IN THE FAIR WORK COMMISSION

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

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

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

GROUP OF 8 UNIVERSITIES FINAL SUBMISSIONS IN SUPPORT OF PROPOSED VARIATIONS

A. Introduction and different approaches

1. These submissions are made on behalf of the Group of Eight Universities (**Group of 8**) and filed pursuant to Direction 1 of the Directions of the Fair Work Commission (**Commission**) issued on 12 January 2017.

2. The submissions are made in support of the limited variations proposed by the Group of 8 to the Higher Education Industry - General Staff - Award 2010 (**General Staff Award**) and the Higher Education Industry - Academic Staff - Award 2010 (**Academic Staff Award**) (together the **Higher Education Awards**) (**Group of 8 Proposed Variations**).

3. The difference in approach adopted in this award review by the NTEU and by our clients (and AHEIA) is stark.

4. The NTEU have sought a large number of changes to Higher Education Awards, a number of which are significant and fundamental, at an unnecessary and significant expense and time commitment of the parties and the Commission.

5. It has done so notwithstanding:

   (a) the industrial provisions based upon the established and well settled features of the sector and its employment;

   (b) that the modern awards were the subject of detailed consideration (as part of the priority stage of the award modernisation process by DP Smith) before operating from the start of 2010;

   (c) that, in conjunction with the NES, they have clearly been operating as a fair and relevant safety net, and supporting successful negotiation of detailed, comprehensive enterprise agreements at every employer in the sector;

   (d) that employees in the sector are not award-dependant;

   (e) "problems" identified by the NTEU are not issues arising from the wording or operation of the awards and the need for fundamental change to the awards sought by the NTEU does not exist; and

(f) the NTEU proposals undermine a stable modern award system.

6. Those matters will be expanded upon and the majority of the Group of 8 final written submissions will be made in opposition to the many variations proposed by the NTEU. Accordingly, they will be filed in accordance with direction 2 of the Directions, by 3 March 2017.

7. The existing awards are to be taken as constituting a fair and relevant safety net when made in 2009/10[1]. Consistent with that presumption and that the awards have in fact been operating as a fair and relevant safety net supporting successful negotiation on multiple iterations of "wall to wall" detailed enterprise agreements across the sector since 2010:

(a) there is no proper basis or significant change to the awards of the type sought by the NTEU; and

(b) the changes proposed by our clients during this process are limited and are for reasons of a technical nature or based upon operation of the FW Act.

B. Group of 8 Proposed Variations

8. The limited variations sought by the Group of 8 are to:

(a) delete the "severance pay" provisions applying upon the expiration of fixed term employment in clause 12.4 of the Academic Staff Award and clause 11.4 of the General Staff Award ; and

(b) vary clause 17.6 of the Academic Staff Award to remove the entitlement to an aged-based notice scale upon redundancy. The current provisions provide for 6 months' notice for those under 40 through to 12 months' notice for those 45 years of age and over. This age based notice scale is in addition to notice and redundancy provided under the NES. The Group of 8 have proposed that the notice period be the uniform notice period (in clause 15.2(b) of 6 months) plus NES redundancy pay. In the alternative, the Group of 8 supports the AHEIA proposed variation to delete the additional notice entitlement and simply apply the NES.

9. The proposed variation orders are attachment 1 (for the Academic Staff Award) and attachment 2 (for the General Staff Award) to the Group of 8 submissions in support of the proposed variations dated 11 March 2016 (**Exhibit 3 in the proceedings**).

[1] [2014] FWCFB 1178.

C. Summary of reasons for deletion of severance pay for fixed term contract expiration

10. In summary, the provisions are inconsistent with the NES and do not constitute a "fair and relevant minimum safety net of terms and conditions" in accordance with the modern awards objective:

(a) this entitlement to severance upon expiration of certain fixed term contracts was originally included in the historical awards at a time that there was no Federal legislative redundancy scheme or termination entitlements. The *Fair Work Act 2009* (Cth) introduced legislative entitlements to redundancy and specifically identifies redundancy attaching to "termination" for reasons of redundancy[2] and also expressly excludes the expiration of contracts for a specified period of time/specified task[3];

(b) provisions which operate to exclude the NES or part of the NES are void and are of no effect under the Act[4]. While an award can supplement the NES, in this instance the higher education awards adopt a position which is inconsistent with the NES and operates to exclude at least part of the NES;

(c) there is a public interest in ensuring that the awards provide a clear safety net and such clauses, having unclear operation given the intersection with the NES, do not do so;

(d) the awards already significantly limit when fixed term contracts can be used. If it is accepted that contracts meeting the requirements/limitations can be offered on a fixed term basis as provided for in the award, the cessation of employment due to the expiration of that fixed term/effluxion of time should not attach termination/severance payments;

(e) there are no similar provisions attaching severance entitlements to the expiration of a fixed term contract, in other modern awards; and

(f) any such benefits are more properly matters for enterprise bargaining or negotiation as part of the particular contract.

D. Summary of reasons for deletion of age based notice scale

11. The existing provisions:

(a) clearly discriminate on the basis of age and are therefore of no effect[5];

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[2] s.119(1).
[3] s.123(1)(a).
[4] ss. 55(1) and 56 of the FW Act.

[5] s.153 FW Act.

(b) do not constitute a "fair and relevant minimum safety net of terms and conditions" in accordance with the modern awards objective; and

(c) deletion is supported by a number of authorities which have held that clauses in both enterprise agreements and in a modern award distinguishing redundancy benefits on the basis of age are discriminatory.[6]

12. It is also noted that the NTEU acknowledges that such provisions are potentially discriminatory[7]. The NTEU suggest the "solution" be that the entitlement be increased for all employees to 12 months (plus NES notice, plus redundancy pay). There is no proper basis for the adoption of such approach; increasing the benefits to a standard completely out of keeping with the NES and community standards, out of keeping with the pre-reform awards and any other Modern Award. This would also be inconsistent with the role of awards as a minimum safety net and would not constitute a variation only to the extent necessary to achieve the modern awards objective, contrary to section 138 of the FW Act.

E. Detailed submissions

13. Given the nature and basis for the limited variations sought by the Group of 8, they are not dependent upon witness evidence in the review. Accordingly, the detailed submissions previously filed by the Group of 8 in support of the proposed variations dated 11 March 2016 (**Exhibit 3**) and dated 8 July 2016 (**Exhibit 4**) are unaffected and are relied upon in full. In addition, oral submissions were made in respect of the Group of 8 Proposed Variations on 22 July 2016 before the Full Bench[8].

14. For the Commission's ease of reference the main detailed submissions, being Exhibit 3 are attached to these submissions.

F. NTEU evidence led in respect of the Group of 8 Proposed Variations

15. The only evidence led by the NTEU in respect of the Group of 8 Proposed Variations was in relation to the proposal to delete the severance provisions applicable upon expiry of a fixed-term contract and was very limited. Specifically, the NTEU asked questions of a limited number of university witnesses to support its position that universities, "as a matter of practice", do not treat the employment relationship as having ended where an employee is employed on a fixed term contract that expires and is offered a further fixed term contract - which position it says is evidenced by the "practice" of rolling over the employee's leave entitlements from one contract to the next[9] (**the Fixed-term Severance Objection**).

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[6] Centennial Northern Mining Services Pty Ltd v Construction, Forestry, Mining and Energy Union (No 2) [2015] FCA 136 and see also Full Bench decision in this 4 yearly review of the Black Coal Award 2010, [2015] FWCFB 2192 at [39].

[7] see Exhibit C, paragraph 9 of Part C (located on page 14).

[8] at PN572 to PN574 and PN624 to PN637.

[9] Exhibit C, paragraphs 5-8. See also the transcript of conference proceedings before Commissioner Johns dated 21 July 2016, at PN220.

16. The evidence led in support of the Fixed-term Severance Objection is that:

(a) the annual leave entitlements of Ms Elodie Janvier were rolled over on two occasions during the course of her employment at Flinders University[10];

(b) an employee's accumulated leave entitlements would be rolled over between successive fixed-term contracts at the Universities of New South Wales[11] and Wollongong[12], provided that there is no time-gap between the two contracts; and

(c) leave entitlements may be rolled over between successive fixed-term contracts at Charles Stuart University depending on the circumstances and preferences of each individual[13].

17. It is not open to the Commission to accept that the asserted trend exists within the higher education sector, "as a matter of practice", based upon a sample size of 4 universities (which represents less than 10% of the industry, and only one member of the Group of 8). On this basis alone the Fixed-term Severance Objection must be rejected.

18. Further, the relevance of such evidence, even if it were accepted, is highly questionable. Where an existing employee enters into a new contract, either replacing a previous contract or immediately following on from the expiry of a previous fixed term contract, the employment does not cease and accordingly, leave would not be paid out and would continue to be recognised by their employer. This does not support a basis or need for a severance payment to be made where a fixed term contract expires and further employment is not offered.

19. The Group of 8 otherwise relies upon its response to the Fixed-term Severance Objection as set out in its Previous Submissions[14].

G. Positions of other parties

20. The Group of 8 Proposed Variations are supported by the Australian Higher Education Industrial Association (**AHEIA**), subject to its separate claim in respect of the industry specific redundancy provisions contained in the Higher Education Awards.

21. The Group of 8 also supports the claim made by AHEIA to vary subclause 11.3 of the Academic Staff Award to include a new paragraph (g) providing for a new category of fixed-term employment where an area is under review[15].

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[10] Paragraph 4 of Exhibit E.
[11] at PN9249 to PN9250 per Mr David Ward (Vice-President Human Resources, UNSW).
[12] at PN4251 - PN4253 per Ms Susan Thomas (Director of Human Resources at the University of Wollongong).
[13] at PN5553 - PN5554 per Professor Andrew Vann (Vice-Chancellor of Charles Sturt University and President of AHEIA).
[14] Exhibit 4, paragraphs 2 to 5. See also the transcript of conference proceedings before Commissioner Johns dated 21 July 2016, at PN182 to PN205.
[15] See AHEIA3, paragraphs 9-12. See also the transcript of proceedings dated 22 July 2016 at PN894 to PN900.

H. Conclusion

22. On the basis of the matters set out above and in the Previous Submissions, the Group of 8 submits that the Proposed Variations should be made.

Clayton Utz, Solicitors for the Group of Eight

3 February 2017

IN THE FAIR WORK COMMISSION

Fair Work Act 2009

s.156 - Four Yearly Review of Modern Awards

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

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

Filed on Behalf of the Group of Eight Universities

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

A. Introduction

1. These submissions are made on behalf of the 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 total of 40 universities in Australia in the higher education sector.

2. These submissions are filed pursuant to the Directions of the Fair Work Commission (**Commission**) issued on 25 November 2015 and are in respect of a number of variations proposed by the Group of 8 to the Higher Education Industry - Academic Staff Award 2010 (**Academic Staff Award**) and the Higher Education Industry - General Staff Award 2010 (**General Staff Award**).

3. These submissions are in addition to and elaborate on the matters set out in previous correspondence sent to the Commission on behalf of the Group of 8, being:

   (a) letter dated 2 March 2015 in response to the statement issued by the President dated 23 January 2015 asking the parties "to identify the nature of any changes they intend to propose during the review" of the Academic Staff Award and the General Staff Award; and

   (b) letter dated 2 October 2015 in response to the Directions issued by the President on 10 September 2015 asking the parties "to file at AMOD the text of all those proposed variations (i.e. varied or new clauses and definitions)".

B. Proposed variations

4. In summary, the variations proposed by the Group of 8 to the Academic Staff Award and the General Staff Award comprise the following:

   (a) deletion of the "severance pay" provisions applying upon the expiration of fixed term employment in clause 12.4 of the Academic Staff Award and clause 11.4 of the General Staff Award.

   (b) variations to clause 17.6 of the Academic Staff Award to remove the entitlement to an aged-based notice payment scale upon redundancy; and

   (c) minor drafting update to the annual leave loading provisions in both the Academic Staff Award (clause 23.3) and the General Staff Award (clause 30.3).

5. The proposed variations are set out in the draft determinations that were filed in the Commission by our letter of 2 October 2015 and reattached for ease of reference as Draft Determination for the Academic Staff Award (**Attachment 1**) and the Draft Determination for the General Staff Award (**Attachment 2**).

C. Severance pay provisions

6. The Group of 8 propose that the "severance pay" provision upon the expiration of fixed term employment be deleted from clause 12.4 of the Academic Staff Award and clause 11.4 of the General Staff Award. The current clauses in both of the awards are in almost identical terms. An extract of both of these clauses is set out in **Attachment 3**.

7. The effect of the proposed deletion would be that any entitlement to notice and redundancy payments (if any) for fixed term employees upon expiration of their contracts under both awards, would be governed by the NES as in force and as amended from time to time.

8. The existing provisions:

   (a) are inconsistent with the National Employment Standards (**NES**) in the *Fair Work Act 2009* (Cth) (**FW Act**); and

   (b) do not constitute a "*fair and relevant minimum safety net of terms and conditions*" in accordance with the modern awards objective[1].

Introduction of redundancy and other entitlements into the FW Act

9. The entitlement to "severance pay" upon the expiration of certain fixed term contracts of employment was originally included in the historical awards in the higher education sector in 1998.[2]

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[1] section 134 of the FW Act.

10. At the time, there was no Federal legislative redundancy scheme or legislative provisions regarding termination entitlements, including provisions dealing with notice or entitlement to, or exclusion from, payments upon cessation of employment. Further, employees engaged under a contract of employment for a specified period of time were unable to make an application for a remedy in relation to unfair dismissal, including where their employment came to an end during the term.[3]

11. Since the introduction of the higher education severance pay provisions there has been significant changes in the regulation of fixed term employment:

(a) the introduction of provisions in the FW Act from 1 January 2010 allowing employees engaged for a specified task or period of time access to the unfair dismissal regime for the duration of the specified task or period of time[4]. Relevantly, a person employed under a contract of employment for a specified period of time, for a specified task, or for the duration of a specified season, will not be entitled to bring an unfair dismissal claim where the employment has terminated at the end of the period, on completion of the task or at the end of the season but otherwise has access to the unfair dismissal regime [5]; and

(b) the introduction for the first time of Federal legislative entitlements to redundancy pay and associated termination entitlements. These were provisions introduced by the FW Act as part of the NES, and applied to all employees from 1 January 2010[6]. Division 11, Part 2-2 of the FW Act specifically prescribed redundancy pay attaching to "termination" by the employer for reasons of redundancy. It expressly excludes from entitlements to notice of termination and redundancy pay, the expiration of contracts for a specific period of time/specified task[7]. This reflects a legislative intention that notice and redundancy payments do not attach to the expiration of such a contract.

12. The FW Act relevantly provides [our emphasis]:

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[2] *Higher Education Contract of Employment Award 1998*, cl 4.1.3; See Q0702, p 45 for the Full Bench decision which led to the creation of that award and introduction of severance pay entitlement for fixed term employees.

[3] *Workplace Relations Regulations 1996* (Cth) reg. 30B(1)(a).

[4] sections 383 and 386 of the FW Act; [2010] FWAFB 1333, [15] (the Full Bench formed the view that the changes in the relevant legislative provisions since the making of the HECE award were significant and warranted change to the definition of "Fixed-term employment" in the modern award).

[5] section 386(2)(a) of the FW Act

[6] FW Act, Division 11, Part 2-2, specifically sections 117, 119 and 123.

[7] section 123(1)(a) of the FW Act.

"***117 Requirement for notice of termination or payment in lieu***

Notice specifying day of termination

(1) An employer must not terminate an employee's employment unless the employer has given the employee written notice of the day of the termination (which cannot be before the day the notice is given).

Note 1: Section 123 describes situations in which this section does not apply.

Note 2: Sections 28A and 29 of the Acts Interpretation Act 1901 provide how a notice may be given. In particular, the notice may be given to an employee by:

(a) delivering it personally; or

(b) leaving it at the employee's last known address; or

(c) sending it by pre-paid post to the employee's last known address.

Amount of notice or payment in lieu of notice

(2) The employer must not terminate the employee's employment unless:

(a) the time between giving the notice and the day of the termination is at least the period (the minimum period of notice) worked out under subsection (3); or

(b) the employer has paid to the employee (or to another person on the employee's behalf) payment in lieu of notice of at least the amount the employer would have been liable to pay to the employee (or to another person on the employee's behalf) at the full rate of pay for the hours the employee would have worked had the employment continued until the end of the minimum period of notice.

(3) Work out the minimum period of notice as follows:

(a) first, work out the period using the following table:

Period		
	Employee's period of continuous service with the employer at the end of the day the notice is given	*Period*
1	*Not more than 1 year*	*1 week*
2	*More than 1 year but not more than 3 years*	*2 weeks*
3	*More than 3 years but not more than 5 years*	*3 weeks*
4	*More than 5 years*	*4 weeks*

(b) then increase the period by 1 week if the employee is over 45 years old and has completed at least 2 years of continuous service with the employer at the end of the day the notice is given.

119 Redundancy Pay

Entitlement to redundancy pay

(1) An employee is entitled to be paid redundancy pay by the employer if the employee's employment is terminated:

(a) at the employer's initiative because the employer no longer required the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or

(b) because of the insolvency or bankruptcy of the employer.

….

123 Limits on scope of this Division

Employees not covered by this Division

(1) This Division does not apply to any of the following employees:

(a) an employee employed for a specified period of time, for a specified task, or for the duration of a specified season;…"

Inconsistent with the NES

13. Under section 55(1) and section 56 of the FW Act, provisions in a modern award which operate to exclude the NES or part of the NES are of no effect. A modern award may include terms that supplement the NES but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the NES (section 55(3)).

14. In this instance, both clause 12.4 of the Academic Staff Award and clause 11.4 of the General Staff Award require an employer to adopt a position which is directly contrary to parts of the NES (rather than supplement the NES). If applied, the provisions operate to exclude at least part of the NES (being the NES exclusion of entitlement to notice and redundancy pay in respect of the expiration of a fixed term contract).

15. This absence of an entitlement to notice and redundancy pay upon the expiration of a fixed term contract in the FW Act is consistent with the position at common law which states that where a contract provides for employment for a fixed term, the contract will automatically end

when the term expires (i.e. due to the effluxion of time).[8] It is not a termination of employment and does not attract termination payments.

Not a fair and relevant minimum safety net

16. The severance pay provisions in clause 12.4 of the Academic Staff Award and clause 11.4 of the General Staff Award do not provide a fair and relevant minimum safety net of terms and conditions as required by the modern awards objective including because:

(a) the provisions are 18 years old and were included in the historical awards at a time when the regulation of fixed term employment was very different and there were no legislative entitlements to termination and redundancy pay. Given the legislative developments that have occurred in these areas since that time (as set out above), the provisions are no longer fair and they are now inconsistent with the clear legislative intent of when severance/redundancy payments apply, in respect of fixed term contracts;

(b) the legislative changes to fixed term employment in the unfair dismissal provisions were accepted by the Commission as a basis to vary the fixed term provisions established in 1998 and which had been included in the higher education modern awards. The Full Bench of the Commission in 2010[9] 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;

(c) the inconsistencies between the severance pay entitlements in the awards and the NES, and the intersection between the two, do not provide a clear, simple and easy to understand[10] safety net for employees. It provides uncertainty as to the entitlements that do apply (if any) to employees on fixed term contracts at the expiration of such contracts; and

(d) the provisions do not promote flexible modern work practices and the efficient and productive performance of work[11] and have the potential to impact business,

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[8] *"The Law of Employment"* O'Grady, Sappideen, Warburton, Riley 7th Ed 2011, p 351; *Victoria v Commonwealth* (1996) 187 CLR 416, 520; *Gallotti v Argyle Diamond Mines Pty Ltd* [2003] WASC 166, [4]-[7].

[9] *Higher Education Industry - General Staff - Award 2010* [2010] FWAFB 1333 (26 February 2010).

[10] section 134(1)(g) of the FW Act.

[11] section 134(1)(d) of the FW Act.

including on productivity, employment costs and the regulatory burden.[12] They also provide a disincentive to employ persons on such contracts given the costs associated with the expiration of such contracts (in circumstances where there is otherwise no legislative entitlement to such benefits).

Other relevant matters

17. In addition to the matters set out above, the proposed changes to the severance pay provisions are also sought on the basis that:

    (a) there are no similar provisions attaching severance entitlements to the expiration of a fixed term contract in other modern awards;

    (b) the Academic Staff Award[13] and the General Staff Award[14] already significantly limit when fixed term contracts can be used as a result of the Higher Education Contract of Employment (**HECE**) Award 1998. If it is accepted that contracts meeting the requirements/limitations can be offered on a fixed term basis as provided for in the award, the cessation of employment due to expiration/effluxion of time of that fixed term should not attach to termination/severance payments;

    (c) these are more appropriately matters for enterprise bargaining rather than minimum terms and conditions of employment in a modern award; and

    (d) part of the rationale for a severance/redundancy payment is to compensate for the loss of non-transferable leave credits and in the higher education sector service with other employers is generally recognised for the purposes of leave that is not paid out by the former employer, particularly long service leave. Accordingly, even if applicable, the rationale for such payments is not supported here.

18. For the reasons set out above, the existing severance pay provisions upon the expiration of certain fixed term contracts should be varied in accordance with the Draft Determination for the Academic Staff Award and the Draft Determination for the General Staff Award.

D. Clause 17.6 of the Academic Staff Award

19. Clause 17.6 of the Academic Staff Award provides for an entitlement to a notice payment upon redundancy which is based on age (rather than length of service) as follows:

    "*17.6 Employees not accepting redundancy*

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[12] section 134(1)(f) of the FW Act.

[13] clause 11.3.

[14] clause 10.3.

Where an employee is not a volunteer for redundancy and the employer terminates the employment of an employee for reason of redundancy the following benefits will apply:

…

(b) notice according to the following scale:

Age	***Notice***
Below 40	*6 months*
40	*7 months*
41	*8 months*
42	*9 months*
43	*10 months*
44	*11 months*
45 and over	*12 months"*

20. This notice entitlement is stated to be in addition to the notice and severance/redundancy payments provided for in the NES.[15]

21. The proposed variation sought to this clause (as set out in the Draft Determination for the Academic Staff Award) is on the basis that such provision:

(a) discriminates on the basis of age and is therefore of no effect[16] ; and

(b) does not constitute a "*fair and relevant minimum safety net of terms and conditions*" in accordance with the modern awards objective[17].

22. The history of clause 17.6 goes back to 1999 and the *Universities and Post Compulsory Academic Conditions Award 1999* (**Academic Conditions Award**) which provided redundancy entitlements that differed based on age[18]. This was a time when there was no Commonwealth *Age Discrimination Act 2004* and was prior to any Federal legislative redundancy pay entitlements as referred to above. These provisions were then included in the Academic Staff Award as part of the award modernisation process in 2010. These provisions were not originally included in the Exposure Draft for the Academic Staff Award and were not

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[15] sub-clause 17.6(a) of the Academic Staff Award states that the employee will receive the greater of the period of notice prescribed by the NES or the contract of employment of the employee plus the notice prescribed in sub-clause 17.6(b).

[16] sections 136, 137 and 153 of the FW Act.

[17] section 134 of the FW Act.

[18] see specifically clause 11.3 of the *Universities and Post Compulsory Academic Conditions Award 1999*.

therefore the subject of detailed submissions about the exposure draft by the parties. However, the Full Bench in the Award Modernisation Decision[19] included the redundancy provisions from the Academic Conditions Award in the modern award on the basis that they were an "*industry specific redundancy scheme*" and that such provisions would only apply to universities who were a party to the Academic Conditions Award[20].

23. In relation to "industry-specific redundancy schemes" in modern awards, section 141 of the FW Act sets out limitations on the variation of those schemes. In particular, section 141 states in part [our emphasis]:

> "*Varying industry-specific redundancy schemes*
>
> *(3) The FWC may only vary an industry-specific redundancy scheme in a modern award under Division 4 or 5:*
>
> *(a) by varying the amount of any redundancy payment in the scheme; or*
>
> *(b) in accordance with a provision of Subdivision B of Division 5 (which deals with varying modern awards in some limited situations).*
>
> *(4) [**Limits to the variation of industry-specific redundancy schemes**] In varying an industry-specific redundancy scheme as referred to in subsection (3), the FWC:*
>
> *(a) must not extend the coverage of the scheme to classes of employees that it did not previously cover; and*
>
> *(b) must retain the industry-specific character of the scheme.*
>
> *Omitting 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*."

24. In addition to the Commission's power under section 141 of the FW Act to vary an industry-specific redundancy scheme, the Commission also has powers to do so under section 156 of the FW Act as part of the 4 yearly review of modern awards as well as under Division 5 of Part 2-3 of the FW Act in various circumstances including if necessary to achieve modern awards objective[21] and to remove ambiguity or uncertainty or correct an error[22].

Discriminatory on the basis of age

25. The FW Act contains provisions prohibiting the inclusion of discriminatory terms in modern awards and enterprise agreements. In respect of modern awards, the FW Act provides that:

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19 [2008] AIRCFB 1000.

20 [2008] AIRCFB 1000 at [62] and [171].

21 section 157 of the FW Act.

22 section 160 of the FW Act.

(a) a modern award must not include terms that discriminate against an employee because of, or for reasons including, the employee's age[23]; and

(b) a term of a modern award that contains such a term has no effect[24].

26. In respect of enterprise agreements, the FW Act provides that:

(a) a term of an enterprise agreement is a discriminatory term to the extent that it discriminates against an employee covered by the agreement because of, or for reasons including, the employee's… age[25]; and

(b) a term of an enterprise agreement that is a discriminatory term is unlawful[26].

27. In addition, in performing any of its functions or exercising any of its powers (including in relation to modern awards), section 578(c) of the FW Act requires the Commission to take into account "*the need to respect and value the diversity of the workforce by helping to prevent and eliminate discrimination on the basis of … age…*".

28. Clause 17.6(b) of the Academic Staff Award clearly directly discriminates on the basis of age. The basis of the entitlement is solely dependent on age. It is therefore a discriminatory term on the basis of age pursuant to section 153 of the FW Act.

29. Clause 17.6(b) directly discriminates on the basis of age as it contains significantly different entitlements for employees based upon their age rather than their length of service or for any other reason. The effect of clause 17.6(b) is that persons below the age of 40 with a long period of service with the employee will receive less notice entitlements than (say) a 45 year old with less service. On its face, the clause directly discriminates on the basis of age as the only reason for that difference in outcome is the employee's age. By way of example:

(a) an employee aged 39 with 15 years' service would receive 6 months' notice;

(b) an employee aged 43 with 5 years' service would receive 10 months' notice; and

(c) an employee aged 45 with 1 year service would receive 12 months' notice.

30. This is both discriminatory and unfair.

Discrimination Legislation

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[23] section 153 of the FW Act.

[24] sections 136 and 137 of the FW Act.

[25] section 195 of the FW Act.

[26] section 194 of the FW Act.

31. As referred to above, the age-based redundancy provisions were included in the Academic Conditions Award at a time when there was no Commonwealth legislation prohibiting discrimination on the basis of age and prior to there being any legislative notice or redundancy pay entitlements based on length of service.

32. The *Age Discrimination Act 2004* (Cth) (**AD Act**) commenced operation on 21 June 2004 and prevents discrimination in employment on the basis of age. In particular, section 14 of the AD Act provides that:

> ***"14** Discrimination on the ground of age—direct discrimination*
>
> *For the purposes of this Act, a person (the **discriminator**) **discriminates** against another person (the **aggrieved person**) on the ground of the age of the aggrieved person if:*
>
> *(a) the discriminator treats or proposes to treat the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of a different age; and*
>
> *(b) the discriminator does so because of:*
>
> *(i) the age of the aggrieved person; or*
>
> *(ii) a characteristic that appertains generally to persons of the age of the aggrieved person; or*
>
> *(iii) a characteristic that is generally imputed to persons of the age of the aggrieved person.*"

33. In addition section 18 of the AD Act provides in part that it is unlawful for an employer to discriminate against a person on the ground of the other person's age:

(a) in the terms or conditions on which employment is offered[27];

(b) in the terms or conditions of employment that the employer affords the employee[28]; or

(c) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment[29]; or

(d) by dismissing the employee[30]; or

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[27] sub-section 18(1)(c) of the AD Act.

[28] sub-section 18(2)(a) of the AD Act.

[29] sub-section 18(2)(b) of the AD Act.

[30] sub-section 18(2)(c) of the AD Act.

(e) by subjecting the employee to any other detriment[31].

34. There is also legislation in each State and Territory which prohibits discrimination on the basis of age in employment including in relation to the terms and conditions of employment[32]. Under the FW Act, modern awards generally apply to the exclusion of State and Territory laws to the extent of any inconsistency[33]. However, an important exception to this is the State and Territory Discrimination laws[34]. Accordingly, compliance with clause 17.6(b) in circumstances where it is discriminatory on the basis of age may expose an employer to breach of these State and Territory Discrimination laws.

Supporting Authorities

35. This is reinforced and supported by a number of authorities which have held that clauses in both enterprise agreements[35] and in a modern award distinguishing redundancy benefits on the basis of age are discriminatory. In *Centennial Northern Mining Services Pty Ltd v Construction, Forestry, Mining and Energy Union (No 2)*[36] (**Centennial Northern Decision**), the Federal Court of Australia held that the following clause in the Centennial Northern Mining Services Enterprise Agreement 2011 was a discriminatory term, and therefore an unlawful term under section 195 of the FW Act:

> "*30.8 The amount of retrenchment payment due to an employee is not to be more than the employee would have received had the employee remained in employment with the Company until the age of sixty (60) years.*"

36. Buchanan J held (at 351):

> "*Clause 30.8 will have a dramatically different effect upon a long-serving employee retrenched at age 60 or over than one retrenched at less than that age. The effect of cl 30.8 is, from age 60 on no retrenchment payment is available no matter what the employee's length of service. The reason for that difference in outcome is the*

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[31] sub-section 18(2)(d) of the AD Act.

[32] *Anti-Discrimination Act 1977* (NSW), ss 49ZYB; *Anti-Discrimination Act 191* (Qld) ss 7(1)(f), 15; *Equal Opportunity Act 1984* (SA) ss 85A, 85B; *Anti-Discrimination Act 1998* (Tas) ss 16(b), 22(1)(a); *Equal Opportunity Act 2010* (Vic) ss 6(a), 18; *Equal Opportunity Act 1984* (WA) ss 66V, 66W; *Discrimination Act 1991* (ACT) ss 7(1)(l), 10; *Anti-Discrimination Act 1992* (NT) ss 19(1)(d), 31.

[33] section 29 of the FW Act. See also sections 26, 27 and 28 of the FW Act.

[34] sections 29 and 27(1A) of the FW Act.

[35] These authorities consider section 195 of the FW Act, which deals with discriminatory terms in enterprise agreements and is in similar terms to section 153 of the FW Act.

[36] [2015] FCA 136; a similar clause was considered by Vice President Lawyer in *Australian Catholic University Limited re The Australian Catholic University Staff Enterprise Agreement 2010-2013* [2011] FWAA 3693 and held to be a discriminatory term under section 195 of the FW Act and therefore unlawful.

employee's age. Clause 30.8 is a discriminatory term, and therefore an unlawful term under s 195 of the FW Act."

37. A similar clause was considered more recently in the context of the Commission's current 4 yearly review of modern awards in respect of the Black Coal Mining Industry Award[37] (**Coal Mining Award**). In this case, the Full Bench considered part of an "industry-specific redundancy scheme" in the Coal Mining Award which distinguished redundancy entitlements based on age. Specifically, sub-clause 14.4(c) of the Coal Mining Award states:

> "*The amount of payment due under clause 14.4 is not to be more than what an employee would have received had the employee remained in employment with the employer until the age of 60 years.*"

38. The Full Bench concluded amongst other things that:

(a) the clause is not a provision which can legitimately form part of a "*fair and relevant minimum safety net of terms and conditions*" as required by the modern awards objective[38];

(b) clause 14.4(c) is a term which discriminates against employees on the grounds of their age[39] and the effect of this is that under section 137 of the FW Act the clause has no effect[40];

(c) the provision should never have been placed in the Coal Mining Award because at all times since the award became effective on 1 January 2010 it was inconsistent with the modern awards objective in section 134(1) and offended section 153(1)[41]; and

(d) there are ample sources of power in the FW Act to remove clause 14.4(c) (contrary to submissions made by the Coal Mining Industry Employer Group (**CMIEG**)[42]): under the Commissions general power in section 156(2)(b)(i) to vary modern awards as part of the 4 yearly review, under the power in section 141(3)(a) to vary an industry-specific redundancy scheme to vary the amount of any redundancy payment in the scheme (which would necessarily occur by removal of the age cap),

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[37] [2015] FWCFB 2192.

[38] see paragraph [39].

[39] see paragraph [40].

[40] see paragraph [41].

[41] see paragraph [42].

[42] the CMEIG submitted amongst other things that the Commission did not have the power under section 141(3)(a) of the FW Act (which deals with industry-specific redundancy schemes) to remove clause 14.4(c) - see paragraph [13].

and under section 160(1) to correct the error of clause 14.4(c)'s inclusion in the Coal Mining Award[43].

39. For the reasons set out above in relation to clause 17.6(b), and consistent with the conclusions reached by the Full Bench in the Coal Mining Award decision, the Commission should determine that the term is a discriminatory term pursuant to section 153 of the FW Act and therefore has no effect under section 137 of the FW Act. Further, the Commission should also find that notwithstanding the term is an industry-specific redundancy scheme that it has the power to vary the Academic Staff Award in accordance with the Draft Determination for the Academic Staff Award by deleting clause 17.6(b) pursuant to sections 141(3)(a) and (5), section 156(2)(b)(i) and/or section 160(1) of the FW Act.

Not a Fair and Relevant Minimum Safety Net

40. In addition to being a discriminatory term, clause 17.6(b) also fails to provide a "fair and relevant minimum safety net of terms and conditions" contrary to section 134 of the FW Act. The age-based provisions are not objectively fair. As demonstrated by the examples at paragraph 29 above, the effect of the clause is to provide lesser entitlements for some long serving employees solely because they are 40 or under. This also provides an incentive for employers to retrench particular employees based on age.

41. The provisions are also inconsistent with the current legislative redundancy and notice entitlements which provide a safety net of minimum terms and conditions of employment (which are based on length of service). In that context the provisions are also unnecessary.

42. Accordingly, consistent with the reasoning of the Full Bench in the Coal Mining Award decision, the Commission should also find that the clause is not a provision which can legitimately form part of a "*fair and relevant minimum safety net of terms and conditions*" as required by the modern awards objective and should be deleted as set out in the Draft Determination for the Academic Staff Award.

E. Minor drafting errors

43. In the award clauses relating to the calculation of annual leave loading (clause 23.3 of the Academic Staff Award and clause 30.3 of the General Staff Award) the references to the relevant statistics from the "August quarter" is now out of date as there is no August quarterly reporting. The draft determinations refer to amending this to the August Quarter. However, the frequency of the Australian Bureau of Statistics Average Weekly Earnings survey is now conducted on a biannual basis in November and May. We understand that it is agreed between the parties that the awards should be updated to reflect this as follows in each of clause 23.3 of the Academic Staff Award and clause 30.3 of the General Staff Award:

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[43] see paragraph [44].

"Annual leave loading will be paid at a rate of 17.5% of the ordinary rate of pay paid during the leave period, up to the limit of payment equal to the Australian Statistician's average weekly earnings for all males (Australia) for the May half preceding the date of accrual."

F. Variation sought by AHEIA

44. The Australian Higher Education Industrial Association (**AHEIA**) has proposed a variation to sub-clause 11.3 (Fixed-term employment categories) of the Academic Staff Award to include a new paragraph (g) to provide for an additional fixed-term category of employment where an area is under review. Similarly, AHEIA has also proposed a variation to sub-clause 10.3 (Fixed-term employment categories) of the General Staff Award to include a new paragraph (f) to provide for an additional fixed-term category of employment where an area is under review. The Go8 supports the inclusion of the addition of the fixed term category. The Go8 understands that the AHEIA will be filing submissions in respect of such variation.

Clayton Utz
Solicitors for the Group of Eight
11 March 2016

Higher Education—Academic Staff—Award 2010

Subclause 12.4 (Severance pay)

" [Numbered as 12.4(a) by PR994502 from 01Jan10]

(a) A fixed-term employee whose contract of employment is not renewed in circumstances where the employee seeks to continue the employment will be entitled to a severance payment or retrenchment benefit payment howsoever called in accordance with the NES as it would apply to a full-time employee engaged in an equivalent classification in the following circumstances:

[12.4(a) renumbered as 12.4(a)(i) by PR994502 from 01Jan10]

(i) the employee is employed on a second or subsequent fixed term contract to do work required for the circumstances described in clause 11.3(a) or (b) and the same or substantially similar duties are no longer required by the employer; or

[12.4(b) renumbered as 12.4(a)(ii) by PR994502 from 01Jan10]

(ii) the employee is employed on a fixed term contract to do work required for the circumstances described in clause 11.3(a) or (b) and the duties of the kind performed in relation to work continue to be required but another person has been appointed, or is to be appointed, to the same or substantially similar duties.

[Numbered as 12.4(b) by PR994502 from 01Jan10]

(b) Where an employer advises an academic in writing that further employment may be offered within six weeks of the expiry of a period of fixed-term employment, then:

[12.4(c) renumbered as 12.4(b)(i) by PR994502 from 01Jan10]

(i) the employer may defer payment of severance benefits for a maximum period of four weeks from the expiry of the period of fixed-term employment.

[Numbered as 12.4(c) and varied by PR994502 from 01Jan10; varied by PR542126 ppc 04Dec13]

(c) An employer, in a particular case, may make application to the Fair Work Commission to have the general severance payment or retrenchment benefit payment prescription varied if the employer obtains acceptable alternative employment for the employee."

ATTACHMENT 3 to Exhibit 3

Higher Education Industry—General Staff—Award 2010

Subclause 11.4 (Severance pay)

" [11.4 substituted by PR994510 from 01Jan10]

(a) A fixed-term employee whose contract of employment is not renewed in circumstances where the employee seeks to continue the employment will be entitled to a severance payment or retrenchment benefit payment howsoever called in accordance with the NES as it would apply to a full-time employee engaged in an equivalent classification in the following circumstances:

(i) employee is employed on a second or subsequent fixed term contract to do work required for the circumstances described in clause 10.3(a) or (b) and the same or substantially similar duties are no longer required by the employer; or

(ii) employee is employed on a fixed term contract to do work required for the circumstances described in clause 10.3(a) or (b) and the duties of the kind performed in relation to work continue to be required but another person has been appointed, or is to be appointed, to the same or substantially similar duties.

(b) Where an employer advises an employee in writing that further employment may be offered within six weeks of the expiry of a period of fixed-term employment, then the employing university may defer payment of severance benefits for a maximum period of four weeks from the expiry of the period of fixed-term employment.

[11.4(c) varied by PR542127 from 04Dec13]

(c) An employer, in a particular case, may make application to the Fair Work Commission to have the general severance payment or retrenchment benefit payment prescription varied if the employer obtains acceptable alternative employment for the employee."

<<FileNo>> <<PrintNo>>
FAIR WORK COMMISSION

DRAFT DETERMINATION

Fair Work Act 2009
Part 2-3, Div 4 – 4 Yearly reviews of modern awards

Higher Education Industry – Academic Staff – Award 2010

(ODN AM2014/229) MA000006

Higher education industry

VICE PRESIDENT CATANZARITI

DEPUTY PRESIDENT KOVACIC

COMMISSIONER JOHNS

MELBOURNE, XX YYY 2016

Review of modern awards to be conducted.

[1] Further to the Decision and Reasons for Decision <<DecisionRef>> in <<FileNo>>, it is determined pursuant to section 156(2)(b)(i) of the *Fair Work Act 2009*, that the *Higher Education Industry – General Staff – Award 2010* be varied as follows.

[2] Delete existing sub-clause 12.4 and re-number existing sub-clause 12.5 to 12.4 and existing sub-clause 12.6 to 12.5.

[3] Delete existing sub-clause 17.6 and insert new sub-clause 17.6 as follows:

"Where an employee is not a volunteer for redundancy and the employer terminates the employment of an employee for reason of redundancy the following benefits will apply:

(a) notice, or pay instead of notice, in accordance with clause 15(2)(b); and

(b) on retrenchment, an employee must, in addition, receive the amount of severance pay set out in the NES in respect of a continuous period of service."

[4] Delete existing sub-clause 23.3 and insert a new sub-clause 23.3 as follows:

“Annual leave loading will be paid at a rate of 17.5% of the ordinary rate of pay paid during the leave period, up to the limit of payment equal to the

Australian Statistician's average weekly earnings for all males (Australia) for the May quarter preceding the date of accrual."

[5] The determination shall operate on and from XX YYY 2016.

VICE PRESIDENT

<<FileNo>> <<PrintNo>>
FAIR WORK COMMISSION

DRAFT DETERMINATION

Fair Work Act 2009
Part 2-3, Div 4 – 4 Yearly reviews of modern awards

Higher Education Industry – General Staff – Award 2010

(ODN AM2014/230) MA000007

Higher education industry

VICE PRESIDENT CATANZARITI

DEPUTY PRESIDENT KOVACIC

COMMISSIONER JOHNS

MELBOURNE, XX YYY 2016

Review of modern awards to be conducted.

[1] Further to the Decision and Reasons for Decision <<DecisionRef>> in <<FileNo>>, it is determined pursuant to section 156(2)(b)(i) of the *Fair Work Act 2009*, that the *Higher Education Industry – General Staff – Award 2010* be varied as follows.

[2] Delete existing sub-clause 11.4 and re-number existing sub-clause 11.5 to 11.4 and existing sub-clause 11.6 to 11.5

[3] Delete existing sub-clause 30.3 and insert a new sub-clause 30.3 as follows:

"Annual leave loading will be paid at a rate of 17.5% of the ordinary rate of pay paid during the leave period, up to the limit of payment equal to the Australian Statistician's average weekly earnings for all males (Australia) for the preceding May quarter.

Shift workers on annual leave will be paid the greater of:

(a) shift penalties an employee would have received had they not been on annual leave; or

(b) the 17.5% annual leave loading as prescribed."

[4] The determination shall operate on and from XX YYY 2016.

VICE PRESIDENT