

IN THE FAIR WORK COMMISSION

Fair Work Act 2009

4 yearly review of modern awards – Education group (AM2015/6)

AM2014 Higher Education (Academic Staff) Award 2010 [MA000006]

AM2014 Higher Education (General Staff) Award 2010 [MA000007]

AHEIA Final Submissions in Support of Proposed Variations

1. These submissions are made by the Australian Higher Education Industrial Association (AHEIA) in accordance with Directions issued by Johns C. on 12 January 2017. They relate to the variations of the academic and general staff modern awards proposed by AHEIA. They are to be read in conjunction with the submissions filed by AHEIA on 18 March 2016.
2. AHEIA no longer pursues its application to vary both of the higher education awards to make changes to the definitions of types of employment as this issue was resolved by consent during conciliation in respect of both awards.

A. Addition of a further category of fixed-term employment

3. AHEIA has proposed varying both clause 11.3 of the *Higher Education (Academic Staff) Award 2010* and clause 10.3 of the *Higher Education (General Staff) Award 2010* to add a further circumstance in which fixed-term employment may be used, by adding the following subclause:

(g) Where uncertainty exists as to future workforce requirements arising from a decision to undertake major organisational change or a formal review of a work area, or where work activity is being introduced or discontinued, or to cater for a sudden and unanticipated increase or decrease in student enrolments.

4. At Attachment B of its submissions filed on 18 March 2016, AHEIA provided extracts from enterprise agreements then in place at all Australian public universities, showing that, taken together, each of the elements covered in the proposed new subclause has been included with NTEU agreement at one or more universities.

5. Although the NTEU has claimed in its submissions in reply of 3 June 2016 that the proposed subclause is “vague, as well as being unfair”, this has not prevented the union from agreeing to provisions allowing for fixed-term employment in each of the circumstances shown in the table below:

A. Where uncertainty exists as to future workforce requirements arising from a decision to undertake major organizational change.	Charles Darwin University Edith Cowan University University of Western Australia
B. Where uncertainty exists as to future workforce requirements arising from a formal review of a work area.	Murdoch University
C. Where work activity is being introduced.	Most universities
D. Where work activity is being discontinued.	Most universities
E. To cater for a sudden and unanticipated increase in student enrolments.	Southern Cross University University of Canberra University of Western Australia Western Sydney University
F. To cater for a sudden and unanticipated decrease in student enrolments.	Curtin University of Technology Edith Cowan University Murdoch University University of Adelaide University of Queensland University of Wollongong

6. The NTEU has not provided any evidence of disputation or abuse at any university in relation to these agreed provisions. Indeed, that lack of disputation relating to the provisions should serve as evidence of their workability.

7. AHEIA provided evidence from Diana Chegwidden, Director, Human Resources at the Australian Catholic University (“**ACU**”), in relation to the clause agreed in the current and former enterprise agreement at ACU which allows for fixed term employment to be used in the circumstances of a new or disbanded organisational unit.
8. It was put to Ms Chegwidden in cross-examination by the NTUE that the fixed-term category in the modern awards relating to “specific task or project” is wide enough to allow for fixed-term employment in relation to a new or disbanded organisational unit (PN9388-9391). Ms Chegwidden’s evidence was that explicit reference to new or disbanded units had been seen as necessary by ACU to provide “clarity” and “flexibility” and that in the past the use of the specific task or project category in these circumstances had been “challenged” by the NTEU (PN 9400 and PN9403).
9. This evidence demonstrates that approval of AHEIA’s proposal would promote the modern awards objective of ensuring that the higher education awards are “simple” and “easy to understand” (s 134(g)).

B. Deletion of severance payments upon expiry of fixed-term employment

10. AHEIA has proposed the deletion of subclause 12.4 of the *Higher Education (Academic Staff) Award 2010* and clause 11.4 of the *Higher Education (General Staff) Award 2010*. These provisions relate to the payment of a “severance payment or retrenchment benefit howsoever called in accordance with the NES” in defined circumstances in which a fixed-term contract is not renewed.
11. This provision is inconsistent with the legislative provision for the National Employment Standards, which were introduced after the making of this award provision, as section 123(1) of the *Fair Work Act 2009* states that the National Employment Standard which provides for notice of termination and redundancy pay does not apply in relation to:
 - (a) an employee employed for a specified period of time, for a specified task, or for the duration of a specified season;

12. AHEIA further notes and supports the submission made on behalf of the Group of Eight Universities in this case at Paragraph 16(b) of its written submissions filed on 11 March 2016: “The Full Bench of the Commission in 2010¹ deleted from the definition of fixed-term employment the sentence “*During the term of employment, the contract is not terminable, by the employer’ other than during a probationary period, or for cause based upon serious or wilful misconduct.*” The Full Bench omitted this sentence on the basis that such provision had been overtaken by the legislative changes. Similar considerations apply here and a similar approach should be adopted.”
13. Furthermore, no other modern award includes provisions of this nature. These provisions therefore do not provide a “fair and relevant minimum safety net”, particularly having regard to “productivity, employment costs and the regulatory burden”.

C. Deletion of industry specific redundancy provisions

14. AHEIA has proposed the deletion of clause 17 – Industry Specific Redundancy Provisions of the *Higher Education (Academic Staff) Award 2010*. This clause currently has application to any institution which ... was bound by the *Universities and Post Compulsory Academic Conditions Award 1999* [AP801516] at 12 September 2008.
15. We note that section 141(5) of the *Fair Work Act 2009* specifically envisages the removal of industry specific redundancy schemes:

(5) The FWC may vary a modern award under Division 4 or 5 by omitting an industry-specific redundancy scheme from the award.

AHEIA submits that the FWC should do so in this case for the following reasons.

16. The other employers to whom this modern award currently applies, who were not bound by the 1999 award as at 12 September 2008, include the University of Notre Dame, Bond University and the Batchelor Institute of Indigenous Education. However,

¹ *Higher Education Industry - General Staff - Award 2010* [2010] FWAFFB 1333 (26 February 2010)

respondency to this award is not defined by a list of employers, but rather by a definition (see Clause 4 and the definition of **higher education industry**). It is possible, even probable, that other educational institutions will in the future be covered by the *Higher Education (Academic Staff) Award 2010*. They, like the 3 institutions named above, will not be bound by the requirements of clause 17.

17. The provisions of Clause 17 impose a significant regulatory burden and cost on those universities to whom it does apply. This is a burden that other institutions escape for no good reason other than the historical development of award coverage in the sector.
18. The notice period provided for in Clause 17 is significantly out of step with general standards that now apply in other modern awards. It imposes an employment cost and regulatory burden (s 134(f)) that is unique to some employers in the higher education industry.
19. Furthermore, the application of such a regulatory burden of this type on some employers in an industry and not on others is not consistent with requirement that a modern award provide a fair safety net. In particular, the proposition that a modern award be said to be “simple, easy to understand and sustainable” (s 134(g)) is challenged where employees move from one employer to another within the coverage of the award with different conditions of employment applying.

Australian Higher Education Industrial Association

3 February 2017