

IN THE FAIR WORK COMMISSION

Fair Work Act 2009

s.156 - Four Yearly Review of Modern Awards

AM 2014/196 & AM 2014/197 - Casual Employment & Part Time Employment

HIGHER EDUCATION INDUSTRY - ACADEMIC STAFF - AWARD 2010 (MA000006)

Filed on Behalf of the Group of Eight Universities

(University of Western Australia, University of Adelaide, University of Melbourne, Monash University, Australian National University, University of New South Wales, University of Sydney and University of Queensland)

A. Introduction

1. These submissions are made on behalf of the Group of Eight research intensive universities in Australia, comprising the University of Western Australia, University of Adelaide, University of Melbourne, Monash University, Australian National University, University of New South Wales, University of Sydney and University of Queensland (**Group of 8**). Together, these universities employ approximately half of the staff across the 40 universities in Australia in the higher education sector.
2. These submissions are filed pursuant to the Directions¹ of the Fair Work Commission (**Commission**) issued on 5 July 2017 in decision [2017] FCWFB 3541 (**Decision**) and deal with the provisional decision to include a 2 hour minimum daily engagement provision for casual staff in the Higher Education – Academic Staff – Award 2010 (**Academic Staff Award**).
3. At paragraph 408 of the Decision, the Full Bench states that it has reached the view that it is necessary for modern awards to contain some form of minimum engagement period for casual employees to avoid exploitation. It stated a provisional view that the modern awards listed in Attachment G to the Decision should be varied to include a two hour minimum daily engagement period for casual employees on the basis that they "*contain no minimum engagement period at all*". Attachment G to the Decision relevantly includes the Academic Staff Award.

¹ Direction 3 at paragraph 902 of the Decision.

B. Submission - Position and Overview of Reasons

4. The Academic Staff Award should not be varied to include the 2 hour minimum engagement for a number of reasons:

- (a) the Academic Staff Award was not part of the Full Bench matter – the applications before this Full Bench did not include any applications to vary the Academic Staff Award by either union or employer parties (Cf the Higher Education Industry – General Staff – Award 2010). Rather they were consciously and specifically excluded by the NTEU and ACTU². Accordingly, issues concerning engagement of casual academic staff and their unique employment characteristics and arrangements were not canvassed in this proceeding and were not part of the consideration. In comparison, other applications to vary the Academic Staff Award in respect of academic staff conditions were referred to a separate Full Bench specifically dealing with the Higher Education Awards in AM2015/6 (noting that there was no application for a minimum period of daily engagement for academic staff in that context either);
- (b) the Academic Staff Award already incorporates additional hours - it is therefore not an award where there is no minimum – the Academic Staff Award already includes the equivalent of minimum periods of engagement. The rates and descriptions specified in the Academic Staff Award incorporate additional hours for preparatory and associated work for lectures, tutorials, musical accompanying and clinical nurse education performed by casual academic staff. Predominantly, the casual academic salaries in the Higher Education Award are in effect "piece rates" with an incorporated number of hours of associated work. For example the rate for a 1 hour lecture includes payment for 3 hours representing 1 hour delivery and 2 hours preparation at Level B lecturer rate plus 25% loading. The incorporated hours vary depending on the nature of the activity and are listed in clause 18.2 of the Academic Staff Award (see section D below);
- (c) timing of academic work and spread across days has a high degree of autonomy and self-determination – academic work is largely self-directed and the timing and location of performing academic work (other than delivery of lectures/tutorials and demonstrating), is generally determined by the staff member. While the volume of work may exceed two hours, the staff member will often determine to do that on different days. For example, a casual academic staff member performing say 4 hours of marking of a group of assignments or examinations, can determine when and where they perform that work and choose to perform it across multiple days for

² ACTU outline of claim & list of affected awards, Attachment B, page 5, filed 11 November 2014; XXN of L Gale at PN1771-PN1774.

an hour each day. Similarly, an academic preparing a lecture may do the preparation across multiple days rather than as a block. Further, such academic work (eg undertaking marking or preparation) is often undertaken by the staff member at home or a location of their choice. Where this autonomy leads to a staff member performing work for less than 2 hours on a day, such activity should not each attract minimum engagements of 2 hours;

- (d) many casual academic staff are students already in attendance or staff with other primary occupations at the University – a significant number of casual academic staff are students already in attendance at the University and a further number already have a primary occupation with the University which is supplemented by casual academic work. The rationale for the 2 hour minimum engagement (as set out at paragraph 399 of the Decision to cover the expense and inconvenience of transport time and cost, childcare and the like) does not apply (or is significantly diminished) as such staff are already in attendance at the University. This is reflected in the Higher Education – General Staff – Award 2010 (**General Staff Award**) that has 1 hour minimum engagements for such employees (ie students at the University and staff with a primary occupation elsewhere, including with the University); and
- (e) some academic casual work is highly specialised and does not extend to 2 hours on a day – the nature of some academic work is very specialised and discipline specific and a requirement for at least 2 hours of engagement may not be able to be accommodated depending upon the nature of the academic activity and whether there is any need beyond an hour on that day. For example a specialist casual who comes in to deliver a specialised lecture or an expert musician on a particular instrument who attends to perform musical accompanying, in respect of which the activity only lasts an hour. In such circumstances, it is not a matter of choice for the University as to whether to provide or not provide the activity for a minimum of two hours.

5. Having regard to these matters and applying the provisions in ss134 and 138 of the Act, the principles identified in the preliminary jurisdictional issues decision³ and the guidance in the Decision itself, the Academic Staff Award should not be varied to include a 2 hour minimum daily engagement for casual employees. It is not a variation necessary to achieve the modern awards objective, nor is it a variation only to the extent necessary. It should not be adopted.
6. If contrary to our submission, the Full Bench does decide to adopt a 2 hour minimum daily engagement, then having regard to the above matters any clause for minimum daily

³ [2014] FWCFB 1178.

engagement for a casual academic staff member included in the Academic Staff Award needs to be tailored or modified to ensure that:

- (a) an employee who performs an academic activity which already incorporates payment for 2 or more hours is taken to meet the 2 hour minimum daily engagement requirement in respect of any work done in performing that activity;
- (b) any minimum engagement does not apply when the staff member could perform the academic activities for which they are employed for 2 or more hours on a day and chooses to perform the activities across days such that they work for less than 2 hours on any day; and
- (c) similar to the General Staff Award⁴ and maintained by the Decision, the minimum engagement should not apply to:
 - (i) employees who are students (including postgraduate students) who are expected to attend the university on that day in their capacity as students. A student would be taken as being expected for attendance on any Monday to Friday during the main teaching weeks of the university, other than public holidays as applied at the relevant university; and
 - (ii) employees with a primary occupation elsewhere, including with the employing University.

7. The Group of 8 previously filed detailed submissions and witness evidence in these proceedings in respect of proposed variations to the General Staff Award, which was the subject of the ACTU application for a 4 hour minimum engagement for non-academic staff (eg administrative staff). In these submissions reference will be made to those documents where relevant.

C. Principles and approach required

8. Under section 138 of the Act, a Modern Award, including any proposed variation, may include permitted or required terms, but only to the extent necessary to achieve the modern awards objective.

9. As a preliminary issue, the Group of 8 notes that the Academic Staff Award and issues concerning the engagement of casual academic staff were not canvassed in this proceeding, nor was an application brought by any party to vary the Academic Staff Award as proposed.

10. While the Full Bench is not limited to variations to modern awards being proposed by application, variations that have not been subject of detailed submissions and witness

⁴ MA000007 at clause 12.1

evidence should not be made lightly, particularly where academic employment, casual academic activities and the existing award payment provisions for such staff differ significantly from "standard" casual employment.

11. We expand below on some of the reasons set out in the Overview in section B.

D. Casual Academic Award salaries and incorporated hours

12. Clause 13.2 sets out the base rate used to calculate the rates attaching to casual academic activities:

13.1 Casual employment is employment by the hour and paid a rate on an hourly basis that includes a loading related to award-based benefits for which a casual employee is not eligible. A casual employee will be paid per hour 1/38th of the weekly base rate derived from the relevant classification plus a loading of 25%.

13.2 Formulae

The minimum salary paid to academic staff employed on a casual basis will be at the rates provided for in clause 18.2. These rates are derived from three base rates calculated using the following formulae:

(a) Lecturing and higher marking rate

The base rate applicable to lecturing or for purposes of the higher marking rate is determined by reference to the second step of the full-time Level B scale.

(b) Rate applicable to performance of other duties involving full-time subject coordination or possession of a relevant doctoral qualification

The base rate applicable where the duties include full subject coordination or where the academic possesses a relevant doctoral qualification is determined by reference to the sixth step of the full-time Level A scale.

(c) Rate applicable to all other duties

The base rate applicable to all other duties including tutoring rates not covered above is determined by reference to the second step of the full-time Level A scale.

13. Clause 18.2 of the Academic Staff Award provides the minimum rates of pay per hour for casual academic staff. It provides [our emphasis]:

	Per hour (including the casual loading) \$
Lecturing	
Basic lecture (1 hour of delivery <u>and 2 hours of associated working time</u>)	125.77
Developed lecture (1 hour of delivery <u>and 3 hours associated working time</u>)	167.72
Specialised lecture (1 hour of delivery <u>and 4 hours associated working time</u>)	209.64
Repeat lecture (1 hour of delivery <u>and 1 hour associated working time</u>)	83.84
Tutorial	
Tutorial (1 hour of delivery <u>and 2 hours associated working time</u>)	98.14
Repeat tutorial (1 hour of delivery and 1 hour associated working time)	65.41
Tutorial (1 hour of delivery and 2 hours associated working time) (where academic holds Doctorate)	111.38
Repeat tutorial (1 hour of delivery and 1 hour associated working time) (where academic holds Doctorate)	74.23
Musical accompanying	

Musical accompanying (1 hour of delivery and 1 hour preparation time)	65.41
Musical accompanying (1 hour of delivery and 1 hour preparation time) (where academic holds Doctorate)	74.23
Undergraduate clinical nurse education	
Little preparation required (1 hour of delivery and 0.5 hours associated working time)	49.07
Normal preparation time (1 hour of delivery and 1 hour associated working time)	65.41
Little preparation required (1 hour of delivery and 0.5 hours associated working time) (where academic holds Doctorate)	55.68
Normal preparation time (1 hour of delivery and 1 hour associated working time) (where academic holds Doctorate)	74.23
Marking rate	
Standard marking	32.69
Marking as a supervising examiner, or marking requiring a significant exercise of academic judgment appropriate to an academic at level B status	41.93
Standard marking (where academic holds Doctorate)	37.13
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)	41.93

14. As the table shows, many activities undertaken by casual academic staff are paid salary rates that are based upon a number of incorporated hours. That is, they include payment for delivery of an actual task or output (e.g. delivery of a lecture or conducting a tutorial) and payment for associated working.
15. Accordingly, the rates under the Academic Staff Award already factor in a 'minimum period of engagement' by compensating academics for working associated time inherently linked to each hour of delivery. For example, for each hour of lecturing (standard lecture) the staff member is paid \$125.77, which incorporates payment for both the hour of delivery and the 2 hours associated working time in preparing). Accordingly, if appointed as a casual lecturer to deliver a series of, say, 6 standard lectures of an hour each, the employee receives payment of 6 x \$125.77 (being the equivalent of 18 hours at the Level B step 6 rate + 25% loading).
16. As noted above, the stated basis for listing awards in Attachment G to the Decision was they were awards that should be varied to include a two hour minimum daily engagement period for casual employees on the basis that they *"contain no minimum engagement period at all"*.
17. Whilst it is true in one sense that there is no minimum engagement period specified, the salary construct does specify a number of incorporated hours and compensates for those hours in the rate that attaches to each activity. This is evident on the face of the Academic Staff Award and clause 18.2. Accordingly, in substance the Academic Staff Award already regulates and provides for minimum periods of engagement and the Academic Staff Award should not have been listed in Attachment G.
18. As noted in the Decision at paragraph 399:

Minimum engagement periods in awards have developed in an ad hoc fashion rather than having any clear founding in a set of general principles. However their fundamental rationale has essentially been to ensure that the employee receives a sufficient amount of work, and income, for each attendance at the workplace to justify the expense and inconvenience associated with that attendance by way of transport time and cost, work clothing expenses, childcare expenses and the like. An employment arrangement may become exploitative if the income provided for the employee's labour is, because of very short engagement periods, rendered negligible by the time and cost required to attend the employment. Minimum engagement periods are also important in respect of the incentives for persons to enter the labour market to take advantage of casual and part-time employment opportunities (and thus engage the consideration in paragraph (c) of the modern awards objective in s.134).

19. Given the incorporated hours (and the self-directed nature of when and where activities are performed), this basis/rationale for adopting a 2 hour minimum engagement does not substantively apply to most casual academic work and is otherwise achieved by the existing provisions.
20. This is reinforced when the Full Bench considers that:
 - (a) in addition to the incorporated hours attaching to the activity, the incorporated base hourly rates are relatively high, being at least \$32 per hour;
 - (b) further, as was the subject of uncontested submission in the Award stream dealing with the education awards before the Full Bench in AM 2015/6, academic employees (including casuals) employed by universities are all covered by enterprise agreements⁵ and receive salaries in the order of 30-70% more than the award rates in any event.⁶

E. Autonomous determination of when work is performed

21. It is understood that each award must be reviewed in its own right, and that the characteristics of employees covered by modern awards influences the determination of a fair and relevant safety net. As such, it is necessary to look at the characteristics of casual academic employment to determine whether the proposed variation is a fair and relevant safety net for the purpose of the Academic Staff Award.
22. One feature of academic employment is that significant portions of academic work are self-directed and academics largely set their own hours of working. Other than timetabled lectures, tutorials, lab demonstrations or similar student facing activity, when and where casual academic work is performed and whether it is all done on a day or is spread across multiple days is determined by the staff member, who exercises significant autonomy over those matters.
23. Accordingly, a staff member will determine whether they undertake preparation of materials for a tutorial or a lecture all on one day or perform marking of papers in "one hit", or spread this

⁵ XXN of L Gale at PN1794-PN1795

⁶ NTEU Closing Submissions dated 3 February 2017 in AM2015/6, [A10], [A108].

work across multiple days. They will also decide whether to perform their marking on a day that they may attend at the University for a meeting, or whether they do none of the marking on that day.

24. This autonomy allows the academic to work flexibly around their other commitments, including other employment, family or study commitments.
25. The concept of a minimum period of engagement for a day does not readily apply to such employment and the self-determination of when work is performed. It would be unreasonable to impose a 2 hour minimum payment obligation on universities that attached to each day if a staff member decided to perform an hour of the work activities engaged to perform, rather than performing it on the same day or grouping their work in at least 2 hour blocks on days they did decide to perform the work. This autonomous and self-directed nature of academic work will be known to the Full Bench from its own experience, but was also the subject of substantial evidence in relation to academic staff generally in the award stream before the Educational Awards Full Bench in AM 2015/6.
26. Accordingly, a minimum engagement period as proposed is inconsistent with the autonomous nature of academic work and with clause 18.2 of the Academic Staff Award, which envisages that a casual academic might, by choice, spread these aggregated hours and/or various activities over a number of days.
27. The introduction of a two hour minimum engagement period for casual employees would also be inconsistent with the modern awards objective as the variation does not promote flexible modern work practices⁷. Faced with an obligation to pay for 2 hours each day on which work is undertaken including by choice, would likely require universities to place more restrictions on when academics are permitted to choose to perform work, to avoid multiple days on which 2 hour minimum payments were required without at least 2 hours work being performed.

F. Students and employees with another primary occupation with the University

28. Witnesses in these proceedings have previously given evidence regarding student employment in the higher education sector⁸. That evidence identifies that:
 - (a) a significant proportion of casual staff in Universities are also students studying at the University. For example, UNSW identified that this was approximately 50% of casual professional employees;⁹ and

⁷ s.134(1)(d).

⁸ Exhibit 44, Witness statement of David Ward dated 25 February 2016 at [29]-[30]; Exhibit 45, Witness statement of Bronwyn Shield dated 25 February 2016 at [15]-[16]; Exhibit 48, Witness statement of Diana Dalton dated 25 February 2016 at [37].

⁹ Exhibit 44, Witness statement of David Ward dated 25 February 2016 at [28].

- (b) Universities often seek to provide employment opportunities to students to meet the operational needs of the university, but also to assist students by providing an income and to develop their skills and experience, including by engaging in work that is specific to their area of study, around their lectures and class commitments.
29. Being employed by the university in which they are undertaking studies is ideal for students for two reasons:
- (a) students can work in short periods between lectures, practical classes, tutorials and other study commitments; and
- (b) students are typically already present on campus at the university so do not need to travel to the university specifically for work.
30. For example, a PhD student will often be employed as a casual/sessional academic to lead or set up a demonstration in a lab. This may involve an hour of work between the student's scheduled classes or study commitments for the day and will typically be in the same lab areas that the student is undertaking their own PhD research in. This is just one example of students being employed as casual academic staff at universities. Other examples include casual engagements of post-graduate students to undertake marking or employing students as research assistants to support administrative and project based work, to provide development opportunities for the students as part of making them employment and career ready.
31. If a two hour minimum engagement period were included in the Academic Staff Award, this would limit opportunities to undertake work that fits in between class and lecture commitments. This would likely lead to decreased workforce participation for students and limit flexible work practices undermining the modern awards objective¹⁰. Aside from removing an income stream for the students, it would also mean that students are less likely to gain valuable experience they would be exposed to when conducting the relevant work.
32. There was also evidence¹¹ provided in the proceedings that in universities there are:
- (a) a significant proportion of casual employees who have other full-time employment;
- (b) a proportion of casual employees who also have other part-time employment, including with the University, in a different substantive position in a different area; and
- (c) employees who may have substantial casual engagement with the University (eg undertaking administrative work) and who undertake another casual engagement that is unrelated (other than being with the same employer).

¹⁰ s.134(1)(c) and (d).

¹¹ XXN of L Gale at pn1890-pn1896 and in Attachment 1 to Statement of Ms Gale (Exhibit #13), being a report of Professor Junor.

33. These features of casual employment in the Higher Education sector are reflected in the General Staff Award at clause 12.2, which provides a minimum engagement period of one hour for students who are expected to be in attendance at campus and for those who have a primary occupation (including at the University) in addition to their casual work.
34. If the proposed two hour minimum engagement is to be included in the Academic Staff Award, the Group of 8 submits that it is appropriate to include similar provisions as the General Staff Award in relation to these two categories of casual employees, which are a feature of the higher education sector.

G. Alternate Clause

35. If, contrary to our submissions, a clause providing for a 2 hour minimum daily engagement is to be inserted into the Academic Staff Award, it is appropriate to include modifications to the following effect:
- (a) *If a casual academic employee is engaged to undertake an activity that includes payment for the activity and incorporated working or preparation time, totalling payment for at least 2 hours, the casual academic will be deemed to meet the minimum engagement period in clause X for all work to performed to undertake that activity.*
 - (b) *The minimum engagement period in clause X does not apply when the employee could perform the academic activities for which they are employed for more than 2 hours on a day and chooses to perform the activity or activities across days such that they work for less than 2 hours on any day.*
 - (c) *The minimum period of engagement for a casual employee will be one hour for:*
 - (i) *employees who are students (including postgraduate students) who are expected to attend the university on that day in their capacity as students. A student will be taken as being expected for attendance on any Monday to Friday during the main teaching weeks of the university, other than public holidays as applied at the relevant university;*
 - (ii) *employees with a primary occupation elsewhere or with the employer.*

H. Conclusion

36. For the reasons set out above, the proposed variation to include a two hour minimum engagement period for casuals in the Academic Staff Award is not necessary to achieve the modern awards objective and should not be made.

Clayton Utz
Solicitors for the Group of Eight
2 August 2017