IN THE FAIR WORK COMMISSION

Fair Work Act 2009

s.156 - Four Yearly Review of Modern Awards

AM 2014/229 & AM 2014/230

HIGHER EDUCATION INDUSTRY - ACADEMIC STAFF - AWARD 2010 (MA000006)
HIGHER EDUCATION INDUSTRY - GENERAL STAFF - AWARD 2010 (MA000007)

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)

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Part 1. Introduction

1. These submissions are made on behalf of the 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 39 universities in Australia in the higher education sector. They conduct approximately 75% of the research undertaken by universities in Australia.

2. These materials are filed pursuant to the Directions of the Fair Work Commission (**Commission**) issued on 20 April 2016, and comprise:

   (a) these submissions and attachments;

   (b) witness statements of:

      (i) Professor Stephen Garton, Provost and Deputy Vice Chancellor, University of Sydney;

      (ii) Professor Marnie Hughes-Warrington, Deputy Vice Chancellor (Academic) at the Australian National University;

      (iii) Professor Simon Biggs, Executive Dean, Faculty of Engineering, Architecture and Information Technology, University of Queensland; and

      (iv) Professor Dawn Freshwater, Deputy Vice Chancellor (Research) University of Western Australia;

      (v) Mr David Ward, Vice-President, Human Resources, University of New South Wales; and

(vi) Mr Andrew Picouleau, Industrial Relations Consultant and former Deputy Director Monash HR, Monash University.

3. These submissions are made in response to the NTEU Outline of Submissions dated 11 March 2016 (**NTEU Submissions**) and to the claims contained in those submissions.

4. The Group of 8 oppose the majority of the applications/claims made by the NTEU to vary the Higher Education Industry - Academic Staff - Award 2010 (MA000006) (**Academic Award)** and the Higher Education Industry - General Staff - Award 2010 (MA000007) (**General Staff Award) (**together the **Higher Education Awards**). With limited exceptions (as identified in these submissions), the NTEU claims should be rejected and the content of the Higher Education Awards can continue substantively unchanged.

NTEU Claim	**Go8 Position**	**Comment**
Part A - New clause to regulate academic hours of work and or provide for overtime pay	Opposed	
Part B - Claims for two new allowances: • policy familiarisation • discipline currency	Opposed	
Part C - Variation to clause referencing MSALs to qualify the exclusion on the MSALs being used for reclassification (ie enabling them to be so used in certain circumstances)	Opposed	
Part D- Changes re sessional marking rates to include additional references to higher rates for staff performing subject co-ordination, to also apply to their other casual activities	Opposed	
Part E - General Staff overtime - claim to impose additional employer obligation to take positive steps	Opposed	
Part F- Linking wages to classifications	Not opposed - minor difference in formulation	
Part G- changes to classification descriptors	Not supported	NTEU have indicated they are not seeking to have determined if not supported by the other parties
Part H- Bond University claim - to extend application of certain clauses to Bond University	N/A	

Part I- Clarification of "Full time", "Part time", "casual" and "Fixed term" intersection.	Not opposed and proposed wording in FWC conference	Has been determined to finality in technical drafting conference
Part J- Claim for ICT Allowances	Opposed	
Part K- Wording change from "academic context" to "academic content"	Opposed	
Part L- Claim to extend coverage to research institutes.	N/A save that oppose elements of proposed definition of "Research Institute"	Intersects with claim by AAMRI
Part M- Claim for conversion of academic staff	No submission	No articulated claim and NTEU not presently pursuing

5. The following table briefly summarises the claims and the Group of 8 position.

6. These submissions will be expanded upon both during the proceedings and in final submissions.

Part 2. Preliminary Comments, Principles and Approach

Preliminary Comments

7. The Higher Education Awards were the subject of significant consideration by the Commission in 2009/2010, forming part of the priority phase of the award modernisation process. The content of the awards was the subject of conferences conducted by DP Smith, who was intimately familiar with the sector, its industrial regulation and history. Exposure drafts were prepared and submissions made both by the employers and by relevant unions including the NTEU, leading to further consideration of the issues of content in the Award before final orders were made by the Full Bench.

8. A number of provisions the NTEU now seek to significantly vary or replace were the subject of agreement in the making of the modern awards in 2009/2010 and accepted by all parties and the Full Bench as constituting a fair and relevant safety net meeting the requirements of the *Fair Work Act 2009* (Cth) (**FW Act**), including the modern awards objective. Other NTEU claims are to introduce significant new regulation or entitlements, including where it was determined in making the modern awards that such regulation would not be included.

9. Whilst it is accepted that a review can lead to updating or modernisation of the existing content, the fundamental changes sought by the NTEU, including introduction of prescriptive regulation of academic work, adoption of provisions that do not reflect existing practices, inclusion of additional allowances never previously applied, inclusion of additional entitlements

to overtime pay and significant increases in regulation, should be approached with very significant caution by the Commission. There is no necessity identified for the significant changes sought by the NTEU for the awards to continue to operate as a fair and relevant safety net and meet the modern awards objective. There have been no significant changes in the last 6 years that would establish a proper basis to depart from what was determined in the making of the modern awards.

10. This is particularly so where the employees in the sector are not reliant upon the awards for their actual terms and conditions. There are comprehensive, "wall to wall" enterprise bargaining agreements that have been negotiated since the modern awards were made and the higher education awards have operated as an effective basis for bargaining. Collective agreements have been negotiated at each university on at least one and generally on two occasions since 2010. The enterprise agreements are lengthy and marked by their detailed employee benefits and protections. Considered objectively, the awards have fulfilled their role in this sector and operated effectively as a relevant safety net, underpinning bargaining and the negotiation of the actual terms and conditions at each University. This includes bargaining in almost every subject area in respect of which the NTEU are now seeking variations. No significant problems in the operation of the awards have actually arisen.

11. In that context and to avoid significant waste of public money both in the time and resources of the Commission and those of publicly funded Universities, there is no proper need or basis for the voluminous materials and claims brought by the NTEU. The claims amount to industrial opportunism and seeking to have the Commission impose additional provisions and restrictions in areas where the NTEU have pursued the same or similar claims in bargaining. The NTEU claims are therefore not directed at the award safety net as such, but rather are effectively to seek bargaining leverage.

12. These comments are also supported by the principles required to be applied by the Commission.

Principles and task of the FWC

13. Consistent with the award review principles set out below the task of the Full Bench is not to establish or make new awards or new award provisions, but rather to review the existing provisions.

14. It is only if the Higher Education Awards are not functioning as an appropriate award safety net and there was a compelling need for change to the existing provisions that the Commission should vary the awards. It then must do so only to the extent necessary to provide the fair and relevant safety net.

15. Section 134 of the FW Act provides [our emphasis]:

> *"(1) FWA 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:*
>
> *…*
> *(b) the need to encourage collective bargaining; and*
> *(c) the need to promote social inclusion through increased workforce participation; and*
> *(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and*
> *(e) the principle of equal remuneration for work of equal or comparable value; and*
> *(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and*
> *(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and*
> *(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.*
>
> *This is the modern awards objective."*

16. Under section 138 of the FW Act, the award, including any proposed variation may include permitted or required terms, but only to the extent necessary to achieve the modern awards objective.

17. As set out in the Preliminary Jurisdictional Issues Decision:[1]

    (a) whilst broader in scope than the Transitional Review of modern awards completed in 2013, the nature of the task remains one of review of the existing award provisions;[2]

    (b) each award must be reviewed in its own right;[3]

    (c) the Commission is obliged to ensure that awards together with the NES provide a fair and relevant minimum safety net taking into account the need to ensure a stable modern award system;[4]

    (d) any party seeking to vary a modern award must advance a merit argument accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation;[5]

    (e) the Commission will have regard to the historical context applicable to each modern award;

[1] [2014] FWCFB 1178.
[2] Ibid [60(1)].
[3] *Fair Work Act 2009* (Cth) s 156(5).
[4] Ibid, s 134(1)(g).
[5] [2014] FWCFB 1178, [60(3)].

(f) on its face the modern award being reviewed will be considered by the Commission as achieving the modern awards objective at the time that it was made in 2010;[6]

(g) the characteristics of employees and employers covered by modern awards influences the determination of a fair and relevant safety net; and

(h) the proponent of a variation must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective.[7]

18. All of these principles weigh against granting the NTEU claims in respect of the Higher Education Awards and support the substantive retention of the existing provisions.

Part 3. Overview of why variations should be rejected

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

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

(b) several of the proposed clauses sought in the claims are uncertain and unclear. They are therefore ill-suited to a binding award obligation, breach of which is a contravention of civil penalty provisions attracting penalties[8];

(c) the NTEU claims would create entitlements for employees, and obligations and restrictions on employers that are not found or prevalent in other awards, including those applying to similar staff and/or in associated industries. This would result in significant disparities in award regulation and is not a fair and stable safety net;

(d) many of the NTEU claims are more appropriate for determination at the enterprise level through bargaining. They have been pursued in bargaining by the NTEU, with various enterprise outcomes. Such claims extend beyond a fair, minimum safety net of award terms and certainly extend beyond the Commission's role to only vary modern awards to the extent necessary to meet the modern awards objective;

(e) the NTEU claims, particularly in relation to academic hours of work would be unworkable and impose obligations that are, in effect, impossible to apply and to police;

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[6] [2014] FWCFB 1178, [24].
[7] Ibid, [36].
[8] s 45 *Fair Work Act 2009* (Cth).

(f) the NTEU claims are not necessary to achieve the modern awards objective (s.138), including having regard to the factors identified in s.138(2):

(i) s.138(2)(b) - the need to encourage collective bargaining - many of the NTEU claims have already been pursued in bargaining and are more appropriate for bargaining. In a number of cases they are also inconsistent with outcomes agreed to by the NTEU in bargaining;

(ii) s.138(2)(c) - the need to promote increased workforce participation - the NTEU Academic hours of work clause and discipline and policy allowance claims increase costs and undermine flexibility in academic employment and would undermine increased workforce participation;

(iii) s.138(2)(d) - the need to promote flexible modern work practices and the efficient and productive performance of work - many of the claims, including the Academic hours of work clause do not promote flexibility and introduce disincentives for efficient and innovative work;

(iv) s.138(2)(f) - the likely impact upon business including on productivity, employment costs and regulatory burden - The NTEU seek to limit the performance of work and to increase its cost. Several of the claims would significantly increase the regulatory burden, requiring introduction of new systems, recording of time, recording of work and monitoring to have any confidence in compliance. They also introduce additional allowances with significant additional costs;

(v) s.138(2)(g) - the need to ensure simple, easy to understand, stable and sustainable modern award system - The nature and extent of the NTEU claims do not promote a stable award system. Further, the NTEU academic hours of work clause is very complex and difficult to understand, let alone apply. It is almost impenetrable and likely to lead to confusion, disputation and uncertainty;

(vi) s.138(2)(h) - the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy - the NTEU academic hours of work claim will lead to directions to limit research and service to minimise overtime costs and to the recording of time and directions about work time and potentially location. The greater regulation and loss of flexibility and academic freedom will lead to a loss of academics to overseas institutions, and likely limit research, innovation and efficiency, damaging an important part of the Australian economy.

Part 4. Context

20. In considering the NTEU applications the Commission should have regard to the industrial and practical context in which the awards operate in this sector.[9]

21. There are a number of contextual matters that weigh generally against the NTEU claims.

    (a) that as part of the scheme provided by the FW Act, as set out above the awards are operating successfully as an industrial safety net underpinning bargaining, leading to agreements including in two bargaining rounds across the sector since the modern awards were made in 2009/2010;

    (b) there is already a significant and higher degree of industrial regulation in the sector;

    (c) that universities compete internationally and increasingly with private post-secondary education providers who have less restriction and prescription in their award regulation;

    (d) universities are presently at the likely peak of Government funding per student with foreshadowed policy changes likely to see a reduction in Commonwealth funding per student.

22. Accordingly, at a general level the NTEU claims seek to impose greater restrictions and introduce new entitlements and regulation that would increase costs and reduce flexibility in an environment where universities are facing either flat or declining government funding and increased international and domestic competitive threats from providers, the majority of whom are not presently subject to the same awards and industrial restrictions. Universities more than ever need to increase flexibility in relation to its staffing, increase research outputs and contain costs.

23. These matters all form part of a context in which the Commission is now being asked to vary awards to impose further costs, further restrictions and further regulatory burden on universities. This is inconsistent with the awards being modern, relevant and fair.

Awards fulfilling their function

24. As their name suggests the Higher Education Awards are industry awards operating in the higher education industry. In short, they apply to Universities.

25. There are 37 public universities together with 2 private universities in Australia and many private higher education providers, who are significantly increasing in number and volume of students taught.

[9] 2014] FWCFB 1178

26. With the exception of some staff at Bond university all of the staff in the universities are covered by comprehensive enterprise bargaining agreements together with the national employment standards (NES). The Higher Education Awards do not actually apply to set their terms and conditions of employment.

27. In the higher education sector, enterprise bargaining agreements have been negotiated since the mid-1990s with most universities having successfully negotiated with the relevant unions (predominately the NTEU and to a lesser extent the CPSU, ASU, AMWU, CEPU and CFMEU) and their staff, 4 or 5 successive enterprise agreements.

28. No significant problems or deficiencies in relation to enterprise bargaining have arisen which would warrant any significant intervention by the Commission to vary the awards as part of the modern awards review.

International Competitors, private providers and on-line competitors

29. The Group of 8 universities compete in an increasingly competitive international and domestic higher education environment. Universities compete for leading academic talent, and researchers globally and compete for international and domestic students and also for commonwealth funding for research.

30. Australia's higher education industry is commonly reported as Australia's second or third largest export industry[10]. To a significant extent this relies upon the standing and reputation of the relevant Australian universities, particularly based upon their research output and global rankings and there is a constant focus on the need to have international standards of research and to support and encourage innovative research and academic effort. This includes continuing to attract and retain students, including to assist in funding the University and its research, which is necessarily cross-subsidised by teaching revenue.

31. All of the public Universities in Australia are not-for profit organisations, re-directing any "profit" into facilities, research and education activities of the University.

32. The Universities are predominantly funded from:

    (a) Commonwealth Government Funding, (CGS and HECS) based upon numbers of domestic students;

    (b) International Student Fees;

    (c) Research Grant funding in the form of:

[10] Australian Bureau of Statistics *International Trade in Services, by Country, by State and by Detailed Services Category, Financial Year, 2014-15* (ABS Catalogue no. 5368.0.55.003), 20 November 2015.

(i) competitive grants from funding from Commonwealth research bodies, including the two main bodies, being the Australian Research Council (ARC) and National Health and Medical Research Council (NH&MRC);

(ii) Fellowships from those funding bodies, which fund a particular fellow for a certain period of time (usually 3 years).

(d) Specific Government grants tied to particular capital or other projects; and

(e) Other sources of funding including investment revenue, contract research fees, donations/bequests and similar funding.

33. In recent years there has been a degree of deregulation in relation to funding, together with a rise in private providers and on-line education providers both domestically and globally. As a part of the deregulation, private providers of education in Australia have had much greater capacity to access Commonwealth funding for domestic students and to offer commonwealth supported places.

34. This has further contributed to increased numbers of such providers, and also coupled with the growth in on-line offerings of courses, enabled by increased IT functionality and capability.

35. The NTEU clauses would impose additional restrictions and regulation and include additional entitlements that are not included in other awards applying to staff of a similar nature or associated industries and to the private providers of post-secondary education.

36. These matters contribute to the need for the universities to avoid increases in costs of delivery of courses to students and to be able to attract, support and retain the best researchers in Australia, to be increasingly flexible in their staffing and operations. This is necessary if the universities in Australia are to remain competitive, sustainable and produce innovative research.

Australian University funding is likely to decrease

37. This is then compounded by increasing risks in relation to Commonwealth funding where the Commonwealth funding per student that universities receive is also likely to reduce, while costs continue to increase.

NTEU materials

38. While the NTEU materials and attachments are voluminous - 5 folders of hard copy witness statements and attachments plus some additional 5000 plus pages of reference material, significant parts of the material have no clear relevance to the task required of the Commission and/or to the variations sought. Various documents presented as evidence are at their highest effectively submissions or otherwise are of no clear relevance. We will seek to

address the Commission on this issue depending upon what the NTEU actually seek to rely upon and tender.

39. In the context of a review, the Commission can, or course, choose what material it will consider, what would assist it in the review and what it will not consider taking into account the Commission's resources and criticality of the material.

The comments in Parts 2-4 above apply across the NTEU claims. In addition we now address each specific claim.

Part 5. NTEU - A - Academic Hours of Work Clause (Academic)

40. The NTEU have sought to delete clause 22, Hours of Work, which states *"For the purpose the NES, ordinary hours of work under this award are 38 per week*" and replace it with a clause that runs for in excess of 2 pages, setting out complex and detailed regulation of allocation and performance of academic work. The NTEU clause provides for the directing, recording and monitoring of academic work and hours, including research and/or requires complex and uncertain assessments of prospective work and hours.

Third Attempt by the NTEU

41. It is noteworthy that during this Modern Award review process the NTEU has now provided 3 different provisions to regulate academic hours and work, all of which are presented as being variations only to the extent necessary to achieve the modern awards objective. In and of itself this undermines the argument that the NTEU clause should be adopted as being a variation necessary to achieve the modern awards objective:

(a) in March 2015 the NTEU contended that the award should provide that the maximum work allocated to the employee, or required to meet the performance expectations of the employer to a professional standard, should be able to be performed in 1845 hours per year (less leave and public holidays)[11]:

(b) in October 2015 the NTEU provided a significantly longer and more complex and detailed provision providing for regulation of hours, recording of hours of academic staff and provision of additional pay/overtime. That provision is set out in pages 3 and 4 of the NTEU Submissions;

(c) the NTEU has now presented a third clause as set out on pages 5 to 7 of the NTEU Submissions.

42. The fact that the current NTEU proposed variation differs from the previous 2 in part highlights that the NTEU is not seeking the adoption of a clause that exists anywhere or operates in

[11] NTEU outline dated 2 March 2015 at page 2

practice, but rather is seeking the adoption of clauses that are a fundamental departure from all historical and actual regulation of academic work and is attempting to closely regulate a matter not amenable to close regulation. It seeks to regulate hours of activity for a type of employment and activity that is highly variable in its nature, largely self-directed, and is completely ill-suited to the regulation sought to be introduced by the NTEU. In short the NTEU has effectively drafted its own bargaining claim and sought to have it adopted in the Award to reflect a recently adopted NTEU preferred policy position.

Overview of key reasons why the NTEU claim should be rejected

43. The application for variation should not be granted for a significant number of reasons:

(a) the existing award provision and NES meets the requirements of the FW Act including s.147 and arose from the relevant specific requirements regarding the making of the modern awards;

(b) would introduce award regulation for professional, autonomous employees that is inconsistent with the award regulation of other similar employees such as professional engineers, scientists, specialist doctors, managerial employees and others that have an award safety net of annual salaries for performance of their employment. Such awards do not provide limitations on work able to be performed, recording of hours, or provide for overtime;

(c) the NTEU's claim is not supported by the history of industrial regulation in the industry, nor supported by the NTEU's consistent position in relation to academic hours over the last 30 years;

(d) the NTEU provision does not reflect existing regulation in the sector including as agreed by the NTEU;

(e) the NTEU provision is fundamentally inconsistent with the nature of academic employment;

(f) the NTEU provision is inconsistent with the nature of academic work, particularly research, which is not and cannot be meaningfully allocated or pre-determined in hours;

(g) the NTEU provision is inconsistent with the nature of how such work is organised and determined, with a large proportion of academic work and activities, their location and time undertaken by an academic staff member to perform them, being self-directed;

(h) the NTEU provision would likely be divisive and undermine relationships of trust within the academy;

(i) the NTEU provision is complex and unworkable;

(j) the NTEU provision would impose a very significant regulatory burden, increasing costs;

(k) the NTEU provision is likely to lead to restrictions on academic work including research; and

(l) the NTEU provision is likely to undermine innovation and lead to a reduction in international attractiveness for academics and damage higher education; an important part of the Australian economy and Australia's second largest export industry.

44. We have addressed a number of those general matters below and also specifically responded to some issues and matters raised by the NTEU.

History and industrial regulation - regulation of academic hours

45. Having regard to the nature of academic employment and the history of industrial regulation it is submitted that the current industrial regulation is appropriate and relevant. It was accepted as meeting the modern awards objective in 2010 and nothing substantive has changed since warranting the wholesale departure from the current provisions that is represented by the NTEU claim and would result in unsuitable and unworkable regulation.

46. The derivation of the current academic salaries arose from the academic salaries Tribunal determination and report in February 1976 and adoption in industrial awards in 1987 in the *Australian Universities Academic and Relations Staff (Salaries) Award 1987* (Print G6954).

47. The annual salaries have been included in the awards since that time, with the 2 main pre-reform academic awards being the *Higher Education Academic Salaries Award 2002* (PR968176) and the *Higher Education Academic Staff Core Conditions of Employment Award 2005* (PR967160).

48. At all times the relevant award regulation for academic staff has provided for an annual salary as compensation to perform the entirety of their role as an academic staff member.

49. Because of the nature of academic employment and academic staff (as outlined in more detail below), at no time has there been any award provision regulating hours of work for academic staff in any industrial awards prior to the modern awards made in 2010. At no time, including in the current modern award has there been any provision for dealing with recording or setting hours, spans of hours, shifts, overtime or similar award restrictions.

50. These matters reflect the fact that academic staff are autonomous and semi-autonomous professional employees and because their activities are highly variable and changeable,

reflecting the nature of academic research. Academic staff perform a significant proportion of their work as self-determined and self-directed work at hours and at locations that they themselves determine. They generally pursue their particular discipline or research as a vocation and a life-long passion, both to innovate, discover and create new knowledge and in doing so to advance their own domestic and international standing and their careers. The concept of regulating when work can be performed and how much work is inconsistent with academic character of their employment.

51. In the current modern awards the existing clause 22 introduced a reference to hours of work for academic staff in an award for the first time.

52. The inclusion of this clause arose directly from and was solely to meet a specific legislative requirement at the time of making the modern awards. In accordance the then *Workplace Relations Act 1996 (Cth),* the then Australian Industrial Relations Commission was required to undertake the award modernisation process in accordance with the Ministerial Request under s. 576C. Part of the request of the Minister, published by the Commission on 2 April 2008 stated as follows:

"Ordinary hours of work

40. many entitlements in the proposed NES rely on modern awards to set out ordinary hours of work on a weekly or daily basis for an employee covered by the modern award. The Commission is to ensure that it specifies in each modern award the ordinary hours of work for each classification of employee covered by the modern award for the purpose of calculating entitlements in the proposed NES."

53. Consequently, clause 22 was included in the modern award. In conjunction with the NES it forms part of the industrial safety net and enables the determination and calculation of the entitlements under the NES such as annual leave, personal leave and similar entitlements and the determination of an hourly rate for entitlements that are expressed and accrued and deducted in hours.

54. The adoption was endorsed by the parties and by the Full Bench of the AIRC.

55. Contrary to the NTEU original submission of March 2015 and latest NTEU Submissions, the existing provision clearly does meet the requirements of s.147 of the FW Act, specifying the ordinary hours of work for all classifications of academic staff under the award.

56. This existing award provision operates in conjunction with the NES. It also reflects s. 62 of the NES which already provides regulation and protections in respect of hours of work. Under s.62, an employer must not request or require an employee to work more than 38 hours a week unless the additional hours are reasonable. The section also enables an employee to refuse a request or requirement to work unreasonable hours and sets out a number of factors

that are required to be taken into account, including, inter alia, the nature of the employee's role, level of responsibility and "any other relevant matter".

Similar safety net regulation to professional engineers, scientists, specialist medical practitioners, managers and other self-managed staff etc

The existing approach to award regulation for academic staff is consistent with the award regulation for employees who bear some similarity to academics and the nature of the work that they perform. This is reflected in **Attachment 1**. In that attachment we have identified a number of relevant and related awards to the higher education sector and academic employees and otherwise are awards that contain annual salaries, do not provide for detailed regulation of hours of work and do not provide for any entitlements to overtime for the relevant staff.

57. They regulate employees who are paid an annual salary for the performance of the whole of their employment and/or for whom regulation of hours is inappropriate or largely meaningless because they set their own hours and manner of working. This includes academic teachers in post-secondary institutions, specialist doctors, pilots, professional engineers, professional scientists and Government Agency engineers/scientists and executive level staff in the public sector. A more detailed summary document will be made available to the Commission at hearing.

58. This can be compared and contrasted with the comparisons in the NTEU Submissions, often comparing academic staff and the rates that they receive with trades staff or closely managed/directed employees who perform fundamentally different work in a fundamentally different manner and enjoy none of the freedoms and flexibilities enjoyed by academic staff.

Clause does not reflect existing regulation and approaches adopted in the sector, including as agreed by the NTEU

59. The proposed NTEU clause is not a relevant safety net.

60. The NTEU proposed clause neither reflects the nature of academic employment and its self-directed academic activities (particularly research and self-directed service activities), nor existing legislative or industrial regulation of academic work in Australia or anywhere in the world, to the best of our knowledge. It does not match the regulation that has been negotiated and agreed with the NTEU across any of the enterprise bargaining agreements at Australian Universities.

61. While universities and the NTEU have agreed in enterprise bargaining to clauses providing a series of principles and provisions to guide and regulate the allocation of work and academic workloads, the clause now proposed differs very significantly from those provisions.

62. While those enterprise agreement academic work load clauses vary, they generally contain:

(a) a set of guiding principles to help ensure the workloads are allocated fairly and distributed equitably amongst staff in the particular school, institute or centre;

(b) are based around development of workload models within particular schools, institutes or centres to be implemented in consultation with academic staff to enable fair allocation of academic work activities;

(c) are in the nature of broad guidelines with more detailed focus on the allocation of teaching and associated activities, generally as a proportion or percentage of a notional number of annual hours;

(d) take into account the individual circumstances of the academic staff members including their stage of career, career aspirations, personal and family circumstances;

(e) focus on achieving a balance within the activities allocated by the university which are required to be undertaken, being teaching and associated activities and some limited service activities, with the self-directed research and other activities of the academic staff member;

(f) contain a process for staff to seek a review of, or otherwise dispute, a workload allocation, including on the basis that their workload allocation is inappropriate, unreasonable or excessive;

(g) do not:

(i) contain prescriptive regulation about self-directed activities;

(ii) define "required work" to include hours of work that a staff member decides is necessary to meet performance and/or promotion expectations;

(iii) provide for overtime;

(iv) require and are not based upon recording or monitoring academic staff hours;

(v) impose a tight managerial approach;

(vi) contain concepts of "ordinary hours workload", "ascertained hours" or such constructions on which the NTEU clause is now built.

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

Ill-Suited to the nature of academic employment and its activities

64. The NTEU clause does not constitute a fair and relevant safety net as it does not relevantly or fairly apply to academic employment and academic activities.

65. The evidence of a number of senior and eminent academics and leaders in the higher education sector including Professor Garton, Professor Freshwater, Professor Hughes-Warrington and Professor Biggs, supported by the evidence of Mr Picouleau will identify in detail the nature and features of academic employment, academic work and why the NTEU clause is fundamentally and fatally flawed.

Nature of Academic Employment and Academic work

66. Academic staff are highly skilled and largely self-managed professionals who are typically leaders in their field and are engaged in research passions and pursuits which are fundamentally about innovation and the creation of new knowledge.

67. Academic work is largely self-directed and autonomous. This is reflective of the highly skilled nature of the profession and the work being performed.

68. Academic staff are traditionally engaged in a combination of teaching, research and service including contributions to the university and to the broader community.

69. Their academic "workload" includes a mix and balance of those elements which changes over time and from individual academic to individual academic.

70. In relation to allocated teaching hours, there are many factors that contribute to the variation in teaching contact hours undertaken by academic staff. These include things such as the area of discipline, student enrolments, the academic staff member's stage of career, experience and performance development goals.

71. Outside the teaching and assessment activities, the activities are largely determined by the staff member. The nature and extent of the research performed, how that is undertaken, locations at which work is performed, attendance at the University, hours of work undertaken and service activities are largely determined by the academic staff member themselves. Several academic activities other than teaching and assessment related duties do not directly involve the University at all. For instance, an academic at any level may be appointed as editor of an academic journal and such an appointment would normally enhance promotion

prospects. But usually the employing Universities will have no influence in the appointment as editor (which is a matter determined by the Journal, editorial board or publisher).

72. The Academic staff perform these self-directed activities in their own time and at their own pace and can do so at home or any other location rather than on campus if they wish. The hours of academic staff are therefore very flexible. This flexibility, independence and ability to self-manage their work and time is reflective of the nature of academic work and highly valued by academic staff. It is an integral part of academic employment and the trust in the academic cohort.

73. Academic staff are not required, nor would be willing to complete timesheets for hours worked or attendance. They largely self-manage their work other than specific teaching hours and required meetings.

74. Academics also commonly attend conferences—domestically and overseas—and liaise with other academics within the University and at other Universities whether as part of formal research collaborations or more generally as scholars, sharing ideas, information and supporting each other. Academic staff also have the capacity to undertake paid outside studies programs (OSP) typically for periods of 6 months and generally travel overseas as part of their employment with the University which is supported the University including to visit other Universities and colleagues, potentially collaborating on projects or more generally sharing information. During such periods they do not typically undertake teaching or other duties for the University.

Nature of research

75. A significant proportion of academic work is research. This varies from research only staff through to staff who are performing teaching focussed roles, but a traditional allocation for so called teaching and research academic staff may typically involve a 40% or more of their activities being research based. In relation to such research:

    (a) The nature of academic research involves academic staff engaged in research questions and activities that evolve and develop - they are pursuing new knowledge or the new application of knowledge. The particular question being answered and how the researcher will go about answering it or pursuing a new area of discovery is determined by the researchers themselves. It will vary significantly, not only across disciplines, but within disciplines and across competent researchers.

    (b) Even the same research question could be approached fundamentally differently by two competent academics in the same discipline and the amount of time taken to undertake that particular research activity varies significantly amongst those competent academic staff.

(c) Taking into account the variability and the factors that impact upon research, it is not meaningful to seek to prescribe, allocate and/or determine in hours how long a particular research output or activity will take or should take;

(d) Further, research activities and the product of those research activities can, and often do, span more than a year and develop over several years;

(e) The academic staff members are pursuing their research or discipline area, typically as their passion or "life's work". They do not typically distinguish between what the employer may seek or expect in relation to academic research and the research and effort that they undertake. Their reflective thinking as part of research and other activities they pursue may well span their employment and their professional interest in their field.

Clause is complex and not easy to understand

76. The clause is self-evidently complex and very difficult to follow, understand and apply. It clearly does not constitute a simple, easy to understand, stable and sustainable provision, contrary to s 138(2)(g).

Clause is unworkable

77. The clause does not constitute a fair and relevant safety net as it seeks to impose unworkable binding obligations upon employers. The content of the clause is not meaningfully able to be complied with or applied. It either requires:

(a) a fundamental paradigm shift from the way academic staff and their working hours operate - ie setting their hours, requiring timesheets, recording their time, verifying their activities and closely directing their currently self-directed work ie introduce a system that does not reflect what occurs in the industry and is not relevant to current employment and academic practices; and/or

(b) is dependent upon attempting to apply a number of complex and intersecting provisions, many of which are unclear and at least would give rise to significant difference of views and disputation. Those provisions are based around determining what is considered "required work", "ordinary hours workload" and /or "ascertained hours" as assessed (by persons unknown) against some notional homogenous academic at level in discipline performing the actual intended activities of each staff member (including self-directed research) and then monitoring that work to identify whether an anticipated overtime loading should be paid. Further, to avoid the likely breaches of such provisions, it is necessary to implement an unspecified "fair and rigorous" system to ensure all of the above and as part of that

process to also seek to determine and distinguish between their self-directed "required work" and "productive self-directed work" that falls outside that work.

78. Neither of these approaches presently exist, would not sensibly be adopted in practice and there are no systems that would presently accommodate either approach. It would necessitate creation of onerous systems and recording requirements, which are unlikely to properly fulfil the requirements of the clause in any event.

Required Work

79. The clause contains a concept of "required work", which extends beyond the work that the university directs or requires the employee to undertake to all activities that the staff member determines are necessary to meet performance standards or to achieve promotion expectations. There are number of problems with this definition, including:

(a) who determines what is the particular work necessary?;

(b) the performance standards that appear to be being referred to as dictating certain activities and certain hours of work, set goals for general research outputs and teaching quality. They do not prescribe the particular work or research that the staff member will conduct. For example, it may be a performance expectation that over a 3 year period the staff member will publish 4 journal articles in journals of a particular standing or level and/or a book. They do not specify what research is to be undertaken by the staff member or how it will be done. The "work necessary" to publish, even if it is limited to a particular discipline, will vary very significantly depending upon the particular research that the staff member chooses to pursue. The necessary work could take 100 hours or 500 hours depending upon what research activity the staff member determines to pursue and how they propose to pursue it; and

(c) whilst staff may be encouraged to seek promotion, it is not a part of their existing academic level that they must meet the standards required for promotion ie required work of the current appointment does not include the work to achieve the higher level appointment.

Ordinary Hours Workload

80. The clause refers to "ordinary hours workload" as meaning the amount of work required such that employees at the relevant academic level and discipline could "with confidence" be expected to perform the work of the particular staff member in a "competent and professional manner" within an average of 38 hours per week. Even with the qualifications of "relevant academic level" and "discipline" at best this could only be an indicative guide, given the diversity of academic work within disciplines, given that two "competent", professional

employees may take different times to address the same research question or issue and may address it in a different way. Further, research output and activities typically span a number of years. If one of the performance expectations is to achieve, say, 2 A* publications over a three-year period, what hours are allocated to that in the particular 12 months to the notional homogenous academic that the clause envisages?

81. Further, staff commonly work across disciplines and the boundaries of disciplines can be debatable. Staff also work in collaborative, cross disciplinary teams and in conjunction with multiple industry partners and other organisation.

82. The clause also fails to take into account that the activities and research questions anticipated at the start of the year may evolve and develop significantly during the course of the year and how the clause is meant to be applied in those circumstances and whether overtime is payable is very unclear.

Academics don't see themselves as closely managed employees and enjoy relationships of high trust

83. The imposition of the regulation sought would also be fiercely resisted by academics and seen as highly excessive managerialism, would be divisive and undermine the relationships of trust within the universities.

"Defences" are problematic

84. The proposed clause attempts to recognise the significant difficulty with any possible meaningful compliance by providing two "defences".

85. The first defence is that a breach of the clause will not arise merely because a staff member works any hours above the "ordinary hours workload" if the staff member chooses to perform "*productive self-directed work which is not required work*".

86. The second defence is that an error made in ascertaining the "ascertained hours", will not breach the Award "provided the employer has a fair and rigorous system for ascertaining those hours".

87. The difficulties in the "defences" are manifest. First, the dividing line between "required work" (which is regulated) and "*productive self-directed work*" of academic staff will always be uncertain. The definition of "required work" and the exception relating to "productive self-directed work" therefore creates significant confusion and uncertainty given the significant overlap between the two arising from the nature of academic work, that academic employment is a vocation and academic culture. "Productive self-directed work" which the NTEU theoretically excludes from "required work" would commonly be relied upon by academic staff in pursuing and seeking promotion and therefore constitute "required work" under the NTEU

definitions. The academic staff member will determine how they will competently achieve expectations, the research that they pursue and the time that they will take to do so.

88. Secondly, the defence where an employer "*has a fair and rigorous system for ascertaining the ascertained hours*" will force employers to have complex systems, measures and processes for estimating/measuring hours required for academic staff to perform particular tasks, including all of the self-directed tasks with the inherent variability and difficulties in meaningfully ascribing hours. The clause does not identify or provide guidance on what such a "fair and rigorous system" looks like to enable compliance, it carries all of the problems identified above about a meaningful assessment of "ascertained hours"/"ordinary hours workload" . Further, it appears such system will not prevent an employee from subsequently claiming the overtime loading.

Adverse impact on research and innovation and international competitiveness

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

Costs and regulatory burden

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

91. In a practical sense, to enable any real confidence in compliance with the clause, a detailed system for directing, monitoring and recording hours would have to be introduced and Universities would have to more closely direct and regulate work, including research and what are currently self-directed service activities, of their academic staff. This will have an adverse impact upon staff, research and innovation.

92. The cost impact and ongoing regulatory burden of doing so would be very significant.

93. This is particularly so given that no such infrastructure presently exists for the recording of academic hours of work (except for casual sessional staff) and that academic workloads are generally managed at the local level between individual staff members and their supervisors. It would inevitably direct funds away from the universities' core activities of teaching and research. It would also, somewhat ironically, significantly increase the workload of academic supervisors and the administrative duties of all academic staff.

Implementation of BOOT Issues

94. The provisions will also cause significant problems in relation to the application of the better off overall test (**BOOT**).

95. The BOOT requires an employer to satisfy FWC that the enterprise agreement in aggregate means that all staff, working under the agreement, will be better off overall than if they were employed under the relevant award and NES.

96. To pass the BOOT a university would likely need to adopt the NTEU proposed award clause or if it not adopting the clause, to prepare detailed data estimating the number of hours of work per week for academic staff at each academic level and in each discipline demonstrating that each staff member would not carry out "*required work*" in excess of the applicable BOOT threshold hours per week in any reasonably foreseeable circumstances. The cost and administrative complexity involved is alarming.

97. The NTEU response is that "*there may be some cost to employers arising from*" the claim, but that employers could easily avoid the burden by reducing the amount of work required by some classes of employees and making additional payments to some employees to make up the gap between the EBA and the amount that would be due under the Award. This position should not be accepted, nor is it a proper answer to all of the problems that are evident with the clause. In effect, the Commission is being asked to impose a clause as a necessary part of the safety net, and then put to the Commission that there is no need to worry that it is burdensome, complex and likely unworkable, because employers can effectively avoid the operation of the clause by paying more.

98. A clause that requires broad built-in defences and that needs to be avoided through bargaining to meaningfully avoid breach in practice should not be adopted a the baseline safety net provision.

Response to some particular NTEU issues

Absence of ability to bring industrial disputes

99. The NTEU implicitly recognise that what they are now seeking is a fundamental departure from many decades of settled industrial regulation, including regulation supported by the NTEU. The NTEU's explanation for this departure is that it had previously consented as a "well informed industrial part[y]" and that it was now withdrawing the consent and secondly, that while working time was always unregulated it was a proper safety net as, under previous legislative regimes, the NTEU had the capacity to notify a dispute and seek arbitration to deal with a situation affecting the industry, an institution or indeed an individual employee. Accordingly, the NTEU submit, this provided protection in relation to working hours.

100. Neither of these arguments is a compelling explanation for the complete NTEU reversal of position. There are good reasons that the kind of prescription and regulation of academic working hours now sought by the NTEU have not been adopted, given the nature of academic employment and self-directed autonomous working.

101. Further, whilst a general dispute cannot be notified to create an award:

(a) the NTEU has not pursued such dispute for 25 years and the argument now put forward is a convenient, theoretical one at best;

(b) the scheme of the legislation has changed with an emphasis on enterprise bargaining and the capacity to bring disputes under enterprise bargaining agreements, which are required to contain a dispute settlement procedure enabling the Commission to deal with disputes under the agreement and the NES. Further, the relevant safety net comprises not just the BOOT but also the NES and enables disputes to be brought and determined by the FWC including in relation to the employer's directions or requirements to work additional hours in excess of 38 hours and the employee's ability to refuse reasonable additional hours an average of 38 per week.

102. The NTEU make the somewhat extraordinary submission at paragraphs 44 and 45 that the addition of their complex award clause would make the application of section 62 of the FW Act "a much simpler matter, even where employees were covered by enterprise agreements".

The BOOT

103. Similar considerations apply in relation to the NTEU's submissions concerning the inability to apply the BOOT to enterprise agreements unless there is a limitation on hours of work prescribed in the award of the type they are now seeking.

104. The BOOT is required to be conducted not just against the award, but also against the NES and state laws. The existence of an annual award salary for professional, autonomous employees together with the NES does provide a fair and relevant safety net and enable the BOOT to be conducted. This is borne out by the multitude of enterprise agreements and their terms across the sector and for other employees with awards that do not prescribe detailed hours and overtime.

105. The various hypotheticals in the NTEU submissions (eg a university could include in an EBA a clause that says an employee must work 50 hours a week for salary one percent higher than the award salary and pass the BOOT) has no basis in actual practice or reality. Such hypotheticals are not reflective of the enterprise agreements in the sector. As identified by the NTEU the enterprise bargaining agreements provide significantly higher salaries and do not

and could not contain provisions limiting section 62 of the NES. Any future enterprise agreement also has to be approved by a valid majority of employees.

Comparison of hourly rates

106. The NTEU submission endeavours to compare effective hourly rates for academic staff with base level trade persons and graduate engineers under the Manufacturing Award. There are 2 main issues that can be said in response:

(a) the first is that the academic staff enjoy significant benefits, flexibilities and self-determination as outlined above and a raft of other employment benefits that are not enjoyed by the employees to whom the NTEU is comparing them. Academic employment has a number of characteristics that are limited to that employment; and

(b) a more valid comparison of rates with similar staff is set out in **Attachment 1** with other employees who also receive an annual salary for their total employment, reflecting the nature of their employment and self-determination of hours. As identified in the attachment the rates for a higher education academic employee who works 45, 50 or even 55 hours per week is the same as, or higher than, the hourly rate for these broadly equivalent staff.

107. It should also be noted that amongst the awards in Attachment 1 are the awards that effectively apply the competitors for Universities, being private and online post-secondary education providers. Such employers are predominantly covered by the Educational Services Post-Secondary Award 2010, which also provides for an annual salary in respect of the hours worked in respect of all hours/employment worked for academic teachers.

108. The UNESCO recommendations concerning the status of higher education teaching personnel attached to the submissions and relied upon by the NTEU regarding Bond University coverage, further reinforces the nature of academic employment. The guiding principles set out in those recommendations describe the nature of academic employment as a profession and a community of scholars with high degrees of professional responsibility and autonomy.

109. Finally, this is also reflected in the fact that the EU directive[12] regarding working hours which imposes a 48 hour cap excludes academic staff from that cap.

Other Matters

110. If, contrary to the position of the universities, the FWC was satisfied that it should vary the award (which the Group of 8 very strongly submit is not necessary or appropriate) and

[12] Directive 203/88/EC of the European Parliament and of the Council of 4 November 2003

considered some additional regulation was required in relation to hours of work for academic staff in the award, then the NTEU clause should clearly not be adopted and a much simpler principles based clause to supplement the NES would need to be considered.

Part 6 NTEU - B - claim for professional and disciplinary currency allowance (Academic)

111. In summary the NTEU seek to increase the rates of pay for sessional staff by:

(a) requiring the universities to pay 10 hours at the "other required academic activity rate" to each casual academic staff member who is engaged to deliver a series of 6 or more related lectures of tutorials in an academic unit of study; and

(b) providing that for each 4 hours of delivery of lectures of tutorials a staff member will be paid by the University an additional 1 hour's pay at the relevant rate of pay for "other required academic activity" (currently $30.91 per hour in the award).

112. These claims are excessive, are not necessary to achieve the modern awards objectives and to the extent that they are to be pursued are more appropriately pursued at an enterprise level in enterprise bargaining or policy regulation.

Policy Familiarisation

113. It is acknowledged that employees of universities are required to comply with certain policy requirements and in particular policies concerning occupational health and safety, bullying, harassment and discrimination and certain policies that are directly related to the work that they are performing. It is also acknowledged that universities have a significant volume of additional policies and guidelines available to staff.

114. However, the NTEU assertion that to have a fair and relevant award safety net, it is necessary to include provisions and allowances regarding policy familiarisation and that each casual academic staff member who teaches 6 or more tutorials or lectures should be paid 10 hours at in excess of $30 an hour to read an employer's policies, should clearly be rejected.

115. First, it is very commonly the case across employment in Australia that casual employees in most industries are required to comply with the policies of their employer. However, there is no award that provides a separate specific payment or allowance for reading the employer's policies or for policy familiarisation.

116. Further, at the enterprise level, universities and particular departments or schools provide for induction for their staff, which covering key employer policies and work requirements. Universities commonly provide online induction and access to policy resources through the

intranet. Universities also typically provide information sheets or induction information to casual employees directing them to key relevant information.

117. The existence of policies being readily available on the university intranet also does not require each casual employee to review and read all of those policies. Whilst some are typically required to be read and understood, being policies regarding sexual harassment, discrimination, plagiarism, OHS and similar policies, the vast majority are an available reference that would only need to be consulted if a particular circumstance arose.

118. There are also significant resources and supports provided in each university for staff, including casual staff, enabling them to perform activities or to deal with issues in a way that would be in compliance with the university's policies or guidelines. This includes guidance from the supervisor, the availability of HR advisors, well-being advisors and a range of other people that staff can simply call or email and seek guidance from as and when required.

119. Issues concerning induction, paid training, policy familiarisation and the level of payment are potentially matters for enterprise bargaining. Similar claims to what are now pursued, have been pursued by the NTEU in enterprise bargaining and the subject of negotiation. In some instances this has led to the claim not being pursued and in other cases, the inclusion of clauses regarding induction or paid training being included in enterprise agreements.

120. It should also be noted that where enterprise agreement clauses have been negotiated, the NTEU have agreed in those clauses to a level of payment generally at half a day (approximately 4 hours). There is no rationale identified or articulated in the NTEU Submissions as to why 10 hours as an academic activity is an appropriate payment.

121. The NTEU clause would also impose additional regulatory burden on universities, including to monitor and ascertain if the employee has previously been engaged by the University, whether their previous employment was more than 12 months earlier, whether they are undertaking 6 or more lectures or tutes, including identification of whether those lectures or tutorials are "related" and whether they are "within an academic unit or study".

122. The claim would also impose direct significant additional cost on universities. Based upon payroll analysis undertaken at UNSW and Monash, the estimated cost of this allowance across the sector if adopted at the universities across the sector is approximately $30 million per annum at award rates and approximately $40million per annum at enterprise agreement rates, which amongst other matters, would reduce the funding available for appointment of other casual academic staff and thereby reducing employment opportunities.

Discipline Currency Claim

123. In summary the NTEU's claim is for the universities to meet the costs of persons that it engages as casual academic staff to be current in their discipline. For every 4 hours of

lectures or tutes the University is effectively required to pay a further hour. The claim should not be accepted for the reasons set out below.

124. The claim is in substance a claim that would increase the minimum wages payable for undertaking a series of lectures or tutorials. In accordance with s.156 of the FW Act, the variation should therefore only be made if the Commission is satisfied on work value reasons to provide the increased payments. No evidence of increased work value in relation to the activities of such academic work is identified.

Engaged because they have the skills and currency

125. At the commencement of any teaching requirement (typically at the start of a semester) casual academic staff are recruited to teach into particular subjects, undertake tutorials or undertake other academic activities on a research basis specifically because they are a person that has the relevant expertise and experience in those relevant subject or tute or research area. This is true of any skilled casual employee employed in any industry, where the reason they are offered the casual appointment rather than another person is because they have the relevant knowledge, skills and experience.

126. In respect of the period of their engagement (which may typically be to deliver a series of lectures over half a semester or a semester) (6 or 13 weeks), the academic staff member does not lose currency and need to undertake significant activities to maintain their currency during that period. Rather, they have been engaged in the first place because they have the relevant currency.

127. Parallels can be drawn with an engagement of casual staff in other industries. For example casual teachers or casual nurses are required to hold particular registrations and undertake continuing education to maintain those registrations. They are employed as casuals on the basis that they have those registrations, knowledge, training and skills to undertake the particular casual teaching or nursing work for which they are being engaged. The hospitals or schools employing those casual employees are not required to pay for the casual employee to have the training the skills or maintain their capacity to be employed as a casual employee in those particular roles or industries.

128. Similarly a casual specialist crane driver who may have particular licencing and qualification requirements is not paid by the construction company to hold those qualifications and keep up to date on developments in safe and effective crane operation or new equipment (even when it regularly engages him or her as a crane driver over many projects or years). Rather the decision is made to engage that particular person to perform the work because they have the particular knowledge of the subject area and expertise to undertake the particular work (which in this case, is particular lectures or tutorials).

Rates already incorporate a component for reading and preparation

129. The rates paid to causal academic staff already include a payment for an additional 1 to 3 hours preparatory work and associated activity in addition to the actual 1 hour of delivery of the lecture or tutorial. This is reflected in clause 18.2 of the Academic Staff award.

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
Tutoring	
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)	105.29
Repeat tutorial (1 hour of delivery and 1 hour associated working time) (where academic holds Doctorate)	70.18
Musical accompanying	
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)	70.18

130. The Academic Award also already provides for the other required academic activity. If the employer required a staff member to undertake particular additional preparatory work or additional activity in a particular discipline area or course design work to deliver the lecture, then the provision for payment already exists in the Academic Award.

Diversity of casual academic engagements

131. The NTEU clause does not recognise that there is significant diversity amongst the casual academic staff who are engaged, with some being engaged to teach a very limited number of lectures or a particular subject and others being engaged to teach more substantively and potentially over longer periods of time. The NTEU claim would require the University to fund currency discipline for a staff member who comes in and delivers say, 3 x 2 tutorials in one subject. By way of example the NTEU claim would require the University to fund currency discipline for a PhD student who comes in and delivers say, 4 tutorials and 4 repeat tutorials in one subject. Such a casual staff member would then be being paid:

(a) 12 hours for the 4 tutorials (being 4 contact hours and 8 hours preparation);

(b) 8 hours for the repeat tutorials delivered within 7 days of the original relevant tutorial (being 4 contact hours and 4 hours preparation); and then

(c) in addition to those 20 hours pay, the university has to pay a further 2 hours discipline currency allowance.

Students already studying in the discipline

132. A large number of sessional staff are PhD students, other post-graduate students or are otherwise industry experts. Under the NTEU claim, whilst there is some recognition for industry experts, the clause would still require the discipline currency payment to be made to a staff member who delivers, say, 8 tutorials even if they are currently undertaking or have recently completed their PhD in relation to that particular area of study or have recently or are currently undertaking a masters by Coursework in the same area and subject matter.

133. Such students are a very significant proportion of persons engaged as casual academic staff.

134. Evidence given by Mr Picouleau and Mr Ward identifies that there are significant numbers of post graduate students employed as casual academic staff. Based upon payroll analysis and student records at UNSW, in excess of 50% of casual academic staff are also concurrently students. The majority, if not all of these students, can confidently be assumed to be engaged in casual academic employment relevant to their area of studies. Typically this could be a post-graduate student who undertakes tutorials for a semester in say Mathematics 101 or Biology 101.

135. Casual academic employment, also provides lecturing and tutoring employment opportunities for students, providing a source of income, development opportunities and also furthering their general experience in the relevant discipline through the casual employment activities.

136. The casual appointments also provide opportunities for staff, building a relationship and gaining exposure with the employer and providing a pathway to potential future employment as a continuing academic staff member.

Casual staff focussed on delivery

137. Whilst there are always exceptions, the development of course or subject architecture, co-ordination of the course and the over-arching determination of the material for inclusion in reading guides and preparation of marking guides are predominately done by continuing academic staff. In comparison, sessional staff are predominately involved in delivery of the lectures and tutorials based upon that subject architecture and based upon the reading lists, guidance and assessment.

138. By way of example a PhD law student undertaking a tutorial in contract law for undergraduate staff is given the requisite reading lists, the issues to be addressed by the tutorial and to the

extent that there is assessment in the tutorial a marking guide or assessment guide. The casual tutor would read the relevant material and lead the tutorial of the undergraduate students. Broader significant reading across the law, attendance at conferences and similar activities that the NTEU identify as maintaining currency in the discipline are not necessary to enable that sessional work to be undertaken.

Additional regulatory burden and costs

139. The discipline currency claim would also impose significant additional costs and regulatory burden on the employer.

140. Based upon payroll analysis undertaken at Monash University and UNSW the estimated cost of this claim and the policy familiarisation claim is approximately $2million dollars per annum at each of those Universities, applying award rates and approximately $3m applying enterprise agreement rates. Extrapolating across the sector and taking into account that Monash and UNSW are larger universities the approximate cost of the policy familiarisation and disciplinary currency claim across the 39 universities would be in the order of $50 to $60 million at award rates and $80-$90million dollars at enterprise agreement rates.

141. Further, there would be an additional regulatory burden as the university would need to monitor and record when an employee has undertaken for tutorials or lectures, triggering the payment and the additional costs associated with administering that payment and also identify when a casual academic has been or is concurrently employed at another university given this impacts upon the payment under the proposed clause. University systems do not identify and record such information.

142. It should also be noted that this claim or similar claims have also been pursued in enterprise bargaining.

Part 7. NTEU - C - Academic salaries, promotion and the MSALs (Academic)

143. The NTEU seek to alter clause 18 which deals with the minimum standards for levels of academic staff (**MSALs**) to qualify the existing provision as follows:

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

144. We note the previous statements by the NTEU that they acknowledge and consider that all of the current public universities do have a bona fide academic promotion system that would

meet the additional words that the NTEU is proposing and that therefore the MSALs would not be used as a basis for reclassification at the Group of 8 or other public universities. Accordingly, the impact of the change is likely to be very limited for our clients.

145. However, the issue then becomes one of principle as to whether the change should be made and whether it is appropriate.

146. This provision has a particular history and was the subject of contested arbitration by the Commission in 2002 which considered whether position classification standards for academic staff should be included in the Award. The outcome of that arbitration was to include a modified version of the classification standards sought, to guide what levels of work could be required of academic staff at each level[13].

147. In doing so it was recognised by the Commission that the appropriate process for advancement between academic levels was merit based promotion based upon peer review and that the inclusion of the MSALs in the Award was not intended to undermine that position nor to compete with academic promotion.

148. Part of the underlying issue is that academic promotion does not usually involve promotion to (and is not dependent upon there being), a vacant position and nor does it involve an assessment of the work value of activities being undertaken by the academic staff member at a particular time. Rather, it is based upon the academic staff member's standing and achievements and capacity to achieve at the higher academic level. As submitted by the NTEU themselves in the 2002 arbitration:

> *"People don't get promoted on the basis of establishing they have got a range of duties. It's not the way the system works. Almost all promotions are merit based promotion based on a tough contest between competing members."*[14]

149. These considerations led to a determination by the Commission (and also a subsequent consent award reflecting that position) to include the statement that *"MSALs will not be used as a basis for claims for reclassification by an employee*". Accordingly, the position now sought by the NTEU does depart from the specific basis upon which the MSALs were included in the Award.

150. The MSALs contained in the Award together with clause 18 of the Academic Award already require that an employee be appropriately classified at the time of appointment. The employee is also required to be advised of that classification in the instrument of appointment under clause 14 of the Award.

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[13] PR901141, PR910932 and PR925533.

[14] PR901141, [41].

151. If the employee acquires extra skills and does work at a higher level and increases their academic standing during the course of their employment, the employee is still entitled to the Award safety net of fair, relevant and enforceable minimum salary for their appointed academic level. The employee could not be required by the employer to utilise or fully utilise those additional acquired skills unless appointed to the higher level and the employee can choose to remain at their current level and to perform work at this level.

152. Under the FW Act, awards must contain certain terms (required terms) and otherwise under section 139(1) may include terms about certain matters (permitted terms) including "skill-based classifications and career structures". Consequently, it is not mandatory that a modern award must include terms about all of the matters listed in section 139(1). Accordingly, in considering the references in section 134(1) and section 3(b) of the FW Act to the Commission ensuring that modern awards provide a fair and relevant minimum safety net of terms and conditions, there is no statutory requirement that a classification structure in an award must then also subsequently provide for progression through the classification structure. Accordingly, the NTEU change is not necessary to meet the modern awards objective.

153. Overall, the use of the MSALs as a basis for reclassification does create a tension with the progression of academic staff in the industry which occurs through peer-based academic promotion based upon merit, taking into account academic standing and their demonstrated capacity to make the contribution at the higher level (eg a Level C who has made a "significant contribution" being able to demonstrate a capacity to make an "outstanding contribution" to their discipline at a national level, which is a requirement for Level D). This requires comparison not just with the MSALs but with their peers and overall capability.

154. There are then some problems that arise from the proposed NTEU clause, including:

(a) uncertainty over what is a "bona fide academic promotion system based on academic merit" and whether this will subsequently be disputed;

(b) "academic merit" is defined in paragraph 5 as being the academic standing of the employee's teaching, service and research. There is a significant cohort of teaching focused staff who may be promoted entirely on an assessment of teaching quality and capability - is that an academic promotion system based on academic merit?;

(c) the clause does not appear to accommodate fellowships such as ARC and NH & MRC fellowships, a number of which are specifically tied to a particular classification level and provide the fellowship salary funding at that level. For example, a Discovery Early Career Research Fellowship is only available to early career researchers (generally staff at Level A or B). The academic staff member could achieve academic levels that exceed Level B, but this would be inconsistent

with the Fellowship to which they were appointed (and inconsistent with the externally funding specifically provided to fund their position). Is such staff member able to claim reclassification even if they are not eligible to access promotion while undertaking the fellowship?

155. In summary, there is no compelling reason, particularly having regard to the requirements of the FW Act, for the current clause to be changed.

156. No evidence has been produced to suggest there is any particular industrial injustice arising from the Award that needs to be fixed. The union's hypotheticals (eg a Pulitzer prize or Nobel prize winner or person who cures malaria, being refused advancement from Level A) in paragraph 17, page 46 of the NTEU Submissions as a rationale for the change are fanciful and there is no evidence that they are based in reality.

157. The change proposed by the union could create uncertainties and make the process unnecessarily complex.

158. The NTEU argument that disputes about reclassifications can no longer be resolved through the general Commission dispute processes leading to the making of awards is not unique to reclassification disputes. There are a whole range of matters that are not regulated by modern awards or specifically regulated by modern awards that are now solely in the province of enterprise bargaining. This is one of the key objects of the FW Act.

Part 8. NTEU - D - Changes to the sessional rates schedule (Academic)

159. The NTEU have sought to make a number of changes to sub clause 18.2 of the academic award. The NTEU describe the changes as "correcting minor drafting errors". However, the changes go beyond such description.

160. To assist the Commission we attach at **Attachment 2** a copy of the existing clause 18.2 with:

(a) the proposed changes of the NTEU marked up; and

(b) also identified:

(i) where those changes form part of the pre-reform award,

(ii) where the NTEU have selectively omitted parts of the pre-reform award;

(iii) where the NTEU have modified the reinserted parts of the pre-reform award; and

(iv) any new additions that they have made which formed neither part of the pre-reform award or modern award.

161. As is evident from that document the changes sought by the NTEU are not accurately described as simply correcting errors or omissions. The proposed changes by the NTEU are an amalgam of inserting some wording that appeared in a pre-reform award that were not adopted by the Commission in the modern award, some modifications and additions made by the NTEU.

162. The most significant of those is the changes to provide that certain higher rates which attach to employees who hold a PhD also attach to any employee who performs subject co-ordination duties, not only in respect of the subject co-ordination duties but in respect of any casual academic task they perform even those unrelated the subject co-ordination duties.

163. For example a staff member (without a PhD) employed to undertake full subject co-ordination duties in Sociology 101, based on the NTEU's position, would receive the higher rate for undertaking a tutorial in an unrelated subject or performing some marking in other subjects that they were not performing subject co-ordination duties in.

164. The Group of 8 submit that the NTEU position is not supported conceptually when the two entitlements are considered nor by considering the pre-reform award which led to the making of the modern award.

165. The reference to a holding PhD/Doctorate is a reference to holding a particular level of qualification that is applicable to all the employee does and accordingly and employee with that qualification receives a particular rate when they are performing any academic activities. This is reflected in the current drafting of clause 18.2, where the award deliberately specifies each circumstance where the higher rate applies.

166. The payment of a higher rate for performing full subject co-ordination duties is effectively a higher duties rate and relates to the performance of that particular activity. It recognises the additional duties or responsibilities for performing that activity. The two matters are therefore conceptually different. The fact that an employee performs those additional duties or responsibilities (full subject co-ordination) and receives the higher rate of pay for performing them does not provide a proper basis for requiring that employee to be paid a higher rate for the performance of their other unrelated casual activities.

167. The Group of 8 position is also supported by considering the pre-reform award. Attachment 2 shows the wording from the pre-reform award including the more detailed specification of other required academic activity rate. As can be seen from the more detailed breakdown of the other required academic activities one of those activities is specifically references subject co-ordination. What the clause does it makes it clear that in respect of full subject co-ordination duties the employee is entitled to receive a higher rate, in comparison with the other required academic activities in respect of which (in the absence of a PhD) the employee receives the standard rate. Further, both the pre-reform award and current award specifically identify each

instance where the higher rate applies to those holding a PhD and each instance where the higher rate applies for performance of full subject co-ordination duties. The fact that the full subject co-ordination is not listed as a basis for higher rates in each instance is not an "error". In one area both apply and that is a person performing full subject co-ordination and holding a PhD and this is specified.

168. The reference in the pay scale for non-casual staff, in the note to level A step 6 is simply a recognition that traditionally continuing staff who were engaged to undertake full subject co-ordination duties could not be employed at level A, rather were employed at level B. This does not translate into requiring all disparate casual academic activities that are performed by an employee who also happens to perform subject co-ordination, be paid a higher rate. The casual academic activities are each discrete.

169. The statements by the NTEU that:

(a) the variation they seek does not change any rates of pay, nor change who is entitled to the benefit those rates, is not correct; and

(b) that casual sessional staff "are reliant upon being paid an hourly rate for the work that they do and at the appropriate work value", does not actually assist the NTEU position, it supports the higher rate for subject co-ordination applying to the higher work value activity. The current award already provides for payment for all the work that a casual employee does who performs subject co-ordination duties. Where the work is the subject co-ordination duties it is paid at that higher work value. Where the activities being undertaken are the standard lecture or tutorial or other academic activity (which does not involve higher work value) then they are paid the standard rate.

Part 9. NTEU - E - General staff working hours and overtime (General)

170. The NTEU have sought changes to clause 21, to add at the start "The maximum ordinary hours of work, and the spread of hours during which (other than for shift workers) ordinary hours can be worked, shall be as set out in the following table, provided that ordinary hours may be worked in a manner agreed over a four week cycle….

171. Whilst in substance the wording included is fine and is essentially a drafting matter for this Full Bench, the position is already reflected in the clause and table within the clause. The proposed change is therefore unnecessary and the existing provision is already clear.

172. The NTEU have also sought to add two clauses to clause 23 as follows:

23. Overtime

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

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.

173. In relation to the addition of clause 23.2, such change is not required. The existing Award provision already clearly specifies an entitlement of an employee to be paid overtime "for all authorised work performed outside of or in excess of, the ordinary or rostered hours as follows".

174. This is a standard award formulation and it is in similar or identical terms to a large number of award provisions that provide an entitlement to overtime. Attached at **Attachment 3** is a list of awards containing identical or similar clauses regarding overtime. No award cause that we have been able to idenify has the equivalent of the proposed clause 23.2/23.3.

175. Where an employee is required by the University to work additional time the employee is already entitled to the relevant benefits (for example overtime or TOIL/flexi-time). Further, universities have in place policies concerning overtime, flexi time and toil and provide appropriate forms and on-line mechanisms for employees to record time and to submit relevant documentation for approval. Where an employee claims overtime to which they are entitled, it is paid.

176. The NTEU correctly anticipate the submission that given the existing terms of the award, the issue identified by some witnesses of the NTEU to the effect that they don't feel able to claim overtime or feel that there is no point, is effectively one of ensuring that the award is applied and a question of enforcement.

177. To the extent that the NTEU wishes to pursue a particular mechanism to assist in the practical application of overtime or toil or particular positive steps to be taken by an employer these are matters for enterprise bargaining. This is again demonstrated in fact by the position adopted by the NTEU in pursuing similar claims in bargaining and in some instances agreeing to include particular provisions and in other enterprise agreements agreeing not to include provisions.

178. The proposed clause, based upon "reasonable steps to ensure" as a binding award obligation, creates a degree of uncertainty and ambiguity. To expose an employer to a civil penalty for contravention of such an obligation specified in such terms is not appropriate. This is highlighted by the NTEU's own submissions at paragraph 29 on page 68 where it acknowledges that a "legitimate question" arises as to what might constitute the taking the reasonable steps but should include matters that have "a rational or natural tendency" to ensure that work is not being done which is uncompensated and then goes on to list at paragraph 30:

- *the adoption and promotion of appropriate policies;*
- *clear and direct instruction to supervisors and employees, with measures taken to deal effectively with breaches of those directions;*
- *the re-organisation of work flows to deal with bottle necks;*
- *the recording of time worked including by technological means where feasible;*
- *the inclusion in training of the importance of work life balance and specifically the impropriety of working unpaid overtime.*

179. This raises the issue that if any such activity or any particular part of such an "imagined" list was not adopted then as a starting point presumably the employer is in breach of the award based upon the NTEU's formulation. This highlights the problems with the addition.

180. In relation to the new clause 23.3 this clause, whilst presented as a qualification or clarification, it is a de-facto claim for overtime.

181. If an employee is required to work outside of hours then they have relevant entitlements to claim overtime or TOIL/flexitime, subject to the provisions of clause 23. However, the new clause 23.3 effectively seeks to introduce by implication an entitlement to claim overtime where an employee may occasionally respond to email or make or receive phone calls outside of hours. If that is not the purpose of the clause it is difficult to see how the inclusion of such a clause in the award is necessary to provide a fair and reasonable safety net.

182. Accordingly, the variation to include clauses 23.2 and 23.3 should not be accepted by the Commission.

Part 10. NTEU - F- Link wages to classifications (General)

183. The NTEU have sought to include a link between the body of the general staff award and the classification definition set out in Schedule B of the existing award (becoming Schedule A in the technical draft prepared by the FWC).

184. It acknowledged there currently is no clear reference in the body of the award to applying Schedule B and that the existing provisions from the pre-reform awards were omitted. The inclusion of an appropriate clause is supported by the Group of 8.

185. This issue has also been partly overtaken by the technical and drafting issues in exposure drafts released by the Commission.

186. In that process, the Group of 8 submitted in relation to the technical exposure drafts:

The Group of 8 submit that rather than the draft clause included by the Commission, the Commission should adopt the wording which was contained in the two main general staff pre-reform awards that were applicable at the time of the making of the modern award, but which were inadvertently omitted as follows:

> *"8.1 The higher education worker level classification standard set out in Schedule A - Classification Definitions, shall be the primary determinant of the classifications of general staff positions. Positions will be classified at the level which most accurately reflects the work performed by the employee as required by the employer, taking into account the skills and responsibilities required to perform that work. No employee shall refuse to perform duties reasonably required, consistent with the employee's classification and which the employee is competent to perform."*

This clause reflects clause 6.4/6.5 of the former Higher Education General Staff Salaries and Classifications Award 2002 (AP815928) which applied to the majority of universities outside of Victoria and reflects the equivalent clause in Schedule B of the Higher Education Workers Victoria Award 2005 (AP844616).

It is respectfully submitted that the adoption of this previous formulation provides greater guidance to the parties [than the one the Commission drafted in the exposure draft] as to the relevance and use of the classification levels in Schedule A and reflects the previously established existing award regulation.

187. The only issue raised by the NTEU is a comment that the last sentence under 8.1 is not an allowable award term under section 139 of the FW Act. Such comment is incorrect. The entire clause concerns classifications and duties relevant to the classifications and is otherwise incidental to such matters.

188. It is also incidental to Clause 14 of the award that contains a requirement to provide an instrument of appointment which informs the of employee of certain terms including classification and the main conditions of employment. A provision directed at what skills and duties an employee may be required to perform in the context of that classification structure is clearly incidental to such matters.

189. No other merit based reason has been provided by the NTEU why only part of the pre-reform award provision should be re-adopted rather than reinserted in its entirety.

Part 11. NTEU - G - Changes to classification definitions (General)

190. The NTEU have proposed a number of wording changes in the classification descriptors contained in appendix B. The NTEU have stated both in the NTEU submissions and in the original application made in March 2015 that the changes are simply minor changes and "do not involve or seek to change the work value attaching to a particular classification levels or rates of pay".

191. The NTEU submissions (paragraph 4 at page 77) state that if the employer parties and CPSU consider that the descriptors 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. The Group of Eight consider the descriptors do not require change as part of this review and understand that the NTEU are therefore not pressing the changes. For completeness we nevertheless make some brief comments.

192. Further, notwithstanding the stated position of the NTEU regarding the nature of the changes, on their face the NTEU proposed changes do raise a number of issues, including:

(a) the changes do involve a change in work value - for example, but without listing all matters:

(i) changing "supervision" to the provision of "guidance and direction" at level 3;

(ii) changing the occupational equivalent and level 4 from "Technical Officer" to "Newly Qualified trades based Technical Officer";

(iii) adding qualifies such as in "straight forward" to "respond to reference enquiries" in typical activities of HEW 4,

(iv) replacing "provision of a full range of secretarial services" to only one aspect being "preparing correspondence" in typical activities of HEW 4;

(v) in the typical activities of HEW 4 changing references from "administration" to "coordination", which is a lower level skill;

(vi) changing "researcher" to "senior researcher" at HEW 8; and

(vii) deleting some positions from particular occupational equivalence at certain levels such that they only appear at higher levels;

(b) the changes also place a greater emphasis on "Occupational Equivalent" notwithstanding that dimension of the classification descriptors is effectively a check at the conclusion of a classification conducted against the skill based descriptors, rather than being the basis for classification in a skills based classification structure.

193. Similarly, the Commission should not be directing parties to establish a working party to examine and revise the descriptors. The basis for such a direction is not clear but in any event is not appropriate and a significant waste of resources.

194. To the extent that any modifications or supplementation are sought, this can and does occur through enterprise bargaining at the institutional level. If the parties decided to discuss such matters in working parties that is a voluntary matter for the parties, not for direction by the Commission.

195. For completeness we note that the NTEU refer to directing the parties to hold a working party as being the procedure adopted in 2002. This is not our recollection and we appeared in that award variation matter. In 2002, the descriptors were the subject of a substantive claim by the NTEU and were the subject of final arbitration by the Commission[15].

Part 12. NTEU- H - Bond University Academic Staff Association proposal (Both)

196. This is primarily a matter for Bond University.

197. Whilst the Group of 8 do not accept the matters raised by the NTEU in the NTEU Submissions regarding the merits of regulation of fixed term employment, they do note that there is a disparity in the award regulation whereby our clients are subject to significant award restrictions in relation to appointment of staff under fixed term contracts that are not binding on all universities (and are also not binding on private providers who are regulated by other awards). As a matter of principle this is an inequity in the award safety net and does not support a stable, simple and easy to understand award system.

Part 13. NTEU- I - "Full time" or "continuing" employment (Both)

198. The submissions concerning definitions of full time, part time and fixed term employment have been addressed to finality and a consensus position reached in the technical exposure draft stage, including in conference with Commissioner Johns on 10 May 2016. That clarification of the intersection between full time and part time employment and fixed term employment has subsequently been included in the latest exposure draft of the Award published on 3 June 2016.

[15] PR911627.

Part 14. NTEU - K - "context" to "content" (Academic Award)

199. The NTEU seeks to vary the provisions concerning redundancy to change reference from "academic context" to "academic content " in clause 17.1

200. Clause 17.1 applies in circumstances where an institution has decided to terminate the employment for one or more academic employees for reasons of an economic, technological, structural or similar nature and then has an inclusionary list, one of which is "a decision to cease offering or to vary the academic context of any course or subject or combination or mix of courses or subjects conducted on one or more campuses".

201. The NTEU present this as a "typo" that has been in place for over 25 years.

202. Even if, the NTEU were correct and there was some change between a draft award submitted in 1989 and the final award issued by Baird, C in print H6821, that language has been retained in subsequent arbitrations and been entrenched and the same "typo" has been adopted by the NTEU in bargaining and included in enterprise agreements in the sector.

203. The reference to academic context has logical meaning and can be applied.

204. Further the original formulation from 1989 that the NTEU identify in their submissions as not having been adopted, has also been changed in a number of ways in what now appears in clause 17.1. ie It is not a situation where the current wording is otherwise identical in all respects to what was included in 1989 save for this single "typo".

205. The NTEU Submissions identify that this claim has not come about through any problem with the award or issue with its application, but rather from a discrete dispute under an enterprise bargaining agreement referred to at paragraph 8 of page 99 of the NTEU Submissions with reference to Professor Komessaroff at Monash University. No evidence has been brought concerning that matter. However given it is referred to by the NTEU we are instructed that:

(a) the matters described by the NTEU are inaccurate and incomplete;

(b) Professor Komessaroff was based in a particular unit in respect of which the funding had ceased;

(c) Ethics subjects were already taught elsewhere in the University and aspects of the ethics program previously taught by him as part of his duties, were not continuing and would be addressed as parts of another course;

(d) It was only the NTEU who briefly sought to characterise the issue before a review committee as being one impacted by whether there was a change in academic context or content; and

(e) Professor Komessarof was ultimately redeployed elsewhere and was not retrenched.

206. In relation to the NTEU comments concerning "content" being more "logical and just", both academic context and academic content could have logical and just application and describe circumstances where a staff member's position is no longer required. The suggestion by the NTEU that academic context is essentially a description of moving a subject or subjects from one organisational unit to another, does not reflect the breadth the term "academic context". Depending on the nature and the extent of a change in academic context of a course or offering such change could result in redundancy.

207. In short, the provision has been in place for an excess of 25 years, and has been entrenched in subsequent awards and the enterprise agreements, has not given rise to any issues or concerns save for 1 discrete issue arising under a clause included in an enterprise agreement and which involved significant other issues that are not referred to by the NTEU. These provisions were adopted by the Commission in the modern award and the change can hardly be described as necessary.

Part 15. NTEU - J - Claim for ICT Allowances (Both)

208. The NTEU have sought to include in both the Academic Staff Award and the General Staff Award an Information Technology Allowance that provides for reimbursement with respect to the "*actual costs incurred, up to the monthly subscription cost of the cheapest service package…*" for using ICT facilities when employees are required to use their own telephone, mobile, email and internet to perform work. In the Academic Staff Award, the NTEU clause goes further to say that for the purposes of the allowance, "*an employee is required to use any of the services [specified] for work purposes if that use is required by the nature of their work, including by custom and practice, unless they are directed in writing not to perform any work requiring any of those services when away from the workplace*."

209. The ICT Allowance Claim should not be accepted for the reasons set out below.

Not necessary to meet modern awards objective and not a feature of other modern awards

210. This is not a change that is necessary to meet the modern awards objective and extends beyond a fair and relevant minimum safety net of award terms and conditions. An ICT allowance of the type sought by the NTEU is not a feature of other modern awards, even those that apply to service-based industries that typically use a variety of ICT facilities to perform their work including at home or outside of work hours. In this regard, it should be noted that:

(a) of the 137 modern awards that exist, no other modern award includes a clause in the same or similar terms to the clause sought by the NTEU;

(b) 19 out of the 137 modern awards provide for a telephone allowance, or reimbursement of expenses relating to the use of a telephone, or something similar. However, in most cases, the payment of the telephone allowance is connected to the requirement of such employees to be "on-call". No such requirement exists in the Higher Education Awards. A table which identifies these awards and the relevant provisions is **Attachment 4** to these submissions;

(c) of those 19 awards, the Commercial Sales Award 2010, the Contract Call Centre Award 2010 and the Telecommunications Service Award 2010 contain slightly different terms in that they only apply where the employee does not already have such equipment and are requested in writing by the employer to have such equipment. These awards contain a clause in the following terms (or similar):

> "*Where an employee does not have a telephone, modem or broadband connection and, at the written request of the employer, the employee is required to have such equipment, the employer must reimburse the cost of purchase, installation and rental.*"

(d) none of the 19 awards contain a "reverse onus" type provision such as is proposed for the Academic Staff Award whereby the allowance will be paid unless the employer directs the employee not to perform work using such equipment away from the workplace; and

(e) there are otherwise no other modern awards that require employers to pay for or reimburse employees for home internet use or email access.

211. Further, as is the case with many of the other NTEU claims, the NTEU has pursued similar claims in bargaining to what they are now pursuing in respect of the inclusion of an Award ICT Allowance. In most, if not all, instances this has led to the bargaining claim either not being pursued by the NTEU or an agreement for such a clause not to be included in enterprise agreements. Such issues are already dealt with appropriately through policies and procedures at Universities.

Provision of ICT facilities at Universities

212. Universities provide significant ICT facilities and equipment to all staff which are available throughout the University campuses. Whilst these facilities may vary from University to University and within the various organisational units within those Universities, such facilities and equipment generally include access to desktop computers, laptops, printers, network and internet access including Wi-Fi, e-mail accounts, access to computer laboratories and IT facilities in libraries (including out-of-hours and in some cases 24/7 access). Wi-Fi is generally available across the University campuses for use by both staff and students.

213. Staff (including academic staff) are therefore provided with all of the ICT facilities and equipment, and access to those facilities and equipment, that they need to be able to perform their work at the University. It is not necessary for staff, nor are they generally required, to work from home or to buy their own computers, laptops, mobile phones or home internet use for the purposes of performing work. Staff are not generally directed or expected to be contactable late at night whether by phone or email.

214. Whilst many academic staff perform work from home and at locations other than the university, this is by choice and is reflective of the self-directed nature of academic work and the flexibility and freedom enjoyed and valued so highly by academic staff about how, when and where they perform their work. The NTEU claim and references to custom and practice clearly seeks the universities to fund the home internet access and home computers for academic staff, who regularly choose to work off-campus, in addition to any ICT that the employer provides them at work.

215. It is possible for academic staff to perform all of their work on campus but this is simply not the way in which academic staff choose to undertake their work. For these reasons, the "reverse onus" type provision sought by the NTEU to be included in the Academic Award is unreasonable and ill-suited to the nature of academic work and academic culture. If academic staff were directed in writing by the University not to any perform work when away from the workplace so as to avoid having to pay the ICT Allowance this would also be met with significant resistance from academic staff and would be seen as an intrusion on their self-directed work. It would also limit flexible working practices.

216. If staff are approved to work at home, including in approved flexible work arrangements (eg following parental leave), or on rare occasions that they are required or directed to perform work at home then universities can and do accommodate this. For example:

(a) Academic staff are generally issued with laptops;

(b) some Universities, such as UNSW, allow staff to borrow laptop computers, i-pads and other ICT equipment if required;

(c) Universities have policies and procedures which enable staff to seek reimbursement for things such as telephone rental, calls and home internet access;

(d) Universities also generally provide staff with the option to salary package ICT equipment for work use.

217. Further, it is recognised in Australia that where employees choose to perform work from home and use their own ICT facilities and equipment then this is a tax-deductible expense.

Part 16. NTEU- L - Research Institutes

218. This claim predominately concerns other entities, being Research Institutes, rather than the Group of 8 Universities.

219. Our clients do not presently intend to make substantive submissions about the merits or otherwise of those applications. However our clients do make submissions in relation to the proposed formulation and definition of "research institute" proposed by the NTEU for inclusion in the Higher Education Awards. The NTEU have proposed as follows:

> ***Research Institute*** *means a corporate entity;*
> *• whose primary activity is to undertake medical, health, scientific or social research, and*
> *• which is established for a charitable, educational or other public purpose, and*
> *• which is either affiliated to a university; or*
> *where employees hold academic titles associated with higher education, and*
> *• where the supervision of the research work of postgraduate research students occurs;*
>
> *but not including:*
> *• any entity whose primary business is the provision of medical, health, social, or religious services to patients, customers or clients*
> *• any State, Territory or Commonwealth Department or Agency;*
> *• any for-profit corporation.*
> [our emphasis]

220. An almost identical definition was proposed in the 2 year review under the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 Sch 5, Item 6 (see 213) FWC 7947. Our clients adopt the same substantive submissions that they made at the time concerning the issues with the definition, should the Commission determine that research institutes should be covered by the higher education awards[16].

221. As can be seen from the proposed definition, whether a corporate entity is a "Research Institute" and therefore whether it is covered by the Higher Education Awards will depend on a number of criteria being met, including whether the entity is "affiliated to" a University, or where "employees hold academic titles associated with higher education".

222. The definition as currently drafted should not be adopted for a number of reasons:

(a) there is a significant lack of certainty and clarity. The term "affiliated to" is not defined is not a term of art in the industry. The nature and extent of relationships that are badged or referred to as "affiliations" vary significantly, from the University providing a small one off payment and having its logo displayed on the entity's website through to a formal affiliation that is reflected in the University statutes or is

[16] Note that because the Commission determined that the changes to extend coverage to research institutes were beyond the scope of the 2 year interim review, this issue of the definition was not determined.

the subject of a formal affiliation agreement of some kind that is binding upon the entities. Accordingly, there would be significant and genuine uncertainty for employees, Universities and entities that may or may not be "Research Institutes" as defined;

(b) further, even if it was clear that there was a formal association between an entity and, the coverage does not depend upon the extent of the formal affiliation and whether it bears upon some or all of the work (and staff) of the research institute or is only peripheral;

(c) the definition is neither clearly industry nor occupationally based;

(d) the definition has a temporal element such that an entity would become bound by and required to apply the Award during the period that they had an affiliation (eg upon entering into a formal association with the University) but when that affiliation or association ceased (for example the Agreement expired or was terminated) the Award would no longer cover that entity and would cease to apply to the relevant employees;

(e) the definition could create anomalous results. An entity that is a research institute would be covered by the Higher Education Awards if it entered into some formal association with or was otherwise affiliated in some way with the University (whatever that means) and another entity that conducts exactly the same research employing exactly the same types of staff, performing identical work in the same discipline area or industry (but has not entered into a formal association with a University) would not be covered. In turn this may create incentive or disincentive to affiliate with Universities and this should not be a function or outcome of an award coverage definition; and

(f) problems with reference to academic titles - Universities commonly convey honorary academic titles on a range of individuals. On its face, the proposed NTEU definition would presently be triggered if a research institute happened to employ a person who, for instance, happened to be an honorary professor at a University, irrespective of whether the holding of that academic title relates to or was conveyed because of their employment with the research institute.

223. In the circumstances, if the Commission intends to expressly include "Research Institutes" under the Higher Education Awards, our clients are opposed to the current definition and submit that a definition should be adopted that provides for greater certainty and is not dependent upon an affiliation or formal association with a University or the holding of academic titles associated with higher education.

Part 17. NTEU- M- Claim for casual conversion for academic staff

224. Group of Eight note that the NTEU are not presently pressing any application to provide for academic casual conversion.

Part 18. Common Claims

225. The Full Bench has been referred two matters arising from AM2014/47 (**Annual Leave Full Bench**)[17] and AM2014/300 (**Award Flexibility Full Bench**)[18] regarding whether draft model terms determined in respect of applications concerning other awards, should be included in the education awards. These matters have been the subject of previous submissions by all parties.

Annual Leave

226. On 26 October 2015 the Group of 8 filed submissions to address the issue of the incorporation of the model term in relation to excess annual leave and cashing out of annual leave (**EAL Model Term**) into the General Staff Award and the Academic Staff Award as raised in the decision of the Annual Leave Full Bench on 11 June 2015,[19] and on 15 September 2015.[20]

227. For the reasons set out in its submissions of 26 October 2015, the Group of 8 submit that if the Full Bench intends to include the EAL Model Term in the Higher Education Awards, it should be tailored to take into account and properly have regard to some specific features of the higher education industry. A copy of the Group of 8 submissions previously filed with FWC is attached at **Attachment 5** for ease of reference of this Full Bench.

Award Flexibility (TOIL)

228. On 12 November 2016 the Group of 8 filed submissions directed at the potential incorporation of the model term in relation to time off in lieu of payment for overtime into the General Staff Award (as set out in the Draft Determination issued for the General Staff Award for comment on 16 October 2015 as part of the schedule of draft determinations) (**Draft Determination**).

229. The Draft Determination followed the decisions of the Full Bench on 16 July 2015,[21] and on 6 October 2015.[22] The Group of 8 opposed the Draft Determination being made and oppose the TOIL model term being included in the General Staff Award for the reasons set out in its submissions of 12 November 2015, including as it consequently imposes, for the first time, an

[17] 4 yearly review of modern awards - Annual leave [2015] FWCFB 8030, [11].

[18] 4 yearly review of modern awards - Award flexibility [2015] FWCFB 8412, [7(ii)].

[19] 4 yearly review of modern awards - Annual leave [2015] FWCFB 3406.

[20] 4 yearly review of modern awards - Annual leave [2015] FWCFB 5771.

[21] 4 yearly review of modern awards - Award flexibility [2015] FWCFB 4466.

[22] 4 yearly review of modern awards - Award flexibility [2015] FWCFB 6847.

overtime pay entitlement for more senior professional/general staff employees who expressly have no entitlement to overtime pay. A copy of the Group of 8 submissions previously filed with FWC is attached at **Attachment 6** for ease of reference of this Full Bench).

230. It should also be noted that the there was no application for variation by any party, including the NTEU to change the eligibility for overtime. The claim by the NTEU in relation to the variation concerning overtime for general staff relates to the University taking positive steps to enforce the existing provisions as set referred to in Part 9 above.

231. Since filing of the parties' submissions, the incorporation of the TOIL model term into various other modern awards was subject of a hearing before the Award Flexibility Full Bench on 10 December 2015. Following that hearing the Award Flexibility Full Bench published its decision and confirmed that the TOIL model term would not be inserted into those awards which make no provision of overtime.[23] Accordingly no part of the TOIL common claim has involved the imposition of overtime for employees who were not previously entitled to overtime. Rather the Full Bench has determined not to include the provisions for employees that do not presently have an overtime pay entitlement. These matters further support the Group of 8's previous submissions.

Clayton Utz
Solicitors for the Group of Eight
6 June 2016

[23] 4 yearly review of modern awards - Award flexibility [2016] FWCFB 2602, [50(i)].

Attachments to the Submission

Attachment 1

Attachment 2

Attachment 3

Attachment 4

Attachment 5

Attachment 6

Witness Statements

Statementof Professor Simon Biggs

Statement of Professor Dawn Freshwater

Statement of Professor Stephen Garton

Statement of Professor Marnie Hughes-Warrington

Statement of Andrew Picouleau

Statement of David Ward