creation, through the collegial process and/or through negotiation with organizations representing higher-education teaching personnel, consistent with the principles of academic freedom and freedom of speech, of statements or codes of ethics to guide higher education personnel in their teaching, scholarship, research and extension work;

(l) assistance in the fulfilment of economic, social, cultural and political rights while striving to prevent the use of knowledge, science and technology to the detriment of those rights, or for purposes which run counter to generally accepted academic ethics, human rights and peace;

(m) ensuring that they address themselves to the contemporary problems facing society; to this end, their curricula, as well as their activities, should respond, where appropriate, to the current and future needs of the local community and of society at large, and they should play an important role in enhancing the labour market opportunities of their graduates;

(n) encouraging, where possible and appropriate, international academic co-operation which transcends national, regional, political, ethnic and other barriers, striving to prevent the scientific and technological exploitation of one state by another, and promoting equal partnership of all the academic communities of the world in the pursuit and use of knowledge and the preservation of cultural heritages;

(o) ensuring up-to-date libraries and access, without censorship, to modern teaching, research and information resources providing information required by higher-education teaching personnel or by students for teaching, scholarship or research;

(p) ensuring the facilities and equipment necessary for the mission of the institution and their proper upkeep;

(q) ensuring that when engaged in classified research it will not contradict the educational mission and objectives of the institutions and will not run counter to the general objectives of peace, human rights, sustainable development and

environment.

23. Systems of institutional accountability should be based on a scientific methodology and be clear, realistic, cost-effective and simple. In their operation they should be fair, just and equitable. Both the methodology and the results should be open.

24. Higher education institutions, individually or collectively, should design and implement appropriate systems of accountability, including quality assurance mechanisms to achieve the above goals, without harming institutional autonomy or academic freedom. The organizations representing higher-education teaching personnel should participate, where possible, in the planning of such systems. Where statemandated structures of accountability are established, their procedures should be negotiated, where applicable, with the institutions of higher education concerned and with the organizations representing higher-education teaching personnel.

VI. Rights and freedoms of higher-education teaching personnel

A. Individual rights and freedoms: civil rights, academic freedom, publication rights, and the international exchange of information

25. Access to the higher education academic profession should be based solely on appropriate academic qualifications, competence and experience and be equal for all members of society without any discrimination.

26. Higher-education teaching personnel, like all other groups and individuals, should enjoy those internationally recognized civil, political, social and cultural rights applicable to all citizens. Therefore, all higher-education teaching personnel should enjoy freedom of thought, conscience, religion, expression, assembly and association as well as the right to liberty and security of the person and liberty of movement. They should not be hindered or impeded in exercising their civil rights as citizens, including the right to contribute to social change through freely expressing their opinion of state policies and of policies affecting higher education. They should not suffer any penalties simply because of the exercise of such rights. Higher-education teaching personnel should not be subject to arbitrary arrest or detention, nor to torture, nor to cruel, inhuman or degrading treatment. In cases of gross violation of their rights, higher-education teaching personnel should have the right to appeal to the relevant national, regional or international bodies such as the agencies of the United Nations, and organizations representing higher-education teaching personnel should extend full support in such cases.

27. The maintaining of the above international standards should be upheld in the interest of higher education internationally and within the country. To do so, the principle of academic freedom should be scrupulously observed. Higher-education teaching personnel are entitled to the maintaining of academic freedom, that is to say, the right, without constriction by prescribed doctrine, to freedom of teaching and discussion, freedom in carrying out research and disseminating and publishing the results thereof, freedom to express freely their opinion about the institution or system in which they work, freedom from institutional censorship and freedom to participate in professional or representative academic bodies. All higher-education teaching personnel should have the right to fulfil their functions without discrimination of any kind and without fear of repression by the state or any other source. Higher-education teaching personnel can effectively do justice to this principle if the environment in which they operate is conducive, which requires a democratic atmosphere; hence the challenge for all of developing a democratic society.

28. Higher-education teaching personnel have the right to teach without any interference, subject to accepted professional principles including professional responsibility and intellectual rigour with regard to standards and methods of teaching. Higher-education teaching personnel should not be forced to instruct against their own best knowledge and conscience or be forced to use curricula and methods contrary to national and international human rights standards. Higher education teaching personnel should play a significant role in determining the curriculum.

29. Higher-education teaching personnel have a right to carry out research work without any interference, or any suppression, in accordance with their professional responsibility and subject to nationally and internationally recognized professional principles of intellectual rigour, scientific inquiry and research ethics. They should also have the right to publish and communicate the conclusions of the research of which they are authors or co-authors, as stated in paragraph 12 of this Recommendation.

30. Higher-education teaching personnel have a right to undertake professional activities outside of their employment, particularly those that enhance their professional skills or allow for the application of knowledge to the problems of

the community, provided such activities do not interfere with their primary commitments to their home institutions in accordance with institutional policies and regulations or national laws and practice where they exist.

B. Self-governance and collegiality

31. Higher-education teaching personnel should have the right and opportunity, without discrimination of any kind, according to their abilities, to take part in the governing bodies and to criticize the functioning of higher education institutions, including their own, while respecting the right of other sections of the academic community to participate, and they should also have the right to elect a majority of representatives to academic bodies within the higher education institution.

32. The principles of collegiality include academic freedom, shared responsibility, the policy of participation of all concerned in internal decision making structures and practices, and the development of consultative mechanisms. Collegial decision-making should encompass decisions regarding the administration and determination of policies of higher education, curricula, research, extension work, the allocation of resources and other related activities, in order to improve academic excellence and quality for the benefit of society at large.

VII. Duties and responsibilities of higher education teaching personnel

33. Higher-education teaching personnel should recognize that the exercise of rights carries with it special duties and responsibilities, including the obligation to respect the academic freedom of other members of the academic community and to ensure the fair discussion of contrary views. Academic freedom carries with it the duty to use that freedom in a manner consistent with the scholarly obligation to base research on an honest search for truth. Teaching, research and scholarship should be conducted in full accordance with ethical and professional standards and should, where appropriate, respond to contemporary problems facing society as well as preserve the historical and cultural heritage of the world.

34. In particular, the individual duties of higher education teaching personnel inherent in their academic freedom are:

(a) to teach students effectively within the means provided by the institution and the state, to be fair and equitable to male and female students and treat those of all races and religions, as well as those with disabilities, equally, to encourage the free exchange of ideas between themselves and their students, and to be available to them for guidance in their studies. Higher-education teaching personnel should ensure, where necessary, that the minimum content defined in the syllabus for each subject is covered;

(b) to conduct scholarly research and to disseminate the results of such research or, where original research is not required, to maintain and develop their knowledge of their subject through study and research, and through the development of teaching methodology to improve their pedagogical skills;

(c) to base their research and scholarship on an honest search for knowledge with due respect for evidence, impartial reasoning and honesty in reporting;

(d) to observe the ethics of research involving humans, animals, the heritage or the environment;

(e) to respect and to acknowledge the scholarly work of academic colleagues and students and, in particular, to ensure that authorship of published works includes all who have materially contributed to, and share responsibility for, the contents of a publication;

(f) to refrain from using new information, concepts or data that were originally obtained as a result of access to confidential manuscripts or applications for funds for research or training that may have been seen as the result of processes such as peer review, unless the author has given permission;

(g) to ensure that research is conducted according to the laws and regulations of the state in which the research is carried out, that it does not violate international codes of human rights, and that the results of the research and the data on which it is based are effectively made available to scholars and researchers in the host institution, except where this might place respondents in peril or where anonymity has been guaranteed;

(h) to avoid conflicts of interest and to resolve them through appropriate disclosure and full consultation with the higher education institution employing them, so that they have the approval of the aforesaid institution;

(i) to handle honestly all funds entrusted to their care for higher education institutions for research or for other professional or scientific bodies;

(j) to be fair and impartial when presenting a professional appraisal of academic colleagues and students;

(k) to be conscious of a responsibility, when speaking or writing outside scholarly channels on matters which are not related to their professional expertise, to avoid misleading the public on the nature of their professional expertise;

(l) to undertake such appropriate duties as are required for the collegial governance of institutions of higher education and of professional bodies.

35. Higher-education teaching personnel should seek to achieve the highest possible standards in their professional work, since their status largely depends on themselves and the quality of their achievements.

36. Higher-education teaching personnel should contribute to the public accountability of higher education institutions without, however, forfeiting the degree of institutional autonomy necessary for their work, for their professional freedom and for the advancement of knowledge.

VIII. Preparation for the profession

37. Policies governing access to preparation for a career in higher education rest on the need to provide society with an adequate supply of higher-education teaching personnel who possess the necessary ethical, intellectual and teaching qualities and who have the required professional knowledge and skills.

38. All aspects of the preparation of higher-education teaching personnel should be free from any form of discrimination.

39. Amongst candidates seeking to prepare for a career in higher education, women and members of minorities with equal academic qualifications and experience should be given equal opportunities and treatment.

IX. Terms and conditions of employment

A. Entry into the academic profession

40. The employers of higher-education teaching personnel should establish such terms and conditions of employment as will be most conducive for effective teaching and/or research and/or scholarship and/or extension work and will be fair and free from discrimination of any kind.

41. Temporary measures aimed at accelerating de facto equality for disadvantaged members of the academic community should not be considered discriminatory, provided that these measures are discontinued when the objectives of equality of opportunity and treatment have been achieved and systems are in place to ensure the continuance of equality of opportunity and treatment.

42. A probationary period on initial entry to teaching and research in higher education is recognized as the opportunity for the encouragement and helpful initiation of the entrant and for the establishment and maintenance of proper professional standards, as well as for the individual's own development of his/her teaching and research proficiency. The normal duration of probation should be known in advance and the conditions for its satisfactory completion should be strictly related to professional competence. If such candidates fail to complete their probation satisfactorily, they should have the right to know the reasons and to receive this information sufficiently in advance of the end of the probationary period to give them a reasonable opportunity to improve their performance. They should also have the right to appeal.

43. Higher-education teaching personnel should enjoy:

(a) a just and open system of career development including fair procedures for appointment, tenure where applicable, promotion, dismissal, and other related matters;

(b) an effective, fair and just system of labour relations within the institution, consistent with the international standards set out in the appendix.

44. There should be provisions to allow for solidarity with other institutions of higher education and with their higher-education teaching personnel when they are subject to persecution. Such solidarity may be material as well as moral and should, where possible, include refuge and employment or education for victims of persecution.

B.Security of employment

45. Tenure or its functional equivalent, where applicable, constitutes one of the major procedural safeguards of academic freedom and against arbitrary decisions. It also encourages individual responsibility and the retention of talented higher-education teaching personnel.

46. Security of employment in the profession, including tenure or its functional equivalent, where applicable, should be safeguarded as it is essential to the interests of higher education as well as those of higher-education teaching personnel. It ensures that higher-education teaching personnel who secure continuing employment following rigorous evaluation can only be dismissed on professional grounds and in accordance with due process. They may also be released for bona fide financial reasons, provided that all the financial accounts are open to public inspection, that the institution has taken all reasonable alternative steps to prevent termination of employment, and that there are legal safeguards against bias in any termination of employment procedure. Tenure or its functional equivalent, where applicable, should be safeguarded as far as possible even when changes in the organization of or within a higher education institution or system are made, and should be granted, after a reasonable period of probation, to those who meet stated objective criteria in teaching, and/or scholarship, and/or research to the satisfaction of an academic body, and/or extension work to the satisfaction of the institution of higher education.

C. Appraisal

47. Higher education institutions should ensure that:

(a) evaluation and assessment of the work of higher-education teaching personnel are an integral part of the teaching, learning and research process, and that their major function is the development of individuals in accordance with their interests and capacities;

(b) evaluation is based only on academic criteria of competence in research, teaching and other academic or professional duties as interpreted by academic peers;

(c) evaluation procedures take due account of the difficulty inherent in measuring personal capacity, which seldom manifests itself in a constant and unfluctuating manner;

(d) where evaluation involves any kind of direct assessment of the work of higher-education teaching personnel, by students and/or fellow colleagues and/or administrators, such assessment is objective and the criteria and the results are made known to the individual(s) concerned;

(e) the results of appraisal of higher-education teaching personnel are also taken into account when establishing the staffing of the institution and considering the renewal of employment;

(f) higher-education teaching personnel have the right to appeal to an impartial body against assessments which they deem to be unjustified.

D. Discipline and dismissal

48. No member of the academic community should be subject to discipline, including dismissal, except for just and sufficient cause demonstrable before an independent third-party hearing of peers, and/or before an impartial body such as arbitrators or the courts.

49. All members of higher-education teaching personnel should enjoy equitable safeguards at each stage of any disciplinary procedure, including dismissal, in accordance with the international standards set out in the appendix.

50. Dismissal as a disciplinary measure should only be for just and sufficient cause related to professional conduct, for example: persistent neglect of duties, gross incompetence, fabrication or falsification of research results, serious financial irregularities, sexual or other misconduct with students, colleagues, or other members of the academic community or serious threats thereof, or corruption of the educational process such as by falsifying grades, diplomas or degrees in return for money, sexual or other favours or by demanding sexual, financial or other material favours from subordinate employees or colleagues in return for continuing employment.

51. Individuals should have the right to appeal against the decision to dismiss them before independent, external bodies such as arbitrators or the courts, with final and binding powers.

E. Negotiation of terms and conditions of employment

52. Higher-education teaching personnel should enjoy the right to freedom of association, and this right should be effectively promoted. Collective bargaining or an equivalent procedure should be promoted in accordance with the standards of the International Labour Organization (ILO) set out in the appendix.

53. Salaries, working conditions and all matters related to the terms and conditions of employment of higher-education teaching personnel should be determined through a voluntary process of negotiation between organizations representing higher-education teaching personnel and the employers of higher education teaching personnel, except where other equivalent procedures are provided that are consistent with international standards.

54. Appropriate machinery, consistent with national laws and international standards, should be established by statute or by agreement whereby the right of higher-education teaching personnel to negotiate through their organizations with their employers, whether public or private, is assured. Such legal and statutory rights should be enforceable through an impartial process without undue delay.

55. If the process established for these purposes is exhausted or if there is a breakdown in negotiations between the parties, organizations of higher-education teaching personnel should have the right to take such other steps as are normally open to other organizations in the defence of their legitimate interests.

56. Higher-education teaching personnel should have access to a fair grievance and arbitration procedure, or the equivalent, for the settlement of disputes with their employers arising out of terms and conditions of employment.

F. Salaries, workload, social security benefits, health and safety

57. All financially feasible measures should be taken to provide higher-education teaching personnel with remuneration such that they can devote themselves satisfactorily to their duties and allocate the necessary amount of time for the continuing training and periodic renewal of knowledge and skills that are essential at this level of teaching.

58. The salaries of higher-education teaching personnel should:

(a) reflect the importance to society of higher education and hence the importance of higher-education teaching personnel as well as the different responsibilities which fall to them from the time of their entry into the profession;

(b) be at least comparable to salaries paid in other occupations requiring similar or equivalent qualifications;

(c) provide higher-education teaching personnel with the means to ensure a reasonable standard of living for themselves and their families, as well as to invest in further education or in the pursuit of cultural or scientific activities, thus enhancing their professional qualifications;

(d) take account of the fact that certain posts require higher qualifications and experience and carry greater responsibilities;

(e) be paid regularly and on time;

(f) be reviewed periodically to take into account such factors as a rise in the cost of living, increased productivity leading to higher standards of living, or a general upward movement in wage or salary levels.

59. Salary differentials should be based on objective criteria.

60. Higher-education teaching personnel should be paid on the basis of salary scales established in agreement with organizations representing higher-education teaching personnel, except where other equivalent procedures consistent with international standards are provided. During a probationary period or if employed on a temporary basis qualified higher-education teaching personnel should not be paid on a lower scale than that laid down for established higher education teaching personnel at the same level.

61. A fair and impartial merit-rating system could be a means of enhancing quality assurance and quality control. Where introduced and applied for purposes of salary determination it should involve prior consultation with organizations representing higher-education teaching personnel.

62. The workload of higher-education teaching personnel should be fair and equitable, should permit such personnel to carry out effectively their duties and responsibilities to their students as well as their obligations in regard to scholarship, research and/or academic administration, should provide due consideration in terms of salary for those who are required to teach beyond their regular workload, and should be negotiated with the organizations representing higher-education teaching personnel, except where other equivalent procedures consistent with international standards are provided.

63. Higher-education teaching personnel should be provided with a work environment that does not have a negative impact on or affect their health and safety and they should be protected by social security measures, including those concerning sickness and disability and pension entitlements, and measures for the protection of health and safety in respect of all contingencies included in the conventions and recommendations of ILO. The standards should be at least as favourable as those set out in the relevant conventions and recommendations of ILO. Social security benefits for higher-education teaching personnel should be granted as a matter of right.

64. The pension rights earned by higher-education teaching personnel should be transferable nationally and internationally, subject to national, bilateral and multilateral taxation laws and agreements, should the individual transfer to employment with another institution of higher education. Organizations representing higher education teaching personnel should have the right to choose representatives to take part in the governance and administration of pension plans designed for higher-education teaching personnel where applicable, particularly those which are private and contributory.

G. Study and research leave and annual holidays

65. Higher-education teaching personnel should be granted study and research leave, such as sabbatical leave, on full or partial pay, where applicable, at regular intervals.

66. The period of study or research leave should be counted as service for seniority and pension purposes, subject to the provisions of the pension plan.

67. Higher-education teaching personnel should be granted occasional leave with full or partial pay to enable them to participate in professional activities.

68. Leave granted to higher-education teaching personnel within the framework of bilateral and multilateral cultural and scientific exchanges or technical assistance programmes abroad should be considered as service, and their seniority and eligibility for promotion and pension rights in their home institutions should be safeguarded. In addition, special arrangements should be made to cover their extra expenses.

69. Higher-education teaching personnel should enjoy the right to adequate annual vacation with full pay.

H. Terms and conditions of employment of women higher-education teaching personnel

70. All necessary measures should be taken to promote equality of opportunity and treatment of women higher-

education teaching personnel in order to ensure, on the basis of equality between men and women, the rights recognized by the international standards set out in the appendix.

I. Terms and conditions of employment of disabled higher-education teaching personnel

71. All necessary measures should be taken to ensure that the standards set with regard to the conditions of work of higher-education teaching personnel who are disabled are, as a minimum, consistent with the relevant provisions of the international standards set out in the appendix.

J. Terms and conditions of employment of part-time higher-education teaching personnel

72. The value of the service provided by qualified part-time higher-education teaching personnel should be recognized. Higher-education teaching personnel employed regularly on a part-time basis should:

(a) receive proportionately the same remuneration as higher-education teaching personnel employed on a full-time basis and enjoy equivalent basic conditions of employment;

(b) benefit from conditions equivalent to those of higher-education teaching personnel employed on a full-time basis as regards holidays with pay, sick leave and maternity leave; the relevant pecuniary entitlements should be determined in proportion to hours of work or earnings;

(c) be entitled to adequate and appropriate social security protection, including, where applicable, coverage under employers' pension schemes.

X. Utilization and implementation

73. Member States and higher education institutions should take all feasible steps to extend and complement their own action in respect of the status of higher-education teaching personnel by encouraging co-operation with and among all national and international governmental and nongovernmental organizations whose activities fall within the scope and objectives of this Recommendation.

74. Member States and higher education institutions should take all feasible steps to apply the provisions spelled out above to give effect, within their respective territories, to the principles set forth in this Recommendation.

75. The Director-General will prepare a comprehensive report on the world situation with regard to academic freedom and to respect for the human rights of higher-education teaching personnel on the basis of the information supplied by Member States and of any other information supported by reliable evidence which he/she may have gathered by such methods as he/she may deem appropriate.

76. In the case of a higher education institution in the territory of a state not under the direct or indirect authority of that state but under separate and independent authorities, the relevant authorities should transmit the text of this Recommendation to institutions, so that such institutions can put its provisions into practice.

XI. Final provision

77. Where higher-education teaching personnel enjoy a status which is, in certain respects, more favourable than that provided for in this Recommendation, the terms of this Recommendation should not be invoked to diminish the status already recognized.

Appendix

United Nations

- Universal Declaration of Human Rights, 1948;
- Declaration concerning the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples, 1965;

- International Convention on the Elimination of All Forms of Racial Discrimination, 1965;
- International Covenant on Economic, Social and Cultural Rights, 1966;
- International Covenant on Civil and Political Rights and Protocol thereto, 1966;
- Declaration on the Protection of All Persons from Being Subject to Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment, 1975;
- Declaration on the Rights of Disabled Persons, 1975;
- Convention on the Elimination of All Forms of Discrimination against Women, 1979;
- Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, 1981;
- Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 1984.

United Nations Educational, Scientific and Cultural Organization

- Convention against Discrimination in Education, 1960, and Protocol thereto, 1962;
- Recommendation against Discrimination in Education, 1960;
- Recommendation on Education for International Understanding and Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms, 1974;
- Recommendation on the Status of Scientific Researchers, 1974;
- Revised Recommendation concerning Technical and Vocational Education, 1974;
- Declaration on Race and Racial Prejudice, 1978;
- Convention on Technical/Vocational Education, 1989;
- Recommendation on the Recognition of Studies and Qualifications in Higher Education, 1993.

International Labour Organization

- Convention No. 87: Freedom of Association and Protection of the Right to Organize Convention, 1948;
- Convention No. 95: Protection of Wages Convention, 1949;
- Convention No. 98: Right to Organize and Collective Bargaining Convention, 1949;
- Convention No. 100: Equal Remuneration Convention, 1951;
- Convention No. 102: Social Security (Minimum Standards) Convention, 1952;
- Convention No. 103: Maternity Protection Convention (Revised), 1952;
- Recommendation No. 95: Maternity Protection Recommendation, 1952;
- Convention No. 111: Discrimination (Employment and Occupation) Convention, 1958;
- Convention No. 118: Equality of Treatment (Social Security) Convention, 1962;
- Convention No. 121: Employment Injury Benefits Convention, 1964 [Schedule I amended in 1980];
- Convention No. 128: Invalidity, Old-Age and Survivors Benefit Convention, 1967;
- Recommendation No. 131: Invalidity, Old-Age and Survivors Benefit Recommendation, 1967;
- Convention No. 130: Medical Care and Sickness Benefit Convention, 1969;
- Convention No. 132: Holidays with Pay Convention (Revised), 1970;
- Convention No. 135: Workers' Representatives Convention, 1971;
- Recommendation No. 143: Workers' Representatives Recommendation, 1971;
- Convention No. 140: Paid Educational Leave Convention, 1974;
- Recommendation No. 148: Paid Educational Leave Recommendation, 1974;
- Convention No. 151: Labour Relations (Public Service Convention), 1978;
- Recommendation No. 159: Labour Relations (Public Service) Recommendation, 1978;
- Recommendation No. 162: Older Workers Recommendation, 1980;
- Convention No. 154: Collective Bargaining Convention, 1981;
- Recommendation No. 163: Collective Bargaining Recommendation, 1981;
- Convention No. 156: Workers with Family Responsibilities Convention, 1981;
- Recommendation No. 165: Workers with Family Responsibilities Recommendation, 1981;
- Convention No. 158: Termination of Employment Convention, 1982;
- Convention No. 159: Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983;
- Recommendation No. 168: Vocational Rehabilitation and Employment (Disabled Persons) Recommendation, 1983.

Other

- Recommendation concerning the Status of Teachers adopted by the Special Intergovernmental Conference on the Status of Teachers (convened by UNESCO in cooperation with ILO), Paris, 5 October 1966;

- UNESCO, Universal Copyright Convention, 1952, revised 1971;
- World Intellectual Property Organization, Berne Convention for the Protection of Literary and Artistic Works, Paris Act, 1971, amended in 1979.

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FAIR WORK COMMISSION

TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009 1048331-1

DEPUTY PRESIDENT SMITH

AM2012/187 AM2012/190

Sch. 5, Item 6 - Review of all modern awards (other than modern enterprise and State PS awards) after first 2 years

Application by National Tertiary Education Industry Union
(AM2012/190)
Higher Education Industry-Academic Staff-Award 2010

(ODN AM2008/3)
[MA000006 Print PR985116]]

Melbourne

10.08 AM, TUESDAY, 25 JUNE 2013

Continued from 01/05/2013

Reserved for Decision

PN1941

THE DEPUTY PRESIDENT: Sorry to keep you waiting. Now, Ms Kenna? Who's on? You are?

PN1942

MS S KENNA: Yes, your Honour, if the Commission pleases, I appear for the National Tertiary Education Union, Susan Kenna.

PN1943

THE DEPUTY PRESIDENT: Sure.

PN1944

MS KENNA: Appearing with me is MR KEN McALPINE.

PN1945

THE DEPUTY PRESIDENT: Thank you. All right. Final submissions?

PN1946

MS KENNA: Thank you, your Honour. Yes, the NTEU seeks to make final submissions in response to the employers' submissions of last week.

PN1947

THE DEPUTY PRESIDENT: Yes.

PN1948

MS KENNA: We rely on our earlier submissions in this matter, which were tendered and marked as exhibit NTEU 1 at the hearing on 30 April this year.

PN1949

THE DEPUTY PRESIDENT: Yes.

PN1950

MS KENNA: And our written submissions which were submitted on 3 June.

PN1951

THE DEPUTY PRESIDENT: Yes, I'll mark your final - I don't think I've marked your final written submissions. I'll them NTEU 11.

EXHIBIT #NTEU 11 CLOSING SUBMSSIONS OF NTEU

PN1952

THE DEPUTY PRESIDENT: And that's final submissions with an attachment that has the table attached to it.

PN1953

MS KENNA: That's right, your Honour.

PN1954

THE DEPUTY PRESIDENT: Yes, thank you.

PN1955

MS KENNA: Mr Ruskin might like to formally tender his - - -

PN1956

MR RUSKIN: Yes. Shall I do that? We did file - there's two amendments to the document that we provided - - -

PN1957

THE DEPUTY PRESIDENT: All right. Have you got a new one?

PN1958

MR RUSKIN: Yes, a new one.

PN1959

THE DEPUTY PRESIDENT: Splendid.

PN1960

MR RUSKIN: I'll just take you to the changes. The changes are as I foreshadowed on the evening of filing these that - I think the document at paragraph 20 in 109 talked about a five year review and it is a four year review.

PN1961

THE DEPUTY PRESIDENT: Yes.

PN1962

MR RUSKIN: And, secondly, in the award - awards for lab assistants, we had not included the miscellaneous award in relation to lab assistants. So if I can take you to page 27 of our submissions, which is a table - you'll see under Lab Assistants we've defined that:

PN1963

Where the adequate discharge of the duties of an employee does not require academic qualifications the Miscellaneous Award would apply.

PN1964

And that also appears in the very last page, page 35, the same thing, which then sets out the coverage. And I formally tender that document.

PN1965

THE DEPUTY PRESIDENT: Thank you. R5.

EXHIBIT #R5 CLOSING SUBMISSIONS OF AMRI

PN1966

THE DEPUTY PRESIDENT: I'll come back to that. Thank you. Yes, Ms Kenna?

PN1967

MS KENNA: Thank you, your Honour. Today we seek to respond to the closing submissions of AMRI, the University of Western Australia, Melbourne, Monash University, which was heard last week on 19 June, and have now been tendered as exhibit R5.

PN1968

Before we do so, your Honour, in order - we seek to respond to a question that you raised in hearing on 30 April and 1 May in relation to this matter, that has been responded to by the employers also. This is the question of any likely effects of grouping, researchers and (indistinct) in the industrial award on researchers within universities. And this was raised by you at PN1632 to 1634 on 30 April, and at PN1865 to PN1866 on 1 May.

PN1969

We concur with correspondence of Ms Pugsley from AHEIA, dated 18 June, that was sent to the Commission last week. We say that university researchers are an entrenched and inextricable part of the higher education sector and, of course, they meet the definition of the higher education industry in the two awards in question.

PN1970

We note that both AMRI and the three universities as represented also respond pretty much in this way, and we - at R5, paragraphs 104 to 106, and the three universities at paragraphs 29 to 31 in submission of Mr Pills.

PN1971

We say that the higher education awards are designed to cover the spectrum of teaching, teaching and research, and research only work, and that all of these disciplines are inter-related. We don't see any scenarios in future where researchers would seek to remove themselves from these awards.

PN1972

So returning then to a response to the employers' submissions of last week, your Honour. In order to provide some structure to this response I intend to by and large follow the closing submission of AMRI tendered at R5. Firstly, in relation to cogent reasons for considering these applications, we turn to the objections of AMRI which are set out at R5, paragraphs 9 and 24 to 32.

PN1973

NTEU submits that to the contrary we've provided several cogent reasons for granting these applications and we've provided the evidence to support these arguments. These are best summarised by the original five grounds for the applications made in 2012, and under Contentions (b) to (e) of our final submission of 3 June at NTEU 1 and set out at attachment 1 providing evidence to each of those contentions.

PN1974

These are, firstly, that it's not clear that any modern award applies to these employees. This was an original ground for application. We now say that we have moved on from this original ground, your Honour, and the analysis to support this is provided at NTEU 11, where we discuss our analysis of the modern awards that are said to apply.

PN1975

It's appropriate that an award which covers the nature of the work undertaken apply to employers and employees in research institutes. In the case of both the Academic Award and the General Staff Award, that the work done is analogist to that done in universities, and that employees working in research institutes have been covered by awards. In the case of the General Staff Award, both State and Federal, that also apply to higher education institutions.

PN1976

Within these grounds, as set out at Contentions (b) to (e) in - sorry - in NTEU 11 from 3 June, are the following:

PN1977

That the application describes a coherent related, including a (indistinct) class of employer and employees which it proposes be covered; that the funding sources from medical research institutes and medical researchers in universities are the same the same or similar; that the Higher Education Academic Staff Award 2010; and the Higher Education General Staff Award 2010 are the appropriate awards to cover these employees.

PN1978

And finally:

PN1979

That the awards contended for by AMRI do not apply or at best uncertain in their coverage and in any case are not appropriate.

PN1980

And, again, I say that these contentions are supported by the evidence provided in attachment 1 as summarised at NTEU 11.

PN1981

We then go on to say in R5 of last week, that the matter has been heard and determined and we, of course, disagree with this. We stand by our submissions that there's no evidence that the coverage of MRIs was considered as part of the original award modernisation process.

PN1982

Again, this is articulated at paragraph 13 of our 3 June submission, NTEU 11, where we reference NTEU submission to the modern awards AM2008/1 of 27 May 2008; and decision AM2008/1 to 12 (2008), AIRC Full Bench 1000.

PN1983

And we then go onto cite case law around the fact that they say it's not necessary to provide reasons for a decision, and they do this at paragraphs 25 to 29 of R5. We say this has limited relevance because the NTEU have not questioned the validity of the Commission's decision in the modern award. We say that Commission did not decide anything on this matter.

PN1984

We say this case has arisen because it's an accidental result of decisions in other matters, and we distinguished this in cases such as the ASU Legal case which was clearly decided, a decision was made in respect to the coverage of legal practitioners.

PN1985

So we say that citing cases around the legal validity of decisions is beside the point. And, in any case, the Commission is not necessarily bound by these formalities, and must take a practical approach to this matter. The fact is that employees of research institutes are left with uncertainty around their award coverage, some employees may be award free, and the Higher Education Awards are the best fit for achieving a modern award's objective in relation to the work performed by staff in research institutes. This should be addressed and it should be addressed as part of this two yearly review.

PN1986

Further and contrary to AMRI's submission at paragraph 36 of R5, we say we've provided clear probative evidence in support of our argument that the existing arrangements do not make sense, and these are set out at NTEU exhibits 1 to 7, and in summary form again at attachment 1 to NTEU 11.

PN1987

AMRI then go on to again raise the threshold issues which I'll briefly address. In respect to whether this case meets the threshold for review, NTEU contends that only - not only does, but there's the evidence of our witnesses and those of the objectors make this clear. This is particularly so in relation to one of the original grounds for the application, which is that it is not clear how any modern awards apply to the employees.

PN1988

And, your Honour, I've prepared a brief table that we think best illustrates this for the Commission that I propose to tender.

PN1989

THE DEPUTY PRESIDENT: Yes. NTEU 12 is headed Principal Research Fellow.

EXHIBIT #12 DOCUMENT HEADED PRINCIPAL RESEARCH FELLOW

PN1990

MS KENNA: Thank you, your Honour. So, your Honour, what we've done here is we've set out according to what the employers say is the current award coverage for people working in research institutes for certain occupations. We have compared that to what a principal research fellow would currently receive under the Higher Education Award, which is at level D of the Higher Education Award.

PN1991

So working from the left hand side of the table, we say then if a nurse was working as a principal research fellow within a medical research institute, the equivalent rate under the Nurses Award would, perhaps, be RN4, which is an assistant director level - there is a higher level than that, but we say that that would equate to a professor level. The point being, it's unclear.

PN1992

Similarly, for a Professional Employees Award, we've taken the rate for a level 4 professional employee scientist who would be working as principal research fellow, $62.900. The Medical Practitioners Award couldn't apply because it only applies to those working in the health industry. And for an occupational therapist working as a principal research fellow, we've taken a level 4 PhD qualified level classification under the Health and Professional and Support Service Award at $69,269.

PN1993

And then we've used another example of somebody, for example, who was working as a principal research fellow and had economic qualifications in economics, your Honour, and was working as a principal research fellow but they were a specialist in health economics. There would be no award that applied to them.

PN1994

We say these unknowns demonstrate the anomalies in the application of the modern awards in this instance, whereas it's clear that the Higher Education Award at level D provides an absolute classification that is applicable to research institutes based on well reasoned and historic work value and relativities that should apply. And, in fact, do apply in many of the - most of the enterprise agreements that apply in research institutes and many of the old awards.

PN1995

Just to finish on that point, your Honour, this was pretty much acknowledged by Dr Donelson, in evidence provided in April when she agreed that level E of the Higher Education Award, which is the professor level, would apply to AMRI witness, Prof Kay.

PN1996

So continuing on in this response to - and this argument in relation to the threshold issue, we say the Commission is obviously obliged to review the modern awards under schedule 5, and we say that section 134 of the Act is not being met, particularly, in relation to section 134(1)(g) of the legislation in regards to the modern awards objective, and that is illustrated by the example just provided to the Commission.

PN1997

At paragraph 36 of the AMRI submission they quote the Full Bench in the recent modern awards review penalty rate case. And in respect to that we say that this review clearly does not involve a fresh assessment of something that has been previously assessed but, in fact, is the first assessment in detail that has been considered by the Commission in relation to this matter. And to this extent, we say the application has well and truly met the test of necessity.

PN1998

The Commission must review the modern awards and must consider whether they include any technical issues or anomalies under item 6 part 2(b) and we say that there is an anomaly both in the operation of the modern awards and the acceptance that research institute staff are covered by some patchwork of occupational awards in itself creates anomalies in the operation of the modern awards.

PN1999

A proper review of the modern awards under schedule 5 must consider the operation of modern awards and any anomalies in their operation aside from uncertainty around the application of modern awards to research institute staff. There are clear anomalies if we say that certain awards apply. And, again, I think that was just demonstrated briefly in a simple form in NTEU 12 that was provided to the Commission.

PN2000

We say these applications seek to address anomalies in the sense of their accepted industrial meaning and that is that the circumstances in relation to different rates of pay being paid for the same work for no good reason should be addressed.

PN2001

We say this case is also of a special and isolated nature as enunciated in various anomalies and inequity principles of national wage cases from the 1970s to the

1980s. And one reference for that would be Print F2900 National Wage Case (1983).

PN2002

We say - - -

PN2003

THE DEPUTY PRESIDENT: I remember it.

PN2004

MS KENNA: We say if this case doesn't involve anomalies then, you know, we're not sure what the meaning of the word is, your Honour, in relation to those established principles.

PN2005

And the evidence, again, in relation to this and in relation to whether or not certain awards apply and the appropriateness of the Higher Education Award can be found in relation to Contention (d) and (e) of NTEU submission 11 of 3 June at attachment 1.

PN2006

Turning then to the merit of application as argued by AMRI: firstly, in relation to a definition designed to capture the boundaries of our application, I note that each of the - both Mr Pills for the three universities and AMRI have questioned whether or not the definition does that.

PN2007

NTEU doesn't say that the holding of academic titles is the core business of MRI, of course, we don't say that, but we say it's one of the distinguishing features which is designed to put a fence around our application - applications, plural, I should say.

PN2008

We refute AMRI's claim that it's not clear how the definition would operate in practice and we say, do the objectives really believe that employees and employers will be worse off under the current situation around award coverage, which is unclear. I'll return to the issue of the definition shortly, your Honour.

PN2009

AMRI then go on to question our witness evidence, and I just want to make a few points in relation to this. Firstly, NTEU rejects completely AMRI's characterisation of the evidence of Dr Higgs and Mr Trivax, which are set out at paragraphs 48 and following of R5.

PN2010

In relation to Dr Higgs, a glance at his curriculum vitae shows that he has, in fact, been associated with Burnet Institute since 1996, that's 17 years worth of knowledge of that institution. We could retort in terms, your Honour - and these witnesses have only had experience of one research institute but unlike Dr Higgs did not also have commensurate knowledge of research and teaching in universities. His evidence, in fact, covered the gamut of what's being considered by these applications.

PN2011

Similarly, David Trivax, who works at the Howard Florey Institute, has intense knowledge of his own research institutes, of other research institutes, and of the work of researchers in universities, particularly, the University of Melbourne with which the Howard Florey Institute is affiliated.

PN2012

And David Trivax is not, as asserted at paragraph 49 of AMRI's submission, an NTEU official. I just want to make that clear. David Trivax is a long term technical officer within the Howard Florey Institute who in 2012 took on the honorary officer's role of being the president of the NTEU branch - research institute branch that looks after our research institute members.

PN2013

As stated in his witness statement, Mr Trivax's knowledge and role was very broad and to the extent that he, both, regularly writes grant applications and has been cited as the co-author of publications. His knowledge of funding and work performed in refund institutes is second to none, and Mr Trivax's evidence was uncontested by the employers.

PN2014

Mr McAlpine is a longstanding official of the NTEU. His knowledge of the tertiary education sector industrial arrangements and history is unrivalled. If AMRI wished to challenge either the evidence of Mr Trivax or Mr McAlpine, they could have sought cross-examination during the three day hearing. Most, particularly, AMRI and the employers did not challenge the claims of Mr McAlpine to being an expert in industrial relations within our sector. We say the expert evidence of Mr McAlpine is, clearly, not opinion.

PN2015

Mr McAlpine's witness statement, which was considered as evidence and unchallenged - if I could just quote from paragraphs to 2 to 4 of that statement, your Honour. I'm just trying to find how that was marked. It's marked as NTEU 3.

PN2016

THE DEPUTY PRESIDENT: Yes, go on.

PN2017

MS KENNA: Mr McAlpine states, at paragraph 2 of his statement:

PN2018

I was involved in national award restructuring negotiations for the NTEU for the national higher education industry and playing a leading role in establishing the award descriptors for general staff in higher education and in their revision in the early years of the last decade.

PN2019

I also have a good knowledge of the award modernisation process as I was closely involved in the making of the two modern awards applicable to higher education and to the award applicable to vocational and adult education.

PN2020

I have a very good knowledge of the work performed by general staff and academic staff and the subset of both groups who constitute research staff in

universities and a good knowledge of the work which is performed in research institutes, by which I mean, in this statement, research institutes of the type contemplated by the NTEU applications in this matter.

PN2021

He then goes on to qualify that sentence by disclaiming anything but a lay knowledge of the scientific or academic knowledge produced by the work referred to in research institutes, however, he states:

PN2022

I have an expert knowledge of how such work relates to award categories generally in the workforce and to the concept of work value.

PN2023

Finally, he notes: in his expert opinion he has examined the modern awards which, conceivably, have relevance to research institute occupations on the basis of his factual knowledge of the work performed in research institutes and asserts as fact that only a minority or more likely a small minority of the employees who are the subject to the present application are covered by any modern award and that a significant proportion of that minority who might arguably be covered by a modern award are not covered by a relevant classification which captures or describes the work value of the work they perform.

PN2024

The example provided is:

PN2025

That a professor may be a qualified engineer who undertakes some engineering tasks but that is not the reality of her work where she is actually a researcher. To use an analogy this is like saying that an archaeologist is employed to dig roads.

PN2026

Again, we say this demonstrated in a simple form, your Honour, by NTEU 12, the table that was just submitted to the Commission.

PN2027

Finally, to finish on that point, we emphasise that that evidence was unchallenged. There was no cross-examination of Mr McAlpine or Mr Trivax.

PN2028

Conversely, when questioned, none of the AMRI witnesses could assist in enlightening the Commission around award coverage for research institute staff. So we say we've gone from Mr Col Morgan for AMRI, telling the Commission last year in November, that MRI's were mainly award free and they maybe in the health industry.

PN2029

To Dr Donelson conducting a very selective survey which she then provided the parties with, and she provided the parties with selective results. She was clear about that in her evidence. Dr Donelson claimed no knowledge of industrial relations and no effort to give an accurate account of any advice from her advisors in relation to awards. And now we're given a third attempt at deciphering the state of award coverage as attached to AMRI's submission of last week at R5.

PN2030

Returning then to the issue of the definition of coverage within these applications, your Honour. At paragraphs 53 to 55 of their submission of last week, AMRI seek to address our attempts to confine the coverage of research institutes. At paragraph 53, they refer to government research facilities such as the CSIRO.

PN2031

We say that contrary to their contentions in regards to MRI's such as the CSIRO, we don't quibble that their mission may not be distinct, we do, however, recognise the industrial realities of coverage for both government and for profit research institutes so as to confine our applications to industrial demarcations and a logical industrial fit.

PN2032

NTEU sought to confine our definition to ensure that any enterprise calling itself a research institute could not automatically qualify to covered by an award which has been thought through, has a history, has been designed to cover the full work value defined in academic research.

PN2033

We say that our proposed definition is confined, narrow and conservative. Just taking your Honour to the definition proposed as amended, subsection 1.3 applies - - -

PN2034

THE DEPUTY PRESIDENT: Whereabouts have you got that, I'm sorry?

PN2035

MS KENNA: That can be found in transcript - can I leave for you, your Honour, into - - -

PN2036

THE DEPUTY PRESIDENT: Yes, I'd like to look at though if you wouldn't mind.

PN2037

MS KENNA: Okay. If you go to the original applications? Do you have them there?

PN2038

THE DEPUTY PRESIDENT: Yes.

PN2039

MS KENNA: It's also mentioned at paragraphs 5 and 6 of NTEU submission 11, your Honour.

PN2040

THE DEPUTY PRESIDENT: All right.

PN2041

MS KENNA: So the definition - - -

PN2042

THE DEPUTY PRESIDENT: I see. So you're saying if you call people professors or research assistants they're in?

PN2043

MS KENNA: That's not - that's one criteria, your Honour, yes, absolutely. It's just pointed out though I do need to make the distinction that it's universities call them and confer those titles therein.

PN2044

THE DEPUTY PRESIDENT: And work full time at the research institutes.

PN2045

MS KENNA: Yes.

PN2046

THE DEPUTY PRESIDENT: Or work at - - -

PN2047

MS KENNA: Employed by the research institute, yes. So the definition in full now reads:

PN2048

Research institute means a corporate entity whose primary activity is to undertaken medical health, scientific, or social research, and which is established for a charitable, or educational, or other public purpose and which is affiliated to a university or where employees hold academic titles conferred by a higher education institution - - -

PN2049

It's one or the other.

PN2050

- - - and where the supervision of the research worker post graduate research students occurs.

PN2051

The definition then goes on to exclude entities that provide medical, health, social, religious, or religious services to patients, customers, or clients, State, Territory or Commonwealth departments or agencies and for profit corporations.

PN2052

We say that this definition in applying the criteria that the organisation must undertake research and that the organisation is entrusted by universities themselves with supervising post graduate students and where the universities themselves are willing to confer academic titles on employees in the research institutes.

PN2053

This clearly confines the definition. And, importantly, for us, it doesn't seek to debase the currency of the higher education awards. So it actually lifts those sought through historical classifications, descriptors, based on history and work value and appropriate (indistinct)

PN2054

THE DEPUTY PRESIDENT: If they want to get out of the award they abandoned economic titles and supervised (indistinct)

PN2055

MS KENNA: Yes. Which we'd say would be a major revolution in the research institute, your Honour. Okay. Moving away from the definition and returning to AMRI's primary objections. In respect to discussion around the size of the research institute workforce, we say this is crucial to a consideration of the appropriate industrial coverage for these workers and to advancing section 134(1) of the Fair Work Act.

PN2056

Uncertain and disparate occupational award coverage for such a large group of workers conflicts, in particular, with section 143(1)(g), the need to ensure simple, easy to understand, stable and sustainable modern award system that avoids unnecessary overlap of modern awards. We say that certainly applies at the moment, these institutes.

PN2057

And just to put on the record, your Honour, AMRI raised what they saw were two errors in our submissions. We only see one, and that is that the Murdoch Children's Research Institute was referred to - this is at paragraph 59 of AMRI - was referred to as being a part of Murdoch University, which it certainly is not, and that was an error on the part of the NTEU that we accede to.

PN2058

Turning then to the consideration of funding and AMRI respond to this at paragraphs 62 to 71 of their submission at R5. NTEU notes that AMRI witnesses, can we say colloquially, bent over backwards to disassociate MRI funding from that of universities, and we say that they were unsuccessful in doing this.

PN2059

We reject the statement that our witnesses couldn't provide funding information. The witness evidence of David Trivax, which was uncontested, provided expert evidence on funding to MRIs, and as I said earlier, he's been writing grant applications for Howard Florey for many years.

PN2060

If you refer to his statement, your Honour, which is NTEU 2, the witness statement of Mr Trivax, at paragraph 27 he notes - to give a snapshot in time of what's happening at Howard Florey that he's involved with that the moment:

PN2061

The autonomic neuroscience laboratories currently hold five peer review research grants for NHMRC and one Australia Research Council Grant and have a staff of six research scientists and one PhD student.

PN2062

AMRI then goes on to pull apart what the NTEU submitted at NTEU 11 in respect to funding. They said, for example, that MRIs don't receive direct funding from Australian Research Council grants. An example is that we can provide to illustrate the extent of funding received by both universities and research institutes is taking a look at the St Vincent's Institute Annual Report of 2011, which was tendered attached to Mr McAlpine's original witness statement, NTEU 3, at attachment 9.

PN2063

Page 89 of the St Vincent's Annual Report as a statement of comprehensive income. It lists grants from Commonwealth government, NHMRC, IRIISS, the meaning of which is outlined in our submission of 3 June. The ARC and the Federal Department of Industrial Relations - I withdraw that, your Honour, I'm sorry - the Federal Department of Innovation and Science and Research - which keeps changing its name - and all of these grants added up to the tune of $9 million for 2011.

PN2064

Now, we acknowledge, your Honour, as does David Trivax in his witness statement, that the universities may, in fact, receive the ARC Grant and administer the grant, but as you can see from the St Vincent's Annual Report, they are actually laying claim to that amount of funds from the ARC if they are taking part in a project funded by the Australian Research Council. And that amounted to, in 2011, a $424,303 worth of ARC grants in 2011 at St Vincent's Institute.

PN2065

Again, we say this goes to the issue of collaboration that in many instances - in most instances, in fact, in respect to the ARC, universities receive that grant and pass that onto the institute and they would be working on a project jointly.

PN2066

AMRI then seek to respond to NTEU evidence in relation to peer review, which we say occurs within research institutes and universities. This is in paragraphs 73 to 76 of AMRI, R4.

PN2067

The point here, your Honour, can be summarised by saying, we are not contending that research institutes are part of the higher education industry. We simply say the higher education awards are the best industrial fit in relation to the work values, relativities, and so on, that I've mentioned earlier. And is borne out by the adoption of the work descriptors pay and relativities in the vast majority of research institutes awards and agreements, which were tendered to the Commission in our submission of 3 June, NTEU 11. And each of those awards and agreements were made, of course, by consent.

PN2068

We say further to that, that AMRI and the employers did not question any part of those award descriptors or the classifications or why they were included or should not be included in research industry awards and agreements in the hearings from 29 April to 1 May, or in any of the subsequent documents that have been submitted.

PN2069

THE DEPUTY PRESIDENT: Could I ask you to think about something?

PN2070

MS KENNA: Sure.

PN2071

THE DEPUTY PRESIDENT: Except in two cases, the approach of the modern awards was to create awards reflecting the industry of the employer. The two cases were teachers and nurses, I think, effectively.

PN2072

MS KENNA: Yes.

PN2073

THE DEPUTY PRESIDENT: If this sector is not in the industry of the employer then why is it appropriate to put them in that industry?

PN2074

MR McALPINE: I think it's probably - - -

PN2075

THE DEPUTY PRESIDENT: Yes, Mr McAlpine?

PN2076

MR McALPINE: Your Honour, our view would be that that problem - I mean, we don't think that that sort of - and I don't want to call it a semantic problem, because it's not a semantic problem, I accept that - we would say that, however, in one sense it's a semantic problem because it's simply - for example, the Manufacturing Award covers incredible variety of industries, it so happens that we have a traditional industrial term that describes, somehow - captures all those quite different and distinct industries.

PN2077

The - if there was such a word that captured the research institutes and the higher education award, the question you've asked in a sense wouldn't arise - - -

PN2078

THE DEPUTY PRESIDENT: Yes.

PN2079

MR McALPINE: - - - because we say it is enough - there's certainly must more diversity in the type of industry covered by the Manufacturing Award than there is in - - -

PN2080

THE DEPUTY PRESIDENT: Well - - -

PN2081

MR McALPINE: - - - anything - in anything that's before you at the moment.

PN2082

THE DEPUTY PRESIDENT: Yes and no. There's a consistent argument between building and manufacturing.

PN2083

MR McALPINE: Yes, that's right. So if the awards were renamed as the Higher Education and Research Award that would solve the problem, just remembering that our primary concern is - although these are, in a sense - the application, clearly, has brought these proceedings on, but this is a review. And our primary concern, you know, is about the coverage, it's about the appropriate award coverage of research institutes. Our solution to that - we say that's what you have to review - - -

PN2084

THE DEPUTY PRESIDENT: Yes.

PN2085

MR McALPINE: - - - and we say that's the problem.

PN2086

THE DEPUTY PRESIDENT: Yes.

PN2087

MR McALPINE: Our solution is to group them with another award rather than creating a new award - - -

PN2088

THE DEPUTY PRESIDENT: Yes.

PN2089

MR McALPINE: - - - because we - the reasons that Ms Kenna will go to. But we say you could easily solve that problem by making it the Higher Education and Research Industry Award or some other title, it's just - we say - we would say, with respect, that's a secondary issue, that research goes - that the higher - the definition of higher education industry requires that the employer undertake research already, so research is - if you don't undertake research you're not in that award, so research is already central to defining the distinction between the Higher Education Award and the Post Compulsory Award. So it's already there right at the heart of that award now.

PN2090

So we think that's the solution, but as we say, the issue of whether it's the higher education award is secondary to the issue of fixing up what we see as a dog's breakfast.

PN2091

THE DEPUTY PRESIDENT: I follow. Thank you. Thanks?

PN2092

MS KENNA: Thank you, your Honour. Your Honour, just then turning to address what AMRI say is the historical and now award - modern award coverage of research institutes, and this can be found at pages 20 and following of the AMRI submission, R5.

PN2093

As I said earlier, we've three or four different versions of what the employers think should be or is the current award coverage for workers in research institutes. We say that we've shown that the higher education classifications reflect the definitions of the work performed in research institutes and if there are any differences we can talk about those.

PN2094

We say that our evidence and the lack of evidence from AMRI in this respect bears out our assertion that awards are uncertain at best and, in any case, not appropriate. And our arguments in respect to this is set out at our submission of 3 June, NTEU 11 attachments 1 and at Contention (e) of attachment 1.

PN2095

This goes to the evidence - uncontested evidence of Mr McAlpine and Mr Trivax and the evidence provided by Dr Donelson and Prof Kay and Mr Lloyd. We say

we still have no alternative provided by the employers in respect to what the coverage is or should be.

PN2096

Just moving from this for one second, your Honour, AMRI refer to the Student Union case that was mentioned by the NTEU in NTEU 11, and I suppose this goes in some ways to the question that you just asked and that was responded to by Mr McAlpine. The only reason that the NTEU mentioned the Student Union case was, indeed, because Vice President Lawler saw fit to vary the award for a group of employees that weren't necessarily part of the higher education industry but, nevertheless, if - I withdraw that, your Honour - I should say, a group of employers who aren't necessarily part of the higher education industry but he nevertheless saw that the Higher Education Industry General Staff Award was flexible enough to cover the work performed by employees within student unions.

PN2097

He, therefore, amended the coverage of the award to state:

PN2098

Employers throughout Australia in the higher education industry and university unions and student unions.

PN2099

And just finally on this point, in relation to sub paragraphs 84.1 and 84.2 of R5, AMRI's submission, which goes to a lack of connection between MRIs and universities. We say that that was clearly drawn out by the evidence, in particular, of Mr Trivax, the uncontested evidence of Mr Trivax at NTEU 2. His witness statement at paragraphs 14 to 16 where he talks about the intrinsic link between Howard Florey Research Institute and the University of Melbourne, and that went to Howard Florey being connected to the campus integrated with the IT network at the University of Melbourne, security staff provided by the University of Melbourne and so on. And these are arrangements that have gone on for some time.

PN2100

We then go on at paragraph 85 and 86 to question the relevance of our contention about the number of research staff employed in universities. And we say that that in the NTEU's view was included in submissions simply to illustrate the work performed. So the research work performed in universities by a large number of research only staff and by some teaching and research staff is absolutely analogous to that performed in research institutes.

PN2101

We then go to the issue of cost, your Honour, and the cost of the employers being brought into the two awards, which by AMRI and employers have made generalised statements about, being a burden of cost.

PN2102

In relation to AMRI's submission, they put forward only one potential cost to the employers, and this is paying out fixed term contracts if they are to be foreshortened, which AMRI, themselves, acknowledged is highly unusual - and that's at paragraph 102 of AMRI's submission, R5. For the information of the

Commission, that relates to clause 11 of the Higher Education Awards - the definition of fixed term contracts.

PN2103

Other than that argument, your Honour, we have heard nothing in relation to any potential burden on employers within research institutes, and we say, of course, that in order to attract the appropriate skilled and experienced staff at the moment, those research institutes are paying over and above award rates.

PN2104

In concluding their submissions from paragraphs 107 onwards - and we state that the research institutes haven't been - and they use the word "hankering" for any changes to the current arrangements.

PN2105

We say this is not relevant because the Commission is under an obligation to review the modern awards and this matter is before you. We say the operation of these two awards in relation to these employers is compelling and is the only industrial fit, and that the NTEU evidence has established this beyond doubt. Again, we state - and we have not demonstrated that this would be a burden to employers, nor have the employers for the three universities, and they have not pointed out aside from that fixed term contract issue any provision of the awards that would be problematic. And, indeed, the current awards that on foot, consent awards and agreements, as I said, for research institutes reflect the provisions and, particularly, the classifications and descriptors within the higher education award already.

PN2106

AMRI suggest that maybe the Commission should have a look at this again at the four yearly review, and we say why would we waste the parties' recourses to go through this process again. We've demonstrated an anomaly in the operation of the modern awards and that this should be fixed now.

PN2107

THE DEPUTY PRESIDENT: They all just blend one into another.

PN2108

MS KENNA: Maybe a holiday is in order, your Honour. I haven't got long to go, your Honour, you'll be pleased to hear - I just wanted to respond specifically then to the submission of Mr Pills for the three universities: Monash, Melbourne, and the University of WA, which was submitted last week.

PN2109

THE DEPUTY PRESIDENT: Yes.

PN2110

MS KENNA: Your Honour, the three universities also quibble with the NTEU proposed definition and state at paragraph 7 that:

PN2111

This would likely cause significant problems and anomalies if adopted in its present form.

PN2112

However, they have not demonstrated how. Again, we start, surely, they don't believe that the adoption of this definition and this coverage would create more problems than the current situation of uncertainty around modern award application does. As stated earlier, the NTEU believes we've confined our definition and provided as much as we can in relation to this matter.

PN2113

In respect to paragraphs 10 to 13 of the universities' submission, we state, of course, we've excluded for profit corporations and, of course, we're mindful of our area of industrial coverage.

PN2114

The review of modern awards, of course, is not about coverage, but about an effectively operating safety net of modern awards. The work performed in university medical research department, and MRIs is substantially the same, but NTEU would, of course, not advocate extending coverage of awards to areas of clear commercial private sector activity.

PN2115

Paragraphs 16 to 25 of the universities' submission: they have quite a lengthy discussion about the issue of affiliation and suggest that this definition and coverage were adopted that research institutes would run to disaffiliate themselves from universities.

PN2116

We say this is ridiculous. That the affiliation arrangement is a longstanding and formal, they're set out in statute of the universities and that to the contrary the term "affiliate" is clear and defined. Dr Donelson provided a list of research institutes and their affiliations in her evidence at R3, your Honour.

PN2117

Again, in relation to the conferring or holding of academic titles, NTEU submits that it just simply further confines the definition, as I've already explained, and does not present any problems and I believe that addresses the concerns of the three universities.

PN2118

So just to sum up, your Honour, we believe that the NTEU has established the merit of our argument. We believe it's clear that the Commission must do something about research institutes. Nothing has been raised by the employers around objections to award conditions except for that minor exception of the fall shortening of fixed term contracts.

PN2119

THE DEPUTY PRESIDENT: Yes.

PN2120

MS KENNA: And we urge the Commission to consider our proposal to fix anomaly in the operation of the modern awards. We will be guided by the Commission, if the Commission pleases.

PN2121

THE DEPUTY PRESIDENT: Thanks, Ms Kenna. Mr Ruskin?

PN2122

MR RUSKIN: Your Honour, we have provided submissions in this matter, which have been marked as R5.

PN2123

THE DEPUTY PRESIDENT: Yes.

PN2124

MR RUSKIN: We just to make some additional comments, some of which will respond to what was said by the NTEU.

PN2125

There are some key points to make here, your Honour: firstly, these matters were dealt with by a very competent Full Bench in December 2008. There were some excellent members of the Commission on it and they should be held to their decision which dealt with the issue of the research institutes.

PN2126

The matter of research institutes were raised in submissions and in material by the NTEU. It was dealt with and it was not included. And for the NTEU to say, "Well, we don't challenge the validity of that decision, we just say that it wasn't dealt with." It was dealt with. It was firmly and utterly dealt with. And the Commission must have regard to that, and we've provided case law authorities on how a decision is said to have been made without mentioning every little bit of the evidence that came before it. And we have provided that in our submissions at paragraphs 27 and 29.

PN2127

But more to the point of - - -

PN2128

THE DEPUTY PRESIDENT: We'll elevate those to appeal Benches.

PN2129

MR RUSKIN: Sorry, your Honour.

PN2130

THE DEPUTY PRESIDENT: Draw those attention to appeal Benches regularly.

PN2131

MR RUSKIN: Yes. Well, we shall, your Honour. But we also quote from the decision that of 19 December 2008 to which we have referred, which says that what the Bench has taken into account, and we quote from paragraph 30. It took into account all of the material, it says so; it did.

PN2132

And on a second occasion, not satisfied - see this Tribunal - the NTEU say, "Stick them in this award," having been unsuccessful - it was simply unsuccessful for a Full Bench in doing - in putting research institutes into this award, so it had another crack at it by seeking to put them in the Educational Services Award, and that attempt failed as well. In that decision it says:

PN2133

The parties have not been restricted in the material in which they can refer in the proceedings to date.

PN2134

And all of the submissions, proposals and materials which have been advanced as to the contents of modern awards have been taken into account. So, your Honour, if you go on the decision of June 2012, at paragraph 85 to 101, these matters have been dealt with by two Full Benches of this Tribunal and should not and cannot be said were not dealt with or were overlooked, or were not considered. They most certainly were. So the authority of this Tribunal says these were dealt with as Senior Deputy President Kaufman said in the Legal Services case to which we refer.

PN2135

So then we're down to the question of, yes, you can change - you can change the approach - the decision, you can vary the award if there are cogent reasons for doing so. And one of those reasons is a significant change in circumstances. Not a change in circumstances, but the Full Bench says in June 2010, significant change warranting a different outcome. There's no evidence of changed circumstances since 2008, or 2009 when this was - these matters were aired by the Full Bench - decided by the Full Benches.

PN2136

So there is no significant change in circumstances. I note the NTEU does not assert there had been a change in circumstances. So, your Honour, on the basis of that there is no basis if one relies upon the Full Bench decisions to move away from the current arrangements in this review - in this review. It also says in that June 2012 decision that the two year review is more confined than the four review, and one shouldn't undertake a fresh assessment unencumbered by previous Tribunal authority.

PN2137

We say these are very significant statements of the Full Bench and this case is a significant change sought by the NTEU. It is a significant change. It's taking coverage of a group of employers and placing them under two awards - in fact, three awards, because NTEU has changed its position, which I will come to.

PN2138

And it says - the Full Bench, paragraph 91 that;

PN2139

More significant and substantial changes should be dealt with in the four year review and a cautious approach should be taken.

PN2140

We say, your Honour, the threshold is not met. There are no cogent reasons for department from two - not just one - two previous Full Bench authorities. One can't do it. This Tribunal, we say, if it abides by its earlier decisions cannot change that except if there are cogent reasons for doing so, and there aren't.

PN2141

The union's case has been based - there are two ways of advancing a change in the modern award: structure is an anomaly or a necessity. Only this morning do we hear some talk of an anomaly, which we don't give much account for. The real issue is necessity.

PN2142

The basis of their case, their written submissions is about necessity, because there's nothing about - there are no anomalies that have been found in any of this. Necessity. And, necessity as the - as we quote from the decision of Justice Tracey, is that which is in SDA v NRA, which is quoted against in the VECCHI Full Bench case that:

PN2143

That which is necessary must be done, that which is desirable does not carry the same imperative for action.

PN2144

There is no evidence of necessity here. There is no evidence of employees being treated in some harsh way, there's no evidence of that. The only issue here is award coverage. Some view about, "Does these awards - occupational awards cover employees or not?" Most of them - most employees amongst the employees that we represent are covered by awards, but not al of them.

PN2145

But that was a matter that was considered by the Full - two Full Benches and dealt with, and it can't be reopened, we say, unless there are cogent reasons for doing so.

PN2146

The - about 8000 effective full time employees of the research institutes that we represent - not all of those institutes - medical - will be covered by this proposed award or under this definition, not all of them. So 8000 employees of those - about 41 medical research institutes versus 100,000 in the higher education sector. The 8000 are covered by several awards and we say they are appropriate awards, they are occupational awards, they are - they are suitable definitions that you have in occupational awards to cover a range of work which is done. We say there is a range of work done by employees amongst the employers that we represent.

PN2147

The Commission, the Australian Industrial Relations Commission, made occupational awards for a reason, because some - because it considered that some type of work is better described by the work of the employee and not the work of the employer. The MRI's - the Medical Research Institutes don't fit - don't fit into an industry description. And, certainly, not the industry description that the NTEU seeks to put in them.

PN2148

The work that is performed by MRIs is diverse and one should not forget that there is health provision carried out by MRIs. Not all the people - the professional staff of MRIs perform research. There are genetic counsellors, there are psychologists, they are not doing research and they fit nicely into the Health Professionals Award. There's a description of common health professionals. They fit very nicely into it. It's an occupational award, it's also an industry award, occupational award, that's what they do.

PN2149

And this group of employees fit across several industries and sectors, in particular, the health sector. We say they are not in the higher education industry, which is now conceded by the NTEU, and they don't fit in the health industry either. They

fit somewhere on their own and they very diverse. For instance, the Burnet Institute is an NGO and many of its employees work overseas.

PN2150

The Baker, and a few others, provide health services and we list in our submission at paragraph 72 in our submission in R5, we set out that:

PN2151

Contrary to what the NTEU says the Baker Institute is not the only one that provides clinical services to patients.

PN2152

And we list seven others there. So those people who do that work, who are not researchers will be - will fit properly into the Health Professionals Award.

PN2153

The onus is on the NTEU to make out a case. It's not just - their case can't be that research work is similar, but there is a necessity to alter the award structure based on changed circumstances, and something needs remedying and nothing needs remedying.

PN2154

There is no confusion about award coverage and if there is confusion about award coverage - if you say, your Honour, that Dr Donelson had views about award coverage that you might say was not of an IR expert, that's right, she's not an IR expert. This case was about the application by the NTEU that the higher education industry includes research institutes, and we brought evidence to clearly show that it is not. She does not purport to be an expert.

PN2155

The question of award coverage is ultimately a legal issue. If there needs to be an education campaign around award coverage for many employees, well, well and good, but the descriptors in the award, we say that we have identified that cover many of the staff of these institutes, work appropriately. They are generic awards and they do cater diversity such as the Health Professionals and Support Services Award. The Professional Employees Award covers science work. And, as we say in our submissions, research is a subset of science.

PN2156

The union says that we don't really object to anything in award except the full time - the fixed term provisions of that award. Well, we have objected to the classification standards that refer to research academics. The staff who perform research at these institutes are not research academics. And whereas MRIs may have used those standards and put them in certain EBAs, that's a matter of consent. Why they did it? Who knows, but it's by consent, and it doesn't cover most of the institutes which we represent who do not wish to be lumbered by classifications standards which are not appropriate for them.

PN2157

The preponderance of research at MRIs is not academic. And if you accede to this applicant in respect of the Academic Award, you're going to put into - you're going to create an obligation on these employers to insert, somehow fit the researchers under these classifications, and they will be told, "Are you doing

academic research?" Which they is not. The language of the standards are academic language, it's not the language of research institutes.

PN2158

There's nothing with the Clerks Award covering clerical and administrative people who perform work at the MRIs. The Nurses Award works fine for nurses. We note that the NTEU has now said, "Take out of the award that was supposed to be an industry award, nurses who perform clinical work." So now we have three awards.

PN2159

Doctors are not covered by awards in MRIs. There aren't many - there evidence provided that there aren't many doctors that work or are employed by research institutes, and I refer you to paragraphs 12 to 37 of Dr Donelson's submissions to that effect. Doctors are few in number.

PN2160

Now, I'll come to the definition. The union says that the definitions are, perhaps, the best that they could do, but this would be a first, this would be defining, creating an industry award which doesn't cover the industry. Mr McAlpine talks about the Manufacturing Award. Well, it is diverse, but it seems to us to be clear that if you are in the industry of bitumen, you are in the industry of bitumen, and that will cover - or glazing - that will cover the employees of it. Or if you take the Animal Assistance and Veterinary Services Award, a veterinary - that part of the award that deals with veterinary services says:

PN2161

The industry are employees of private veterinary clinics.

PN2162

Now, it doesn't say - it doesn't have the sort of description which the NTEU proposes for this grouping. It is conceded by the NTEU, and it's obvious, that this industry award is not going to be an industry award any more. It's not an occupational award either. It is a mish mash descriptor of MRIs trying to get into the Higher Education Award, Medical Research Institutes, where there is a linkage to a university, and that's a very dubious definition.

PN2163

It will be an industry award, it cannot be an industry award. It can be an industry award, but the definition is not an industry award. It's a very tenuous description. The Commission would be creating a first if it sought to put medical research - the definition of research institutes into this award and maintain its position that of the 122 awards, they are either industry, occupational and industry, or occupational.

PN2164

And the link - the link to creating award coverage is this: one of the links is that the employees - one of the employees must have an academic title, and as the - one of the links is that the - that in order to be in this so called definition, you've got to have an academic title. And as Monash Melbourne and the University of Western Australia appropriately notes, if you have an academic title because you're an emeritus professor and you join an institute which has no other person as an academic - with an academic title, and that person isn't supervising students on

behalf of a university, suddenly, you're in the industry - or whatever this award is called. Some of the - - -

PN2165

THE DEPUTY PRESIDENT: I'm not sure what the practices are nowadays. It used to be that if you were at Melbourne University you couldn't take your title with you, but if you were at Monash you could.

PN2166

MR RUSKIN: I think at Melbourne you can - yes, yes, well. Or it could be that they have an academic title because they have - they work part time at research institutes and part time of the university and neither the twain yet.

PN2167

THE DEPUTY PRESIDENT: Yes.

PN2168

MR RUSKIN: And yet by dint of that title suddenly the employer is in this industry award and not covered by the occupational awards. It's a terrible, terrible definition which the Commission should not consider changing.

PN2169

What would be the effect upon hospitals that have an affiliation with the university and have a specialist with an academic title? Would they suddenly be brought into this award if they supervised students? This application does this: it splits the award coverage for medical research institutes. It splits. Some will - instead of having six occupational awards, we'll have 10 awards covering different research institutes. And that's a problem, because as we have provided evidence of - not all of the medical research institutes that we represent will be covered by this award.

PN2170

If one takes a small institute like - - -

PN2171

THE DEPUTY PRESIDENT: It reduces the coverage, doesn't it?

PN2172

MR RUSKIN: No.

PN2173

THE DEPUTY PRESIDENT: The NTEU's proposition?

PN2174

MR RUSKIN: No, it doesn't.

PN2175

THE DEPUTY PRESIDENT: That a number of people who are currently, you say, covered by other awards, would no longer be covered by those awards, but would be covered by the academic award?

PN2176

MR RUSKIN: No, your Honour.

PN2177

THE DEPUTY PRESIDENT: No.

PN2178

MR RUSKIN: Because it would - what it would do is, it would mean that some - a number of research institutes that we represent will fall today under the definition - - -

PN2179

THE DEPUTY PRESIDENT: Yes.

PN2180

MR RUSKIN: - - - of the award and would come under it. But that there will be a number of research institutes that we represent, let other research institutes that we don't represent, that will not meet that description and, therefore, will remain covered by occupational awards. That splits an industry.

PN2181

THE DEPUTY PRESIDENT: I follow.

PN2182

MR RUSKIN: The Queensland Eye Institute has a small number of staff and, perhaps, one person who may supervise a student, and that may be the linkage, was don't - I don't know about affiliation - but as you know with the union's definition, you've got to meet all four. The moment that person ceases to supervise a student - perhaps, because they take a sabbatical, suddenly, the award coverage changes, and that's a significant problem.

PN2183

We have to say, your Honour, what are the - why is the NTEU doing it? There are industrial reasons and we've got evidence of an industrial reason. Unions have every right to seek to get members put on them, that's their absolute right, but we haven't heard in the final submission the motive - one of the motives of the NTEU, which we thought might be relevant, is the evidence that was provided by the NTEU uncontested from an email from Mr Thomas, William Thomas, in NTEU 8, to Mr Lloyd, who was cross-examined on this matter, but Mr Thomas wasn't brought forward as a witness so we take his evidence that he says:

PN2184

One other aspect of our application is more political and that is to maintain our presence in the sector as the union of choice bluntly as many MRIs straddle their higher education, research, hospital sectors.

PN2185

And he's right there. There is a straddling of all these because they don't fit anywhere. We want to ensure that some of those - some of the health sector unions don't take advantages of (indistinct) to pursue coverage within the institutes.

PN2186

So there's a political motive I this and we think that's right because there doesn't seem to be any equity motive in pursuing this that has been brought to this Tribunal. This is about the convenience of the NTEU in covering employees under a couple of their awards, and why is it necessary?

PN2187

Indeed, your Honour, if you look at the question of supervision of students - Dr Donelson said at paragraph 1222, in dealing with this definition, she said;

PN2188

15 per cent of staff of researches, perhaps, at Prince Henry's institutes, supervises students.

PN2189

So it's not a great linkage to place people in or out of the award. We say that - many of these research institutes have health related services which are more akin to hospitals. In the final submissions by Ms Kenna today, she says that the Howard Florey is on the University of Melbourne campus. Well, that's right. And if you want to talk about locations, the majority of these institutes are on hospital campuses, not on university campuses. We've given about - from Prof Kay about the linkages - greater linkages with hospitals and the health sector than the university sector.

PN2190

And whilst may be similar: so is clerical similar. That's why there's a good clerical award; nurses awards; and we say that while the research maybe, for some people, similar it's in a different industrial context and a different - in a different employer with a different motive.

PN2191

We're talking about universities that are (indistinct) and that are - they are doing all sorts of things: there are teaching only staff, there are staff who have had nothing to do with medical research. Most staff don't have anything to do with medical research. And the most important distinction is they don't run award courses at MRIs.

PN2192

And I want to emphasise your Honour - and this is a very important point - they do not supervise students, they have staff who take on supervision under the auspices of the university.

PN2193

So, in summary - no, your Honour, I might just go through a couple of points as I finish the issues that were raised. The table that was provided by the NTEU, that's a table - I don't think it proves anything at all. I don't know why - there's no evidence as to why someone would be a level 4 and, therefore, these are the consequences. So I don't give that weight. It's no evidence. I ask the Commission not to as well.

PN2194

THE DEPUTY PRESIDENT: Could I just take you back to - - -

PN2195

MR RUSKIN: Yes.

PN2196

THE DEPUTY PRESIDENT: - - - sorry - the point that you made that you said was important that they don't supervise students?

PN2197

MR RUSKIN: Yes, your Honour.

PN2198

THE DEPUTY PRESIDENT: Isn't it a part of their ordinary duties consistent with their employment?

PN2199

MR RUSKIN: No, it's not part of their duties. They cannot be directed to do it. They choose to do it. They're under the auspices of the university. They're appointed by - the title comes from the university and the supervision and the standards that are expected of them are set by the university and not by the MRI.

PN2200

THE DEPUTY PRESIDENT: No, no, no - - -

PN2201

MR RUSKIN: It's great to have the MRI - great to have students there, because they're clever and they're the future of research, but they are not supervised by the MRI.

PN2202

THE DEPUTY PRESIDENT: But the MRI doesn't - - -

PN2203

MR RUSKIN: They won't object to it, your Honour, no. It's great to have students there but they're not - the students are there to help with the research and they are supervised by the staff there, as you would expect, but under the auspices of the university.

PN2204

THE DEPUTY PRESIDENT: Yes, all right. Thank you. Ms Kenna says that there's uncertain award coverage so why not follow section 134(1)(g) of the Fair Work Act and provide simple easy to understand awards. Well, I don't think that this descriptor does that, and I don't think they're easy to understand and be - if there is an issue about the awards - the occupational awards which cover medical research employees at the moment, it's not the awards. The award coverage is clear and to the extent that it needs tinkering with. You should do it as an overall issue dealing with the modern award system in the four year review, not now.

PN2205

We don't consider that it does need that. If there needs to be clarification about the scope of the awards, do it in an overall context, not limited to research institutes.

PN2206

It was said that the evidence of - the evidence that we brought didn't have people who taught or did research at universities. Well, I don't think it's a major point but Dr Donelson has performed those activities at the University of Queensland. David Lloyd has been actively involved and employed by universities as well as research institutes. Mr Trivax was with Burnet Institute. So that doesn't stand up.

PN2207

So in summary, your Honour, we say that the Commission should stick with its decisions in 2008/2009 and don't meddle. This is radical change and it is not the purpose of the two year review. We don't accept that, "Oh, don't trouble yourself later, do something now." That's not what this is about. There's a particular

reason why this review is going on and one should not seek to change the purpose of the review as set out in the legislation for convenience when it's quite clear what this review is about.

PN2208

We asked the Commission at the beginning of these proceedings to consider the threshold issue and we did our best to limit the time of the Commission, the Commission made a decision to proceed, but let's not forget that there's a very significant threshold issue to get over and that should be upheld.

PN2209

There are no changed circumstances, and the necessity test is not met. In 2014, with a four year review, perhaps, one can look at the occupational awards then to the extent that that is necessary. But we do not support these applications in any respect.

PN2210

Now, there was no evidence - just, lastly, your Honour, there was no evidence brought about any financial or other disadvantage suffered by employees having regard to the modern award objective.

PN2211

THE DEPUTY PRESIDENT: Well, NTEU 12 seeks to focus that as the better off overall test, doesn't it?

PN2212

MR RUSKIN: Better off overall test?

PN2213

THE DEPUTY PRESIDENT: Yes. It's the starting point.

PN2214

MR RUSKIN: Well, the NTEU said that there's no financial disadvantage suffered by employees at the moment.

PN2215

THE DEPUTY PRESIDENT: Yes.

PN2216

MR RUSKIN: This is not a work value case. We don't know that - why such a person would be classified in this way, so I don't think it has any standing.

PN2217

THE DEPUTY PRESIDENT: Thank you. Ms Pugsley?

PN2218

MS PUGSLEY: Thank you, your Honour.

PN2219

THE DEPUTY PRESIDENT: Your letter of 18 June. I'll mark - - -

PN2220

MS PUGSLEY: Thank you. Would you like me to hand up a copy?

PN2221

THE DEPUTY PRESIDENT: I've got a copy, thank you.

PN2222

MS PUGSLEY: Thank you.

PN2223

THE DEPUTY PRESIDENT: AHEIA 2.

EXHIBIT #AHEIA 2 LETTER FROM AHEIA, DATED 18/06/2013

PN2224

MS PUGSLEY: Your Honour, I note that all of the parties here, including the applicant, are in broad agreement with our view as put in that letter, so I'm not going to refer any further to that letter.

PN2225

THE DEPUTY PRESIDENT: Yes.

PN2226

MS PUGSLEY: There's only one issue that I'd like to touch on arising out of today's proceedings, and that is the issue of Mr Ruskin has called, I think accurately, the terrible, terrible definition put forward by the NTEU which has not been ameliorated in any way by the amended definition referred to by Ms Kenna today.

PN2227

We raised that issue, your Honour, in paragraph 5 of AHEIA 1, in relation to the problem of the definition being able to effectively switch on or switch off award coverage.

PN2228

THE DEPUTY PRESIDENT: Yes.

PN2229

MS PUGSLEY: The potential for that problem has been amplified and illustrated well here today by the submissions you've just heard from Mr Ruskin and the university submissions of 18 June at paragraphs 22 to 27, go into that problem in some detail as well.

PN2230

This is really a three tier process that you have before you: the first tier being the threshold issue as referred to again by Mr Ruskin. Then, secondly, the merits issue which is what you've heard all the evidence in relation to and on which we make no submissions. The merits issue being should the - are the higher education awards the right awards, or these employees to be covered by these employers. If the answer to that is "yes" then we come to the question of, "Well, why is an MRI," and back to the terrible, terrible definition.

PN2231

So if we get to that point, we just reiterate what we said at paragraph 6 of AHEIA 1, which has also been amplified at the - or is consistent with what the university has put in their submission - the more recent submission at paragraph 28. But if we get to that point, we would need - or would seek further proceedings to have some discussions or submissions about just what is the proper definition of a research institute or a medical research institute for the purpose of the coverage by the Higher Education Awards. If the Commission pleases.

PN2232

THE DEPUTY PRESIDENT: Thank you. Mr Howard, your submission was received - sent on 18 June.

PN2233

MR HOWARD: Do you have a copy of those?

PN2234

THE DEPUTY PRESIDENT: I have. Thank you. I'll mark it H2.

EXHIBIT #H2 SUBMISSIONS BY MR HOWARD

PN2235

MR HOWARD: Your Honour, those submissions just two points: firstly, the (indistinct) proposed definitions (indistinct) coherent, including (indistinct) class of employer and employees. Secondly, they identify the continuing uncertainties and ambiguities of the proposed definition of research institutes. And, thirdly, they answer your Honour's question raised at the conclusion of the hearing. I don't intend to (indistinct) I ask that they be read and considered.

PN2236

THE DEPUTY PRESIDENT: Thank you. Ms Kenna?

PN2237

MS KENNA: Thank you, your Honour. I propose to address a couple of the issues that have been raised. Firstly, in respect to Mr Ruskin's contentions around the Full Bench decisions in award modernisation. We maintain no decision was made about award coverage for research institutes.

PN2238

Our application was not accepted and Mr Ruskin's comments in relation to Full Bench decision of 19 December 2008 in relation to full material going towards the Bench in argument, does nothing to enlighten any of the parties in relation to the consideration of this matter.

PN2239

There is also no evidence that research institutes were considered as part of any other proceedings of award modernisation and we say that the mess of supposed covered award coverage for these employers remains before the Commission.

PN2240

Mr Ruskin touched on the issues of necessity and anomaly. I note, he challenged NTEU 12, the table that we put before you. We don't suggest that it's new evidence. We suggests it's an illustration, if you like, of how difficult it is to actually assign an occupational and award classification to staff that are qualified in a certain occupation but are working as researchers within a research institute. What are they paid? And a good example of that would be somebody who is working as a scientist researcher but does not have a science degree. What would they be paid currently?

PN2241

Mr Ruskin touched on the example of allied health workers, and I think the award he was referring to was the Health Professional and Support Services Award. Mr Kay - Prof Kay, I apologise - Prof Kay responded to questions in cross-examination around whether or not his institute (indistinct) institute employed -

for example, such as physiotherapists or occupational therapists who have those qualifications but were working as researchers. He responded to that in evidence at transcript PN662, PN655 to 657, and PN711, and that's in attachment 1 of NTEU 11.

PN2242

And he acknowledge that people were working as research staff, not, for example, as occupational therapists, even though they may have an occupational therapist qualification. What are they paid?

PN2243

I've just been reminded also, your Honour, importantly, that he acknowledged in transcript that the research work is what gave them the work value akin to other researchers in medical research institutes and in universities.

PN2244

In relation to what's been raised in regards to the definition, we stand by the definition being as rigorous as we can get it at this stage. An example of a small institute where one person may or may not be supervising a student at any time, we respectfully say would be neither here nor there in terms of whether or not the definition would capture that institute.

PN2245

The point is that this may no longer be an industry award in the sense of what Mr Ruskin was referring to if research institutes were to be covered by the award, but we say that an industry award is an award defined by the industry of the employer. So in the strict formal sense, that would still apply.

PN2246

And, finally, your Honour, in respect to students and supervision, again, there was evidence provided to this that came from Prof Kay, Mr Trivax, Dr Higgs and Mr Lloyd, and can be found - the transcript references can be found at attachment 1 to NTEU 11(d):

PN2247

The business of research institutes is research and education in universities and research institutes and the production of new knowledge.

PN2248

And, your Honour, I recall Mr Lloyd and Mr Kay agreed with Mr McAlpine during cross-examination that they sought to attract students.

PN2249

In relation - we also don't accept Mr Ruskin's assertion that supervision is not part of the duties. Dr Donelson, herself, stated that around 15 per cent of the work of research institutes was student supervision - - -

PN2250

MR RUSKIN: No, I'm sorry, your Honour, I - if that's what - I meant 15 per cent of academic - 15 per cent of the staff.

PN2251

MS KENNA: Yes, I withdraw that, your Honour, I characterised that incorrectly. I agree with Mr Ruskin. And the transcript reference is there in any case.

PN2252

We don't accept that supervision of students is not part of the standard duties, and if I refer to attachment 9 of NTEU 3, Mr McAlpine's witness statement, and the annual reports that were included there - just looking at one annual report, and that is the St Vincent's Institute and report - at page 55 and onwards there are pages of discussion around trying to attract students to St Vincent's Institutes; about undergraduate education; post graduate education; honours; PhD programs; and further study and so on. And also a lot of emphasis paid to a career path going from being a student at research institute up to a researcher.

PN2253

I think that's all we have to say at the moment, your Honour. If the Commission pleases.

PN2254

THE DEPUTY PRESIDENT: Thanks, Ms Kenna. All right. Thank you, very much. I congratulate the parties in leaving me in a great state of uncertainty, which I now have to overcome, and I will reserve. The matter is adjourned.

<ADJOURNED INDEFINITELY [11.49AM]

LIST OF WITNESSES, EXHIBITS AND MFIs

Witness Statements

The following witness statements can be viewed via the links provided:

Witness Statement of Andrea Brown

Witness Statement of Andrew Giles

Witness Statement of Anne Junor

Witness Statement of Anthony Wilkes

Witness Statement of Caron Dann

Witness Statement of ClareMcCarty

Witness Statement of Clark Holloway

Witness Statement of David Trevaks

Witness Statement of Dr Jochen Schroeder

Witness Statement of Glenda Strachan

Witness Statement of Hamel Green

Witness Statement of John Kenny

Witness Statement of Karen Ford

Witness Statement of Ken McAlpine

Witness Statement of Linda Kirkman

Witness Statement of Michael Leach

Witness Statement of Peter Higgs

Witness Statement of Phil Andrews

Witness Statement of Robyn May

Witness Statement of Roy Sneddon

Witness Statement of Cathy Rytmeister

Witness Statement of Steve Adams