

**IN THE FAIR WORK COMMISSION  
4 YEARLY REVIEW OF MODERN AWARDS  
AWARD STAGE – GROUPS 3 AND 4**

**Matter Nos:** AM2014/281 (*Professional Employees Award 2010*)  
AM2015/6 (Education Group)

**Applicants:** The Association of Australian Medical Research Institutes (**AAMRI**) and  
the Association for Professional Engineers, Scientists and Managers,  
Australia (**APESMA**)

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**FINAL SUBMISSIONS IN RESPONSE  
THE ASSOCIATION OF AUSTRALIAN MEDICAL RESEARCH INSTITUTES  
AND  
THE ASSOCIATION FOR PROFESSIONAL ENGINEERS, SCIENTISTS AND MANAGERS  
AUSTRALIA**

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## INTRODUCTION

1. AAMRI and APESMA make the following submissions in response to those of the NTEU dated 3 February 2017 (**NTEU Closing Submissions**), in accordance with the directions made on 12 January 2017 (**Final Directions**). They oppose the variations to the applications made by the NTEU (**NTEU Applications**) to vary the *Higher Education—Academic Staff—Award 2010 (Academic Award)* and the *Higher Education Industry—General Staff—Award 2010 (General Staff Award)* (collectively, the **Higher Education Awards**).
2. AAMRI and APESMA have previously made submissions in support of the variations to the *Professional Employees Award 2010 (PEA)* proposed in their application of 16 October 2015 (**AAMRI & APESMA Application**). These final submissions were made on 3 February 2017 (**AAMRI & APESMA Final Submissions**).
3. The AAMRI & APESMA Application proposes to amend the PEA so that it covers the small minority of MRI research employees who are not currently covered, and has the support of AAMRI, APESMA and the Australian Industry Group (**AiG**).

## SUMMARY

4. The PEA is the modern award that covers scientists performing research, including those with a doctoral research degree.<sup>1</sup> Research employees form approximately 60% of employees at independent MRIs,<sup>2</sup> and most of these are covered by the PEA. Most of the remaining 40% of independent MRI employees have occupational coverage which ought not be disturbed.
5. The NTEU have submitted that:
  - (a) the decision of the Australian Industrial Relations Commission (**AIRC**) in which determined the current award coverage of independent MRIs is inappropriate because it represents an oversight that did not take account of the Award Modernisation Request or the historical coverage of medical research institutes (**MRIs**);<sup>3</sup>

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<sup>1</sup> *Fair Work Ombudsman v Priority Matters Pty Ltd and Ors* [2016] FCCA 1474.

<sup>2</sup> Statement of Douglas Hilton at [56].

<sup>3</sup> NTEU Closing Submissions at [L6], [L14]-[L15] and [L28].

- (b) employees of independent MRIs ought to be covered by the Higher Education Awards because their work is "*considered as industry or occupation*", similar to the work performed by employees covered by the Higher Education Awards;<sup>4</sup>
  - (c) the variation is necessary to meet the modern awards objective.
- 6. The evidence disclosed in these proceedings does not support these arguments. In any case, these arguments fail to justify coverage of independent MRIs by awards that **do not currently apply** and **have never applied** to the employees affected by these proceedings.
- 7. The decision of the Australian Industrial Relations Commission (**AIRC**), as part of the award modernisation proceedings, was that the Higher Education Awards would not cover research institutes. This decision was:
  - (a) based on its clear consideration of the submissions before it regarding research institutes;
  - (b) consistent with the Award Modernisation Request;
  - (c) consistent with the mixed historical coverage of research institutes, in which many research scientists were covered by the predecessors to the PEA, and most independent MRIs were **never** covered by predecessors to the Higher Education Awards; and
  - (d) consistent with the Commission's similar treatment of university-controlled entities, to whom many comparable considerations applied;
- 8. As set out when determining the preliminary issues of this review (**Issues Decision**), a Full Bench considered that there is a "legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective", and that "*[p]revious Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so*".<sup>5</sup>
- 9. The NTEU has failed to justify varying the Higher Education Awards so as to cover independent MRIs. Not only are independent MRIs clearly not in the higher education

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<sup>4</sup> NTEU Closing Submissions at [A111] and [L34].

<sup>5</sup> *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24] and [27].

industry (which the NTEU acknowledges); independent MRIs are not subject to the same industrial concerns as universities. Having regard to the nature of their work and their size, missions, diversity of operations, lack of emphasis on education, regulation and funding arrangements, it is inappropriate for the instrument which sets terms and conditions for a largely monolithic group of higher education institutions to also govern the terms and conditions of the diverse range of independent MRIs .

10. Accordingly, it is **not necessary** to vary the Higher Education Awards so as to cover independent MRIs. The NTEU has failed to demonstrate that there is any practical problem or disadvantage arising from the existing occupational coverage, save that it prefers industrial coverage. The existing arrangements are a fair and relevant safety net, taking into account:
  - (a) the existing rates of pay arise from the pre-reform awards covering most independent MRIs;
  - (b) flexible modern work practices are encouraged by the current system of occupational awards which are appropriate to the occupations of employees at independent MRIs;
  - (c) the principle of equal remuneration for work of equal or comparable value supports the existing occupational coverage;
  - (d) the joint position of AiG, ACCI and the ACTU is that occupational award coverage does not present an issue to employers or employees when multiple awards cover an organisation;
  - (e) the NTEU has led no evidence to support its contention that there are employees at independent MRIs not currently covered by the existing occupational awards on the basis that the employees are professional scientists performing professional scientific duties (save for those research employees AAMRI and APESMA propose should be covered by the PEA);
  - (f) coverage by the Higher Education Awards will impose regulatory burden on employers currently functioning well under the existing occupational coverage; and
  - (g) maintaining the existing coverage is inherently consistent with the stability of the modern awards system.

## SUBMISSIONS IN RESPONSE

### Award Modernisation and historical coverage

11. Currently, most staff at independent MRIs are covered by occupational awards,<sup>6</sup> including:
  - (a) the PEA, in respect of research scientists whose degrees in science are from an Australian, NZ or UK university; and
  - (b) the *Clerks—Private Sector Award 2010*; *Health Professionals and Support Services Award 2010*; *Nurses Award 2010*; and *Miscellaneous Award 2010*, in respect of non-research staff.
12. The AAMRI & APESMA Application seeks to provide award coverage for the small minority of research employees not covered by the PEA.
13. The NTEU's submissions about the award modernisation process contend that the Full Bench of the Australian Industrial Relations Commission (**AIRC**) either:
  - (a) failed to consider the matter of research institutes in spite of the fact that research institutes were the subject of the NTEU's written submissions in both Stage 1 and Stage 3 of the award modernisation and oral submissions before Commissioner Whelan; or
  - (b) made an erroneous decision that did not appropriately take into account the Award Modernisation Request in deciding that the Higher Education Awards should not cover MRIs.
14. It is clear, however, that the AIRC **did** consider the matter of research institutes, and that its decision that they should not be covered by the Higher Education Awards was in line with the Award Modernisation Request.
15. Further, this decision was consistent with the historical coverage of independent MRIs. Less than one-third of independent MRIs (and only in Victoria and Western Australia) were covered by an academic salaries-only award, in respect of "academic" staff, and small fraction were covered by awards containing similar classifications to the General Staff Award. The majority of these independent MRIs

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<sup>6</sup> See Appendix 1 to the AAMRI and APESMA Outline of Submissions in Response (3 June 2016).

were covered by predecessors to the PEA, including to the exclusion of the academic salaries-only award.

***AIRC clearly considered coverage of research institutes***

16. AAMRI and APESMA submit that it is clear that the AIRC considered the matter of research institutes. This is evident on the face of the materials and submissions that were before the AIRC, which are outlined in detail at [14] of the AAMRI & APESMA Outline of Submissions in Response filed on 3 June 2016.<sup>7</sup>
17. To the extent that the AIRC did not expressly refer to the coverage of research institutes in its Statement regarding the Group 3 Exposure Drafts on 22 May 2009, we note that in the Decision of 4 September 2009 the Full Bench made the following point:

*We **emphasise**, however, that parties have not been restricted in the material to which they can refer in the proceedings to date and **all of the submissions, proposals and material which have been advanced as to the contents of modern awards have been taken into account.*** [emphasis added].<sup>8</sup>
18. AAMRI & APESMA also note that it is established law that simply because a court or tribunal fails to expressly refer to a matter does not mean that it has not been considered.<sup>9</sup>
19. To the extent that the NTEU disagreed with the Statement of the AIRC on 22 May 2009, it was open to the NTEU to make submissions on the Exposure Draft. AAMRI and APESMA note that following the Exposure Draft, the NTEU made submissions in respect of student unions,<sup>10</sup> but no such submissions about MRIs.

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<sup>7</sup> NTEU Submissions dated 28 March 2008 at [11] and 6 March 2009 at p 8; Transcript of AM2008/33 dated 17 March 2009 at PN262-270, 288-290 and 512-513. See AAMRI & APESMA Outline of Submissions in Response dated 3 June 2016.

<sup>8</sup> Award Modernisation (AM2008/25-63) [2009] AIRCFB 826 at [5].

<sup>9</sup> *Soliman v University of Technology, Sydney* [2012] FCAFC 146 at [54]; *Bat Advocacy v Minister for Environment* [2011] FCA 113 at [95] and [98]; *Dodds v Comcare* [1993] 31 ALD 690; *Steed v The Minister for Immigration and Ethnic Affairs* [1981] 4 ALD 126.

<sup>10</sup> NTEU Submissions dated 12 June 2009 at [15].

***Decision met the requirements of award modernisation request***

20. The NTEU submits at [L14] of its Closing Submissions that the Commission needs to revisit the AIRC's decision, in particular "*if the Commission omitted in 2009 to consider, let alone give reasons for, the inclusion or otherwise of research institutes in the higher education award*". It refers to the statutory framework at the time including the Award Modernisation Request<sup>11</sup> under s 576C of the *Workplace Relations Act 1996 (WR Act)*.
21. Firstly, as set out above at [15]-[18], there is no basis to the claim that the Commission omitted to consider this issue in 2009.
22. Secondly, this seems to be the first point in these or any proceedings at which the NTEU seeks to rely upon this argument. This goes beyond requesting that the Commission exercise its powers to vary modern awards as part of the 4-yearly review, and suggests that the Commission ought to revisit the decision of its predecessor 8 years ago. The basis of such an argument seems to be that, contrary to s 576V of the WR Act, the AIRC did not exercise its powers in respect of the coverage of modern awards in accordance with the award modernisation request.
23. The NTEU has failed to establish that any doubt attends the decision of the AIRC in respect of its decision to not cover independent MRIs with the Higher Education Awards, let alone sufficient doubt for the Commission to revisit that decision.
24. The NTEU has argued that the decision to not cover MRIs and their employees by the Higher Education Awards is erroneous with respect to clauses 2(a), 2(c), 3(h) and 9 of the Award Modernisation Request.
25. It is clear that clause 2(a) of the Award Modernisation Request is directed at ensuring that new industries and occupations are not excluded from award coverage simply because they have "*traditionally been award free*" if the work performed is similar to work performed by employees covered by pre-reform awards. It has no application in the present circumstances, where the NTEU has not established that the "*traditionally award free*" exclusion was relevant to the decision of the AIRC in respect of research institutes.

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<sup>11</sup> Consolidated *Award Modernisation Request* (26 August 2009).

26. The contention in respect of clause 2(3) of the Award Modernisation Request, that the coverage decision disadvantaged employees, refers to the resulting change in coverage of some employees. The NTEU submits that employees previously covered by the *Universities and Affiliated Institutions Academic Research Salaries (Victoria and Western Australia) Award 1989 (Academic Salaries Award)*, who are now covered by the *Professional Employees Award 2010*, were disadvantaged by this decrease in the applicable minimum wage. It makes a similar argument with respect to the 3 independent MRIs who were covered by the *Higher Education Workers Victoria Award 2005*.
27. The wages in the Academic Salaries Award had not been updated since 2006.<sup>12</sup> No evidence of employees' actual wages was led that this resulted in actual, rather than potential, disadvantage to employees of independent MRIs. The NTEU argue that the reduction in the minimum wage disadvantaged the employees of some 11 institutions covered by the Academic Salaries Award. Conversely, coverage by the Higher Education Awards would have a corresponding increase to the minimum wage applicable to the remaining 25 independent MRIs represented by AAMRI (not mention independent MRIs which are not AAMRI members), the majority of which were covered by the predecessors to the PEA.
28. Similarly in respect of clause 3(h) of the Award Modernisation Request, the decision had regard to the relevant rates of pay of the employees at the 25 independent MRIs covered by the predecessors to the PEA as well as the minority covered by the Academic Salaries Award.
29. To the extent that 3 independent MRIs were also covered by the *Higher Education Workers Victoria Award 2005*, the decision was consistent with the wages and conditions that applied to the remaining 33 AAMRI members (plus other independent MRIs), being the pre-reform occupational awards that covered their relevant occupation.
30. Finally, clause 9 of the Award Modernisation Request stated that "*Where there is any overlap or potential overlap in the coverage of modern awards, the Commission will as far as possible include clear rules that identify which award applies*". This seems directed at minimising situations in which two or more awards apply to the same employer in *respect of the same employee*.

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<sup>12</sup> PR968220.



***Decision was consistent with historical coverage***

31. As set out in the AAMRI and APESMA Outline of Submissions in Support (11 March 2016) at [48] to [54], the historical coverage of research scientists at medical research institutes has **primarily been by the predecessors to the PEA**. These include:
- (a) In Queensland, the *Professional Scientists' Award – State 2002* [AN140228];
  - (b) In NSW, the *Professional Engineers and Professional Scientists (Private Industry) (State) Award* [AN120440];
  - (c) In South Australia, the *Professional Scientists (General Industries) South Australia Award* [AN150119];
  - (d) The *Scientific Services Professional Scientists Award 1998* [AP797607], in respect of:
    - (i) the four named Respondent MRIs in the Roping-In Awards; and
    - (ii) all other independent MRIs in Victoria, to the extent that they were not covered by the Academic Salaries Award.
32. To the extent that the Academic Salaries Award covered less than one-third of MRIs, 3 were removed from its coverage when they became covered by the *Scientific Services Professional Scientists Award 1998* as named respondents, in accordance with section 148(1) of the *Workplace Relations Act 1996*. The Academic Salaries Award only provided for salaries, and unlike the predecessors to the PEA did not contain comprehensive set of terms and conditions. It did not even contain classification descriptors in respect of the employees for whom it provided salary rates. It could hardly be described as the basis for a fair and relevant safety net.
33. It is clear that the predecessor awards to the PEA contemplated research scientists employed at MRIs in their coverage. This is demonstrated by:
- (a) the coverage of four MRIs as named Respondents to the Victorian predecessor award, which displaced the coverage of the Academic Salaries Award; and
  - (b) several of the other predecessor awards expressly excluded particular MRIs, with the necessary implication that other MRIs were covered by those awards if the exclusion had any work to do.

34. The NTEU also refer to the pre-reform coverage of 3 independent MRIs by the *Higher Education Workers Victoria Award 2005*. This is clearly an anomaly arising from historical connections with the universities also covered by that award, and ought not be relied upon to justify imposing those terms on most other independent MRIs who have not been bound by that award. Prior to 2010, the majority of non-research employees at independent MRIs were also bound by pre-modern occupational awards with common rule coverage.
35. To the extent that historical coverage is a guide to the appropriate modern award coverage, the historical coverage of research scientists and other employees at independent MRIs confirms the current position that they have been, and ought to remain, covered by the PEA and other occupational awards.

***Decision was consistent with treatment of university-controlled entities***

36. As noted in the AAMRI and APESMA Outline of Submissions in Response, in the Award Modernisation proceedings the NTEU argued that student unions, university-controlled entities and research institutes ought to be covered by the Higher Education Awards. Later, in the Stage 3 proceedings, it argued for university-controlled entities to be covered by the *Educational Services (Post Secondary Education) Award 2010 (Post Secondary Education Award)* while maintaining its claim in respect of student unions and research institutes.
37. In its Statement of 22 May 2009, the Full Bench of the AIRC determined not to cover university-controlled entities by either the Higher Education Awards or the Post Secondary Education Award. This was in spite of the fact that:
- (a) the university-controlled entities were **clearly** affiliated with universities and were organisationally linked;
  - (b) the university-controlled entities had historically been covered by the same award structures as universities;
  - (c) the decision led to employees of such entities becoming entitled to lower minimum rates of pay; and
  - (d) the decision resulted in university-controlled entities becoming covered by multiple occupational awards.

38. The university-controlled entities were and are connected to universities in a subsidiary relationship, and are affiliated to the extent that they share names with the university. These entities provide services to universities and are often integrated with the university that controls them.<sup>13</sup>
39. A review of the NTEU's submissions of university-controlled entities demonstrates that the majority of these were covered by awards containing the classifications in the Higher Education Awards, such as the Level A to E structure and the Higher Education Worker classifications.<sup>14</sup>
40. The decision of the AIRC not to cover these entities by an industrial award meant that these employees would become covered by occupational awards. Given the high rates of pay in the Higher Education Awards, it is probable that this resulted in such employees becoming entitled to lower rates of pay.
41. The AIRC's decision resulted in university-controlled entities and their employees becoming covered by either:
- (a) the Post Secondary Education Award, *if* they met the definition of the post secondary education industry; or
  - (b) other industry or occupational awards.
42. In spite of the above, the AIRC was content for university-controlled entities to be covered by occupational awards where such entities did not meet the relevant industry definitions that the AIRC had set. The AIRC has found it inappropriate for the Higher Education Awards to cover entities which are closely connected with higher education. In such circumstances, ***it would be highly inappropriate to cover independent MRIs which are far less connected with higher education.***

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<sup>13</sup> Eg see transcript of 17 March 2009 at PN276.

<sup>14</sup> See *La Trobe University Agencies and Companies Award 2001* [AP816088]; *Monyx Group of Companies (Interim) Award 2003* [AP831576]; *University of Melbourne Controlled Entities and Affiliates General Staff Award 2005* [AP846289]; *University of Melbourne Controlled Entities and Affiliates Academic Salaries Award 2005* [AP843338]; and *Victorian Universities (Controlled Entities and Affiliated Organisations Award 2004* [AP838705].

## The NTEU cannot justify coverage by the Higher Education Awards

43. The NTEU argue that the relevant question is whether "*the work – considered as industry or occupation – of research institutes of a similar nature to work that is covered by the higher education modern awards*".
44. It is clear from the 12 September 2008 statement of the AIRC Full Bench in the award modernisation proceedings that the scope of "industry" awards are based on the industry of the employer.<sup>15</sup> These proceedings suggest that, in determining the appropriate boundaries between industries, regard ought to be had to "*factors such as the regulatory environment, training and qualifications and the peculiar circumstances of the enterprises in the industry*".<sup>16</sup> In other words, if the similarity of the occupation were all that mattered, then there would be no need for industry awards.
45. AAMRI and APESMA repeat their submissions that it is clear, from the definition of the higher education industry, that the focus of the industry covered by the Higher Education Awards is on the education of higher education students. The definition relevantly provides that:
- higher education industry means educational institutions providing undergraduate and postgraduate teaching leading to the conferring of accredited degrees and **performing research to support and inform the curriculum***<sup>17</sup>
46. Similarly, the definition of "University unions and student unions" means "*associations of students, or of students and others, established primarily or exclusively for the purpose of providing representation or services to students*".<sup>18</sup>
47. AAMRI and APESMA submit that independent MRIs are clearly **not** in the higher education industry, as they are **not** focused on students. They are not in the same industry as tertiary institutions, having regard to the distinctions in work performed, the purpose, regulation funding sources and arrangements, tax treatment, comparative size (the median number of employees at independent MRIs is 139, compared to universities which are 19 time larger, with a median of 2611 full-time

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<sup>15</sup> Award Modernisation [2008] AIRCFB 717 at [6].

<sup>16</sup> Award Modernisation [2008] AIRCFB 550 at [13].

<sup>17</sup> Higher Education Awards, clause 3, definition of "higher education industry".

<sup>18</sup> General Staff Award, clause 3.

equivalent employees)<sup>19</sup> and lack of commitment to education for the purpose of a curriculum.

48. These factors are important for the reasons considered by the AIRC in the Award Modernisation Proceedings – the circumstances of universities are not the circumstances of MRIs, and contrary to the NTEU's Closing Submissions at [A111], p 183, do **not** have similar industrial issues warranting similar industrial regulation. Similarly, in the Issues Decision, the Full Bench acknowledged that the diversity in characteristics of the employers and employees covered by different modern awards would mean that "*the application of the modern awards objective may result in different outcomes between different modern awards*".<sup>20</sup> Accordingly, changes to underlying terms and conditions that may be appropriate to organisations in the higher education sector will be entirely inappropriate to independent MRIs – borne out by the other claims the NTEU has made in respect of the Higher Education Awards, such as the proposal to introduce an enforceable limit on working hours for academic employees (whereas professionals covered by the PEA may be compensated in a variety of flexible ways for working outside of ordinary hours).
49. The NTEU has sought to pursue these because of prevailing conditions in universities, which are likely to be quite different from those in independent MRIs based on the many factors which make the operations of independent MRIs distinct from those of universities.
50. In any case, the onus is on the NTEU to justify departure from the current coverage of MRIs. The evidence given in these proceedings, discussed in detail below, demonstrates that the purported similarities of work and relevant circumstances:
  - (a) are not established; or
  - (b) are no more common to universities and independent MRIs than they are to hospitals, the public sector and, in many cases, commercial entities.
51. The NTEU has therefore failed to establish that independent MRIs are so similar to higher education institutions that it is unfair for them to not have common award coverage.

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<sup>19</sup> Further Statement of Douglas Hilton at [11].

<sup>20</sup> Issues Decision at [33].

### ***Collaboration and affiliation***

52. The NTEU Applications propose, as one of 4 criteria for coverage of research institutes by the Higher Education Awards, that the entity be "*affiliated to a university, or where persons are employed who hold academic titles conferred by a higher education institution*".
53. AAMRI and APESMA do not dispute that there are affiliations and close collaboration between independent MRIs and universities, as there are between many other organisations and universities. What is in dispute is the significance the NTEU attaches to this unremarkable fact.
54. The evidence clearly disclosed that, far from affiliations and collaboration being unique between independent MRIs and universities, there is ongoing collaboration between independent MRIs and hospitals, private industry, government and universities. In particular, see:
- (a) the evidence of NTEU witness Roy Sneddon:
  - (b) the evidence of NTEU witness Peter Higgs that:
    - (i) he collaborates or has collaborated with employees of the Alfred Hospital;<sup>21</sup> and
    - (ii) the Burnet Institute collaborates with "*big pharmaceutical manufacturers, hospitals, charities...and universities*";<sup>22</sup>
  - (c) the evidence of NTEU witness David Trevaks that:
    - (i) he has collaborated with colleagues at MRIs, universities and hospitals, including the Royal Children's Hospital;<sup>23</sup>
    - (ii) the "*collaboration between unis, MRIs and hospitals are just as important to each other*";<sup>24</sup>

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<sup>21</sup> Transcript of 19 October 2016 at PN7379.

<sup>22</sup> Transcript of 19 October 2016 at PN7466-7.

<sup>23</sup> Statement of David Trevaks at [17]-[18].

<sup>24</sup> Transcript of 19 October 2016 at PN7677-9.

- (iii) there is collaboration between MRIs and CSL;<sup>25</sup>
  - (iv) there are "pay for fee sort of service" [sic] arrangements between private companies and MRIs;<sup>26</sup> and
  - (v) it is important to collaborate with hospitals, and indeed anyone "*who has a similar objective*";<sup>27</sup>
- (d) the evidence of Douglas Hilton that:
- (i) many independent MRIs have affiliation agreements with both hospitals and universities (such as the Walter and Eliza Hall Institute (**WEHI**)'s affiliation with both Royal Melbourne Hospital and the University of Melbourne);<sup>28</sup>
  - (ii) an independent MRI's affiliations do not mean that they are integrated with that affiliated organisation hospital, university or other organisation;<sup>29</sup> and
  - (iii) that universities have affiliations with many organisations, such as hospitals, health service providers, NGOs, zoos and other bodies, not just MRIs;<sup>30</sup>
- (e) the evidence of Brendan Crabb that:
- (i) the Burnet Institute collaborates with pharmaceutical manufacturers (including Omega Diagnostics), hospitals, charities and universities;<sup>31</sup>
  - (ii) universities such as Monash University have affiliations with commercial organisations such as GlaxoSmithKline;<sup>32</sup> and

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<sup>25</sup> Transcript of 19 October 2016 at PN7718.

<sup>26</sup> Transcript of 19 October 2016 at PN7716-7.

<sup>27</sup> Transcript of 19 October 2016 at PN7721-2.

<sup>28</sup> Further Statement of Douglas Hilton at [23]-[24] and Annexure DH-1.

<sup>29</sup> Further Statement of Douglas Hilton at [25].

<sup>30</sup> Further Statement of Douglas Hilton at [27] and Annexure DH-2.

<sup>31</sup> Statement of Brendan Crabb at [38].

- (iii) hospitals, universities and MRIs collaborate through cooperative ventures like the Alfred Medical Research and Education Precinct (**AMREP**) because in "*improving the human condition*" they each "*play quite distinct roles*" and independent MRIs "*fill a different niche*";<sup>33</sup>
  - (f) the evidence of Debra O'Connor that:
    - (i) the National Ageing Research Institute (**NARI**) is affiliated with the Royal Melbourne Hospital as well as the University of Melbourne,<sup>34</sup> and
    - (ii) "*NARI collaborates with a wide range of health services, not-for-profits, advocacy groups and universities*".<sup>35</sup>
55. The NTEU argues, for example, that employees of WEHI, for example, should be covered by the same terms and conditions as employees of the University of Melbourne, because the organisations are affiliated and the employees collaborate with each other.
56. However, if collaboration and affiliation are sufficient justification for joint award coverage, the NTEU has failed to demonstrate:
- (a) why independent MRIs should be covered by the Higher Education Awards instead of the awards covering hospitals, government and commercial entities with which they also collaborate and hold affiliations; or
  - (b) why the NTEU does not seek that the Higher Education Awards cover the hospitals, government and commercial entities engaging in research (or at least their research staff) with which universities collaborate and hold affiliations.
57. This demonstrates that there is no unique collaborative or affiliation relationship between independent MRIs and universities that necessitates joint award coverage.

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<sup>32</sup> Statement of Brendan Crabb at [36].

<sup>33</sup> Transcript of 1 December 2016 at PN 9915 and PN9944.

<sup>34</sup> Statement of Debra O'Connor at [29]-[32].

<sup>35</sup> Statement of Debra O'Connor at [35]-[38].



58. Further, the reliance by the NTEU's definition on affiliations with universities is misplaced and would lead to uncertainty. The unchallenged evidence of Douglas Hilton was that independent MRIs were able to disaffiliate from universities unilaterally.<sup>36</sup> This was accepted by NTEU witness David Trevaks in relation to the Florey Institute's affiliation with the University of Melbourne<sup>37</sup>.
59. The NTEU Closing Submissions make little mention of the academic titles on which the NTEU has placed great import in its proposed variation, save for noting that academic titles are used in some independent MRIs.<sup>38</sup> In any case, the evidence was clear that:
- (a) the titles commonly used in research institutes of "research fellow" etc did not arise from universities but instead because of the National Health and Medical Research Council (**NHMRC**);<sup>39</sup>
  - (b) MRI employees hold honorary appointments at universities, such as the title "professor":
    - (i) primarily so that they can supervise research and higher degree students from that university;<sup>40</sup> and
    - (ii) also to add stature to the output of their own work.<sup>41</sup>
60. As with affiliations, employees of independent MRIs are in no way the unique recipients of such titles from universities. The evidence of Douglas Hilton was that the University of Melbourne has appointed multiple honorary professors, including the Chief Scientific Officer of CSL, a public listed company.<sup>42</sup>

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<sup>36</sup> Further Statement of Douglas Hilton at [26].

<sup>37</sup> Transcript of 19 October 2016 at PN7648.

<sup>38</sup> NTEU Closing Submissions at [A111], p 187.

<sup>39</sup> Transcript of 1 December 2016 at PN9871.

<sup>40</sup> Transcript of 1 December 2016 at PN9874; Further Statement of Douglas Hilton at [28]; Statement of Brendan Crabb at [34].

<sup>41</sup> Transcript of 20 October 2016 at PN8209.

<sup>42</sup> Transcript of 20 October 2016 at PN8036.

61. NTEU witness Roy Sneddon acknowledged in evidence that employees across health, research institutes and other organisations have titles bestowed by universities for similar reasons, for example that it is common for employees in the health industry to have adjunct titles".<sup>43</sup> In discussing this "*complex web*", Mr Sneddon stated that:

*at the Hanson Institute, we would have employees of IMVS, SA Pathology or the Royal Adelaide Hospital that would have affiliations, either clinical affiliations, academic affiliations, with many of the universities. Similarly, at, say, SAHMRI, which is another one of the affiliated organisations that we would work with, our employees at SA Health would also have affiliate status with SAHMRI, they would have worked at SAHMRI and also at the universities.*<sup>44</sup>

62. Similarly, the evidence of Dr Ross Smith, an environmental scientist who runs an environmental science consulting firm, was that he had been appointed an Adjunct Fellow of Southern Cross University, meaning that he collaborated with the university and supervised students.<sup>45</sup> However, there is no suggestion that such an appointment should mean that Dr Smith's firm ought to be covered by the Higher Education Awards, even though it would have that effect in a not-for-profit organisation established for medical research.
63. The two elements of the NTEU's definition that tie independent MRIs to universities are common to a wide range of organisations. Accordingly, it would be inappropriate for these elements, if satisfied, to give rise to common award coverage.

***The industrial character of the work does not justify joint coverage***

64. The NTEU argues that the work of research employees at independent MRIs is more analogous to the work of researchers at universities than to employees covered by any other award.
65. AAMRI and APESMA acknowledge that there are similarities between the work of employees at independent MRIs and a minority of scientific research only employees at universities. However, to a significant degree the extent of any similarity between the work of research employees at MRI's compared with universities is not the central

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<sup>43</sup> Transcript of 19 October 2016 at PN7289.

<sup>44</sup> Transcript of 19 October 2016 at PN7210.

<sup>45</sup> Transcript of 1 December 2016.

point. The question for the Commission is whether research scientists at independent MRIs, who are performing scientific duties and covered by the PEA, ought to be removed from that coverage.

66. In its submission and evidence from witnesses, AAMRI and APESMA's primary contention is that the PEA covers most employees engaged in professional research duties at independent medical research institutes and ought to continue covering such employees. Most of these employees meet the definition of professional scientists performing professional scientific duties. That is the nature of the work of medical researchers. Research in this context is a branch of science and evidence presented by the AAMRI and APESMA witnesses was to the effect that work of all scientists at independent MRI's is the same as or similar to the work of other scientists covered by the PEA.<sup>46</sup>
67. Further, evidence given by AAMRI and APESMA's witnesses demonstrated that 70.1% of research staff are currently covered by the PEA and 89.9% hold degrees in science which are required to perform their work. If the primary position of AAMRI and APESMA is accepted, the remaining issue for the Commission is the appropriate coverage for the minority of those who hold a degree in Science but not from an Australian, UK or NZ university (17.8%), and the small minority who hold a degree not in science but in a medical or health related discipline. The AAMRI & APESMA Application is directed at extending the coverage of the PEA to these employees on the basis that their work is the same or similar as the research scientists at independent MRIs who are already covered by the PEA.
68. However, notwithstanding the primary proposition which is advanced by AAMRI and APESMA , the evidence also disclosed that there are important differences between the work of independent MRIs and medical research work at universities, such as:
- (a) the focus on translational research (including patenting and commercialisation) as opposed to the focus on scholarly publication in universities;
  - (b) the broad range of activities performed by independent MRIs; and
  - (c) the way in which the mission of MRIs affects their operation and the academic freedom of employees.

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<sup>46</sup> Witness Statement of Douglas Hilton (11 March 2016) at [41] and [44]-[45]; Witness Statement of Ross Smith at [5]; Transcript of 20 October 2016 at PN8037; Transcript of 1 December 2016 at PN9947.

69. The NTEU has not shown these similarities to be any greater than those between research scientists in hospitals, government or commercial organisations.

*Work is distinct from the majority of university employees*

70. The NTEU's submissions and arguments have focused on research only staff engaged in medical research in universities, and compared these with research scientists and other researchers at independent MRIs. As evidenced by the Australian Bureau of Statistics' "Industry of Employment by Occupation" worksheet, based on figures from the 2011 Census, the vast majority of the 54,179 university academics are not performing work as **scientists**.

71. The NTEU's argument is that the work performed by all research employees of independent MRIs is similar to work that is done by a small proportion of university employees. It is somewhat artificial to infer from this similarity that independent MRIs ought to be covered by the Higher Education Awards, when the work of employees in independent MRIs is so different from the **other** employees of universities.

*Unlike universities, independent MRIs focus on translational research*

72. It is clear independent MRIs emphasise translational research – that is, the translation of research to impact, including outputs of research on public health activities, policy and health guidelines, and the commercialisation of health discoveries. This primary focus on translational research distinguishes MRIs from scholarly research which is the primary focus of universities.

73. The evidence of Douglas Hilton was that:

- (a) "the work research academics at universities is primarily measured by scholarly publications, including the Excellence in Research Australia initiative...which ranks success of universities in different research disciplines based primarily on scholarly inputs";<sup>47</sup>
- (b) independent MRIs are not included in those ERA rankings;<sup>48</sup>
- (c) independent MRIs will measure success other than by publication, eg through the impact on health and policy outcomes,<sup>49</sup> and are expected to contribute

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<sup>47</sup> Further Statement of Douglas Hilton at [20].

<sup>48</sup> Further Statement of Douglas Hilton at [20].

<sup>49</sup> Further Statement of Douglas Hilton at [21].

through communication of their research in guidelines or policies, developing commercial uses for research, working with NGOs and government or using the research in clinical care;<sup>50</sup>

- (d) contrary to the NTEU's understanding of the operation of research in independent MRIs, the publication of findings in scientific journals is not always an essential part of research and can be an enormous barrier to achieving the type of impact independent MRIs encourage, eg patenting a discovery;<sup>51</sup>
- (e) at universities, patents are not valued as part of the academic appointment and promotion system in the same way as they are in independent MRIs;<sup>52</sup>

74. The evidence of Brendan Crabb was that:

- (a) the Burnet Institute has an entrepreneurial focus as a company limited by guarantee with a board of directors drawn from the corporate world;<sup>53</sup>
- (b) researchers at the Burnet Institute are "more concerned with developing a new drug or treatment or prevention of a disease than the publication of their research in a scholarly journal";<sup>54</sup>
- (c) publications, while valued by the Burnet Institute, are "a surrogate measure of what our primary interest is", and there are "certainly other measures that are more important to us but are harder to compare ourselves to other organisations with";<sup>55</sup>
- (d) the business model of universities depend on their publication output which MRIs simply don't have; and

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<sup>50</sup> Statement of Douglas Hilton at [43].

<sup>51</sup> Transcript of 20 October 2016 at PN7856.

<sup>52</sup> Transcript of 20 October 2016 at PN7863.

<sup>53</sup> Statement of Brendan Crabb at [12].

<sup>54</sup> Statement of Brendan Crabb at [20].

<sup>55</sup> Transcript of 1 December 2016 at PN9824 and PN9826.

- (e) the Department of Infection and Immunology at the University of Melbourne, at which he was previously employed, had an excellent academic output but "*very little in the way of translational or public health focus*";
75. The evidence of Debra O'Connor was that:
- (a) NARI publishes both in peer reviewed journals and often in "grey literature", which is "not peer reviewed is less academic or scholarly than peer reviewed journals and does not contribute to the Excellence in Research (ERA) measure used by universities";<sup>56</sup> and
- (b) "a lot of [NARI's] publications and dissemination are through conferences and workshops".
76. It is true that some of this evidence was contested by NTEU witnesses. However, when it was put to NTEU witness Peter Higgs that the Burnet Institute was more concerned with development of new drugs, treatments and prevention methods than publications, he acknowledged that it "*make[s] contributions to public health that are beyond or more than just writing for publications*". He also agreed that, unlike at independent MRIs, it would be uncommon for universities to encourage "grey literature".<sup>57</sup>
77. When discussing the importance of publication, Peter Higgs' evidence was that publication was necessary to "*get the grants to enable them to do the research to do that sort of stuff*", ie public health activities. In light of the preponderance of evidence around the mission of independent MRIs and the Burnet in particular, his claim that "*ultimately we are doing research to get published in journals*"<sup>58</sup> is difficult to accept. When considering the evidence as a whole, it is clear that publication is not the aim of independent MRIs, but only one of the means by which they achieve their aim of affecting health outcomes.
78. The evidence was also clear that there is not the equivalence of positions across universities and independent MRIs that the NTEU claims. Peter Higgs gave evidence that he had positions at both Curtin University and the Burnet Institute – however,

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<sup>56</sup> Statement of Debra O'Connor at [24]-[25].

<sup>57</sup> Transcript of 19 October 2016 at PN7522-3.

<sup>58</sup> Transcript fo 19 October 2016 at PN7356.

these positions were as a "Senior Research Fellow" at Burnet, and an "Early Career Research Fellow" at Curtin University.<sup>59</sup> This is consistent with Brendan Crabb's evidence that a person's position at Burnet may not be equivalent to their prior academic performance.<sup>60</sup>

79. AAMRI and APESMA note that of the NTEU's witnesses, only Peter Higgs had been employed at both an independent MRI and a university. To the extent he contests the evidence regarding the activities valued by independent MRIs, it is submitted that the evidence of Douglas Hilton and Brendan Crabb ought to be preferred in light of their longer experience and greater knowledge of the direction and expectations of the institutes they run.

*MRIs engage in significant activities outside of research*

80. The evidence of Douglas Hilton was that MRIs perform a diverse range of activities outside of those ordinarily performed by universities, including providing clinical services, performing public health activities, developing intellectual property and commercialisation.<sup>61</sup> This was supported by the evidence of:

- (a) Brendan Crabb, that the Burnet Institute engages in significant public health activities and operates as an international NGO;<sup>62</sup>
- (b) Debra O'Connor, that NARI is engaged in significant advocacy, public health promotion, professional development and publication of "grey literature".<sup>63</sup>

81. The NTEU did not challenge this evidence or suggest that these activities are not performed by independent MRIs, nor that they are a significant part of university activities. The only suggestions of this was the evidence of Peter Higgs that:

- (a) the Burnet Institute does not provide clinical services (limiting his general and unfounded statement that independent MRIs in general do not provide such services),<sup>64</sup> and

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<sup>59</sup> Statement of Peter Higgs at [14].

<sup>60</sup> Transcript of 1 December 2016 at PN9875-7.

<sup>61</sup> Further Statement of Douglas Hilton at [6]-[8] and Annexure DH-1.

<sup>62</sup> Statement of Brendan Crabb at [26] and [28]-[29].

<sup>63</sup> Statement of Debra O'Connor at [19]-[25].

- (b) he currently performs some public health promotion activities while jointly employed by Monash University and the Burnet Institute.<sup>65</sup>

*The missions of MRIs are focused on health improvement, not education*

82. The evidence was that MRIs have distinct missions aimed at improving the diagnosis, prevention or treatment of disease,<sup>66</sup> and that these affect the type of work and the emphasis of work at independent MRIs when compared to universities. Brendan Crabb gave evidence that Burnet's mission– "*better health for poor and vulnerable communities through research, education, public health, locally and internationally*" – "*isn't a department mission, hand wavy department mission in a greater corporate entity; that is our corporate mission*". Because of this "*[t]here's no university ranking tables; there's no numbers of publications that interest my or any other independent medical research institute corporate board. What they care about is the progress toward solutions to the particular health problems that are the focus of those institutes*".<sup>67</sup>

83. In comparing the missions of independent MRIs with universities, the evidence of Brendan Crabb was that generally:

*Those research centres within a university are part of a university contributing to the university's mission and purpose. They're not autonomous. They are for whatever reason set up by the university toward their goal and their mission which is tertiary education and the business model that feed that. That's their purpose.*<sup>68</sup>

84. Peter Higgs also agreed that, unlike the Burnet Institute, universities don't have as their major purpose achieving better health for poor and vulnerable communities.<sup>69</sup>

85. In addition to the focus on translational research and an MRI's other diverse activities, the mission of the independent MRI impacts the type of work done by research employees at independent MRIs. The evidence of Douglas Hilton was that

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<sup>64</sup> Transcript of 19 October 2016 at PN7397.

<sup>65</sup> Transcript of 19 October 2016 at PN7411.

<sup>66</sup> Statement of Douglas Hilton at [28].

<sup>67</sup> Transcript of 1 December 2016 at PN9945.

<sup>68</sup> Transcript of 1 December 2016 at PN9828.

<sup>69</sup> Transcript of 19 October 2016 at PN7433-4.



independent MRI employees do not have the level of academic freedom enjoyed by university academics, and that if an employee's work does not fit within the MRI's mission, they will encourage the employee to go elsewhere.<sup>70</sup>

86. The NTEU argues that Douglas Hilton has accepted that the missions of some university MRIs were comparable to independent MRIs. However, it is clear that at this point, Douglas Hilton was discussing one of the five university MRIs who are sufficiently independent from their university to be granted membership of AAMRI.<sup>71</sup> When it was put to Brendan Crabb that some MRIs based at universities had missions comparable to independent MRIs, Brendan Crabb noted that in some cases that was true, and in such cases they were "*heading toward becoming independent institutes themselves*".<sup>72</sup>

*MRIs are just as similar to hospitals and commercial entities*

87. There are also substantial similarities between the work of employees in independent MRIs and that of employees in hospitals, government and commercial entities. The NTEU has failed to demonstrate any relevant distinction in the work between employees in independent MRIs and equivalent employees in these non-university bodies – both in respect of researchers and non-research staff.
88. This was demonstrated by:
- (a) the unchallenged evidence of Douglas Hilton, that:
    - (i) the work of medical researchers at WEHI has a closer parallel with researchers at CSL (an ASX listed company);<sup>73</sup>
    - (ii) the work of medical researchers is scientific work, in that it involves the application of the scientific method;<sup>74</sup>
  - (b) the evidence of Brendan Crabb that:

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<sup>70</sup> Transcript of 20 October 2016 at PN7882.

<sup>71</sup> Transcript of 20 October 2016 at PN7769-78.

<sup>72</sup> Transcript of 1 December 2016 at PN9829.

<sup>73</sup> Statement of Douglas Hilton at [42].

<sup>74</sup> Statement of Douglas Hilton at [44].

- (i) medical researchers are similar to scientific researchers and distinct from non-scientific university academics;<sup>75</sup>
- (ii) research is involved in almost all scientific activity;<sup>76</sup>
- (c) the unchallenged evidence of both Douglas Hilton and Brendan Crabb that, to the extent that the work of medical researchers involves publication in peer reviewed journals, this is similar regardless of whether the researcher is employed by an independent MRI, hospital, university or commercial organisation;<sup>77</sup>
- (d) the evidence of Debra O'Connor that "[NARI's] **science is different**" to test tube and laboratory science, while still maintaining that it is scientific;<sup>78</sup> and
- (e) the unchallenged evidence of Dr Ross Smith that work is scientific work if it involves the application of the scientific method.<sup>79</sup>

89. This was also acknowledged by the NTEU's witnesses, including the evidence of:

- (a) Roy Sneddon that:
  - (i) research funding, governance, job roles, skills, and processes were similar between research institutes in the public sector, hospitals and universities;<sup>80</sup>
  - (ii) in particular the skills of research administrators are common to these various types of organisations, including hospital based institutes;<sup>81</sup>
  - (iii) the work of research support, while specialised, was "*clerical and administrative*";<sup>82</sup>

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<sup>75</sup> Statement of Brendan Crabb at [22].

<sup>76</sup> Transcript of 1 December 2016 at PN9922.

<sup>77</sup> Statement of Douglas Hilton at [45]; Statement of Brendan Crabb at [21].

<sup>78</sup> Transcript of 20 October 2016 at PN8165-6.

<sup>79</sup> Statement of Ross Smith at [3].

<sup>80</sup> Statement of Roy Sneddon at [6]-[7]; Transcript of 19 October 2016 at PN7198-9.

<sup>81</sup> Transcript of 19 October 2016 at PN7249-50 and PN7299; Statement of Roy Sneddon at [32].

- (b) Peter Higgs that:
- (i) researchers at hospitals, pharmaceutical companies and universities also publish in academic journals;<sup>83</sup>
  - (ii) "*there's a number of people that I work collaboratively with at The Alfred [hospital] who have appointments at both Burnet and, say, Monash University, so the work that we do together is the same kind of work*";<sup>84</sup> and
  - (iii) the ethics requirements that apply to independent MRIs and universities also apply to hospitals.<sup>85</sup>

90. Only Brendan Crabb was challenged on his evidence that the work of research scientists in MRIs was similar to the work of other scientists. Brendan Crabb's responses emphasised the similarities of medical research to other scientific endeavours within his knowledge.<sup>86</sup>

91. There were no serious challenges to the evidence of all witnesses that the work of MRI employees is also comparable to employees in hospitals and government bodies.

92. AAMRI and APESMA note that the NTEU has sought to rely upon the evidence of Ms Karen Ford in relation to the administrative work done in university MRIs. This evidence has not previously been referred to in support of the NTEU's claim in relation to independent MRIs, and AAMRI and APESMA were not given the opportunity to cross-examine Ms Ford on that evidence. However, Ms Ford's evidence regarding the work of an administrative employee in an MRI does not differ in any meaningful way from work that would be covered by the *Clerks – Private Sector Award 2010*.

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<sup>82</sup> Statement of Roy Sneddon at [29].

<sup>83</sup> Transcript of 19 October 2016 at PN7363.

<sup>84</sup> Transcript of 19 October 2016 at PN7379.

<sup>85</sup> Transcript of 19 October 2016 at PN7389.

<sup>86</sup> Transcript of 1 December 2016 at PN9919-24.

***Purported commitment to education***

93. It is not in dispute that independent MRIs supervise research and higher degree students. However, the evidence was clear that this is not due to an alleged "systematic and ongoing commitment to education", as the NTEU has sought to characterise it.<sup>87</sup>
94. The evidence of Douglas Hilton was that, to the extent the employees of independent MRIs are involved in the academic supervision of students, this responsibility lies "*with the honorary appointment at the university and the university has made that quite clear to us*".<sup>88</sup> This was emphasised by the evidence of Douglas Hilton, Brendan Crabb and Debra O'Connor that independent MRIs were unable to supervise students in their own capacity, but only through an honorary appointment with a university.<sup>89</sup>
95. Peter Higgs expressed uncertainty as to whether such supervision was for his university employer or the Burnet.<sup>90</sup> In these circumstances, the evidence of Douglas Hilton, a more senior research scientist with a clearer understanding of the relevant responsibilities, is to be preferred.
96. To the extent that independent MRI researchers work with research and higher degree students in independent MRIs, the evidence was that:
- (a) in the words of Brendan Crabb, with whom Mr Sneddon agreed, it was quite different from teaching, and more like a collaborative and mentoring relationship;<sup>91</sup>
  - (b) the research is a collaboration between the MRI employee and the student;<sup>92</sup>

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<sup>87</sup> NTEU Closing Submissions at [A111], p 186.

<sup>88</sup> Transcript of 20 October 2016 at PN7784-91.

<sup>89</sup> Further Statement of Douglas Hilton at [29]; Statement of Brendan Crabb at [32]; Statement of Debra O'Connor at [27].

<sup>90</sup> Transcript of 19 October 2016 at PN7411-3.

<sup>91</sup> Statement of Brendan Crabb at [33]; Transcript of 19 October 2016 at PN7245-7.

<sup>92</sup> Transcript of 20 October 2016 at PN7784.

- (c) to the extent it involves "passing knowledge on to students", this is in the same sense as the early phases of any professional employment;<sup>93</sup>
- (d) while the development of the research workforce is appreciated by independent MRIs, the primary reason to have such students is that they are "*functioning researchers who produce quality work in the broader context of the research teams that they operate*".<sup>94</sup>

97. Further, the evidence also disclosed that it is not only independent MRIs that supervise research students. The evidence of Brendan Crabb, was that hospitals, as well as private pharmaceutical companies such as CSL Australia and GlaxoSmithKline Australia (or GSK), are also involved in research training students, including some of the staff of the Burnet Institute.<sup>95</sup>

98. To the extent that other forms of "education" occur at independent MRIs, this is clearly not education in the sense of "higher education" or the type of education in which universities engage. The evidence of AAMRI and APESMA's witnesses included:

- (a) Douglas Hilton's evidence that WEHI's "education functions" were in relation to "research training", and were education "defined broadly";<sup>96</sup>
- (b) Brendan Crabb's evidence that the Burnet Institute's education and training is significantly different from education at a university, and is primarily "*capacity building*" and "*not teaching in a traditional sense, but it is raising up the skills of those partners*" in Papua New Guinea, for example;<sup>97</sup> and
- (c) Debra O'Connor's evidence that NARI engages in "professional development" that does not contribute to formal qualifications but instead is designed for upskilling and informing health professionals.<sup>98</sup>

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<sup>93</sup> Transcript of 19 October 2016 at PN7474-5.

<sup>94</sup> Transcript of 1 December 2016 at PN9935.

<sup>95</sup> Transcript of 1 December 2016 at PN9937.

<sup>96</sup> Transcript of 20 October 2016 at PN8020-4.

<sup>97</sup> Transcript of 1 December 2016 at PN9941.

<sup>98</sup> Statement of Debra O'Connor at [23].

99. To the extent that the Burnet Institute has assisted in delivering a Master in Public Health course, it is clear that this is an exception to other MRIs and a small part of the Institute's activities.<sup>99</sup>
100. It is clear from the above that education in the sense used in the Higher Education Awards, or when talking of a higher education institution, is (except for the particular activity at the Burnet) **not** part of the activities of independent MRIs.

***Distinct and diverse sources of funding***

101. As set out above at [47], the funding sources available are circumstances of employers that are relevant to determining the appropriate boundaries of modern awards. For example, funding will mean that terms that meet the modern awards objective in respect of one industry are inappropriate for those outside of that industry having regard to the likely impact on business and employment costs (section 134(1) of the FW Act).
102. It is a substantial mischaracterisation of the evidence to claim, as the NTEU does, that the sources of funding for research institutes are the same or similar as those for analogous components of universities.
103. Little to no evidence was led by the NTEU that was directed at the sources of funding for "*analogous components of universities (e.g. medical research institutes in universities)*".<sup>100</sup> Its Closing Submissions are the first attempt that the NTEU has made to distinguish between these "components" and the wider university of which they are a part.
104. The evidence for AAMRI and APESMA was that, while independent MRIs and universities are the primary beneficiaries of NHMRC grants,<sup>101</sup> other organisations conducting research such as hospitals and not-for-profits are able to access those grants too.<sup>102</sup> The NTEU did not challenge this evidence that there is no source of funding available to both independent MRIs and universities that is not also available to hospitals, government entities and not-for-profit organisations.

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<sup>99</sup> Transcript of 1 December 2016 at PN9939.

<sup>100</sup> NTEU Closing Submissions at [A111], p 187.

<sup>101</sup> Transcript of 20 October 2016 at PN7989.

<sup>102</sup> Further Statement of Douglas Hilton at [36].

105. However, contrary to the NTEU Closing Submissions, the substantial weight of evidence was that MRIs have a diverse range of funding sources that are distinct from the funding provided to universities. In particular:

- (a) unlike universities, independent MRIs do not receive a majority of their funding from federal government block grants, and instead receive a significant amount of funding from sources that are unavailable to universities, such as the Burnet's access to grants from government agencies,<sup>103</sup> and the majority of NARI's funding obtained from the Victorian Department of Health and Human Services;<sup>104</sup>
- (b) a significant amount of the funding of independent MRIs is received from variable sources such as charitable and health specific councils, trusts and foundations, philanthropic funding as Deductible Gift Recipients, industry partnerships and commercial ventures;<sup>105</sup>
- (c) the NHMRC available funding is different, as independent MRIs are able to access some operational costs as part of the IRIIS scheme, whereas universities are not;<sup>106</sup>
- (d) MRIs are ineligible to directly receive most of the significant funding sources that universities receive, including:
  - (i) approximately \$1.8 billion per year in research block grant funding which covers research overheads and research higher degree students;<sup>107</sup> and
  - (ii) ARC grant funding;<sup>108</sup>
  - (iii) recurrent funding for the education of non-research students;<sup>109</sup>

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<sup>103</sup> Statement of Brendan Crabb at [43].

<sup>104</sup> Statement of Debra O'Connor at [41].

<sup>105</sup> Statement of Douglas Hilton at [31]-[35].

<sup>106</sup> Further Statement of Douglas Hilton at [37].

<sup>107</sup> Further Statement of Douglas Hilton at [40].

<sup>108</sup> Further Statement of Douglas Hilton at [44].

<sup>109</sup> Further Statement of Douglas Hilton at [42].

(e) contrary to the statement of Mr Sneddon, not all research funding is portable between universities and independent MRIs (eg ARC funding).<sup>110</sup>

106. While the NTEU relies on the evidence of Roy Sneddon at paragraph 36 of his statement to say that "*[f]unding sources are the same or similar across Research Institutes and Universities, be they ARC or NHMRC or other grants*", at hearing Mr Sneddon acknowledged that he had not been employed with an independent MRI.<sup>111</sup> In contrast, both Brendan Crabb and Douglas Hilton have been employed at both independent MRIs and universities. Accordingly, their evidence is to be preferred in respect of the differences between funding at a university and independent MRI.
107. Further, the unchallenged evidence of Douglas Hilton was that as part of these different funding arrangements, universities are subject to different regulatory obligations imposed under the *Higher Education Support Act 2003*, including reporting requirements to TEQSA, the ARC and the Department of Education and Training.<sup>112</sup>
108. This evidence demonstrates that, even if the Commission only takes into account the funding available in relation to research (and not the significant other sources of funding available to universities), the funding sources, and the obligations that arise from such funding sources, are quite distinct. As noted by Douglas Hilton, the block funding that universities receive from government underpins the ongoing sustainability of universities as compared to the variable funding of independent MRIs.<sup>113</sup>

***Classification structure and "academic staff"***

109. AAMRI and APESMA acknowledge that the classification structure in the Higher Education Awards has been used in some independent MRIs.
110. However, this use of the award structures by independent MRIs is patchy and far from consistent. For example, while the NARI enterprise agreement uses the classifications of the Academic Award, it uses occupational classifications in respect

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<sup>110</sup> Transcript of 19 October 2016 at PN7662-7.

<sup>111</sup> Transcript of 19 October 2016 at PN7221; Further Witness Statement of Douglas Hilton at [46].

<sup>112</sup> Further Statement of Douglas Hilton at [31].

<sup>113</sup> Statement of Douglas Hilton at [36].



of its non-research positions. Further, the Academic Salaries Award did not in fact contain the classification descriptors which the NTEU now say independent MRIs have previously accepted – it was a salaries-only award.

111. To the extent that some independent MRIs use classifications found in the Higher Education Awards, Brendan Crabb also gave evidence that while some independent MRIs had their origins in universities, they had been evolving over a number of years to have very distinct natures.<sup>114</sup>
112. In relation to the classifications in the Academic Staff Award, the evidence of:
- (a) Douglas Hilton was that the Academic Staff Award descriptors were a narrow definition of the work of employees in WEHI;<sup>115</sup>
  - (b) Debra O'Connor was that:
    - (i) the classification levels for research staff were "*chosen in an arbitrary way*" and that NARI was not bound to retain them;<sup>116</sup> and
    - (ii) while the mission of NARI and its employees was to engage in translational research, embedding it "*in practice at clinical levels and at policy levels*", the Academic Staff Award descriptors did not mention translational research;<sup>117</sup>
  - (c) Brendan Crabb was that:
    - (i) the descriptors in the Academic Staff Award were not optimal in their focus on scholarly activity, and many research staff of the Burnet Institute would say that they did not apply at all;<sup>118</sup>
    - (ii) the levels used by universities (eg a professorial level) do not necessarily match up to the levels used at independent MRIs such as the Burnet Institute.<sup>119</sup>

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<sup>114</sup> Transcript of 1 December 2016 at PN9896.

<sup>115</sup> Further Statement of Douglas Hilton at [53]; Transcript of 20 October 2016 at PN7842-54

<sup>116</sup> Transcript of 20 October 2016 at PN8268.

<sup>117</sup> Transcript of 20 October 2016 at PN8292 and 8294.

<sup>118</sup> Transcript of 1 December 2016 at PN9892.

113. Contrary to the claim of the NTEU at L40 of its Closing Submissions there was sound evidence from witnesses that the use of these descriptors was inappropriate.
114. The evidence of Brendan Crabb was that, in his opinion and that of his colleagues at independent MRIs, amendments to the PEA, the award which currently applies to most research employees at independent MRIs, was more appropriate.<sup>120</sup>
115. Further, to the extent that some organisations use academic titles or the word "academic" to describe research employees, it was:
- (a) acknowledged by the NTEU's own witnesses that academic titles are granted to employees at hospitals;<sup>121</sup> and
  - (b) noted that such titles are also given to people in private industry.<sup>122</sup>
116. The NTEU led no evidence of the prevalence or otherwise of the descriptor "academic" in other organisations conducting research, and accordingly it is inappropriate to submit as it does that "*the research staff of research institutes are considered to be academic staff unlike other researchers*". In any case, it has acknowledged that employees of hospitals may also be considered academics.<sup>123</sup>
117. In respect of the HEW classifications in the General Staff Award, Douglas Hilton gave evidence that the HEW classifications in the General Staff Award were used for historical reasons, but that he was aware of many MRIs which did not apply the HEW classifications.<sup>124</sup> He also gave evidence that the pre-reform enterprise award that contained these classifications, the *Walter and Eliza Hall Institute of Medical Research General Staff Conditions of Employment Award 1999*, was allowed to terminate because neither WEHI nor the NTEU chose to modernise it.
118. As previously submitted, the HEW classifications in the General Staff Award are very broad and capable of applying to almost any administrative or technical employees in

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<sup>119</sup> Transcript of 1 December 2016 at PN9874-6.

<sup>120</sup> Transcript of 1 December 2016 at PN9895.

<sup>121</sup> Transcript of 19 October 2016 at PN7304.

<sup>122</sup> Transcript of 20 October 2016 at PN8036.

<sup>123</sup> NTEU Closing Submissions at [A111], p 187.

<sup>124</sup> Transcript of 20 October 2016 at PN8029.

a wide range of industries and sectors. It is therefore unsurprising that there may not have been problems in applying those classifications.

119. However, it is hard to see how the 10 HEW levels would be more appropriate for the 12 non-research employees of NARI than the occupational awards on which that MRI's enterprise agreement are based. It is also clear that they do not apply to other employees who perform similar work – for example, NTEU witness Mr Sneddon during his employment in a research administration role as part of SA Health.<sup>125</sup> It is neither necessary nor appropriate for all employees to whom those classifications could apply to be covered by the Higher Education Awards.

***Minority of AAMRI Members are university research institutes***

120. AAMRI and APESMA acknowledge that a minority of the members of AAMRI are research institutes that form part of a university.<sup>126</sup> However, it is an oversimplification to claim, as the NTEU does, that this demonstrates an affinity between universities and MRIs.<sup>127</sup>

121. The evidence of Douglas Hilton was that:

- (a) there are different levels of membership of AAMRI, including independent MRIs, controlled MRIs, and hubs;
- (b) the controlled MRIs include 5 MRIs within universities, 3 within hospitals (eg Peter MacCallum Cancer Institute), and one statutory entity of the Queensland government;
- (c) the university-based MRIs approached AAMRI requesting to be members;
- (d) in respect of the controlled MRIs, these are a minority which must satisfy particular conditions in order to be admitted to membership; and
- (e) the governance structure of AAMRI acknowledges the distinct nature of independent MRIs and emphasises their precedence within the association.<sup>128</sup>

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<sup>125</sup> Statement of Roy Sneddon at [8]-[10].

<sup>126</sup> Statement of Douglas Hilton at [21].

<sup>127</sup> NTEU Closing Submissions at [A111], p 187-8.

<sup>128</sup> Transcript of 20 October 2016 at PN8027.

122. The evidence of Brendan Crabb was that often controlled institutes "evolved" into independent MRIs on the basis that they did not fit within either a university or a hospital department.<sup>129</sup>
123. Accordingly, to the extent any "affinity" has been established:
- (a) it is with a minority of university-controlled MRIs, not with universities in general;
  - (b) it is common to hospital-controlled MRIs and the Queensland public service; and
  - (c) it is on the basis that these organisations "*didn't fit*" within universities or hospitals.

***Regulation and tax treatment of independent MRIs***

124. It was the unchallenged evidence of the AAMRI and APESMA witnesses that independent MRIs are subject to different regulatory obligations than universities. In particular, it was the evidence of Douglas Hilton that independent MRIs are not subject to the reporting obligations that universities owe to the Tertiary Education Quality and Standards Agency, Australian Research Council and the Commonwealth Department of Education and Training – including, as an example, the Excellence in Research Australia evaluation framework.<sup>130</sup>
125. In contrast, the majority of independent MRIs are organised as corporations limited by guarantee and registered as health promotion charities or public benevolent institutions. To this extent, they are regulated by the Australian Securities and Investments Commission and the Australian Charities and Not-for-profits Commission.<sup>131</sup>
126. It was also the unchallenged evidence of the AAMRI and APESMA witnesses that because of this charitable status, the employees of independent MRIs are entitled to greater tax benefits including staff remuneration in the form of fringe benefits tax

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<sup>129</sup> Transcript of 1 December 2016 at PN9945.

<sup>130</sup> Further Statement of Douglas Hilton at [31].

<sup>131</sup> Further Statement of Douglas Hilton at [12]; Statement of Brendan Crabb at [11]; Statement of Debra O'Connor at [39].

exemptions.<sup>132</sup> NTEU witness Peter Higgs acknowledged that this was a key attraction to working in an independent MRI.<sup>133</sup>

127. These different regulatory obligations and tax benefits clearly show the way in which government considers that independent MRIs are in a distinct category from universities. As discussed above, it also impacts on the focus of the work, the benefits available to employees and the circumstances likely to affect industrial regulation.

### **Modern awards objective**

128. In order to succeed in its application to vary the Higher Education Awards to cover independent MRIs, the NTEU needs to demonstrate not that it is preferable, but that it is *necessary*, that the variation be made in order to meet the modern awards objective.
129. The NTEU has argued that the AAMRI witnesses have identified no problems with the proposed coverage by the Higher Education Awards. However, the onus is on them to demonstrate that there is any practical problem with the current coverage that warrants the variation proposed. They have failed to do so.
130. Coverage of independent MRIs would *not* amount to a "fair and relevant safety net". The Explanatory Memorandum to the Fair Work Bill 2008 (**EM to the FWA**) anticipates at item 518 that "*the terms and conditions will be tailored (as appropriate) to the specific industry or occupation covered by the award*". As demonstrated above, independent MRIs are clearly not subject to the same industrial circumstances as universities, and accordingly it cannot be a fair or relevant safety net for the same terms and conditions to bind both types of organisations.
131. The history of award coverage of independent MRIs has been set out above and indicates a mixed coverage by the professional scientist awards and higher education awards. It appears that a minority of independent MRIs, limited to a small number of those in Victoria and WA, were historically covered by a salaries only award in respect of their "academic staff". This salaries award was made in 1989 and was virtually left unchanged, save for wage movements up until 2006. An even smaller subset of 3 independent MRIs were also covered by the *Higher Education Workers*

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<sup>132</sup> Further Statement of Douglas Hilton at [34].

<sup>133</sup> Statement of Peter Higgs at [21].

*Victoria Award 2005*. It would be inappropriate to treat this severely restricted coverage as a basis for sector-wide terms and conditions.

132. To the extent that those historical awards previously bound both universities and independent MRIs, AAMRI and APESMA note that item 518 of the EM to the FWA also anticipates that the FWA (as it was then) "*will take account of changes in community standards and expectations*". The clear evidence of AAMRI and APESMA's witnesses was that independent MRIs that may have once been integrated with universities have evolved to their current independent status, making this coverage no longer appropriate. This is reflected in the way in which the NTEU and independent MRIs allowed the relevant enterprise awards in this sector to lapse. The clear direction of independent MRIs is to continue to evolve away from any traditional linkages to universities.
133. The NTEU has led little to no evidence of any employee it says is not covered by the current occupational coverage. While the NTEU has not gone into detail in its Closing Submissions, AAMRI and APESMA maintain their submission that the NTEU is misconceived in contending awards such as the *Clerks – Private Sector Award 2010* and the *Health Professionals and Support Services Award 2010* do not apply. The decision of Deputy President Smith in the 2012 Transitional Review indicated that "[f]or those not conducting research, but who might be captured by the *General Staff Award*, they can more readily be placed under a modern award". The NTEU has provided no reason to depart from this observation.
134. In respect of that small proportion of research employees who do not fall within the coverage of the PEA, AAMRI and APESMA submit that it is more appropriate in light of the modern awards objective to vary the PEA.
135. The NTEU Closing Submissions fail to make the connection between the classification structures in the Higher Education Awards and how it says these encourage productivity any more than having occupational awards that the Commission has determined are appropriate for the type of work performed. It also fails to articulate the tenuous link it seeks to establish between the structure of the *Academic Staff Award* and the competitiveness of the national economy. Rather, AAMRI and APESMA submit that these occupational awards encourage flexibility for the diverse activities of different independent MRIs, and the different staffing requirements that result, compared to the strictures of the Higher Education Awards.

136. The principle of equal remuneration for work of equal or comparable value supports the existing occupational coverage. The NTEU has failed to demonstrate a meaningful difference between the work of employees covered by the occupational awards in independent MRIs and private industry. As it seeks to displace this coverage, it bears the onus of showing some deficiency in this coverage. To the extent that there are employees performing similar work in universities, there are also those performing similar work in hospitals and the private sector – independent MRIs and universities by no means have a monopoly on medical research scientists. It is only where there are particular industry considerations that the occupational coverage of such employees should be displaced. The evidence of Chris Walton was that that the 2011 Census also demonstrated that approximately 91% of science professionals identified themselves as being outside of higher education.<sup>134</sup> In his words:

*[T]here's about 80,000-odd scientists in the country. Of those, and the Professional Employees Award, to use a colloquial term, is the mother ship, it's the occupational award which many fall into. The history of this Commission's work over the years is sometimes it places those occupational people under an industry award and sometimes it leaves them under an occupational award. So the default award there for most scientists is the Professional Employees Award and in some sectors where there are scientists, such as higher ed, they've been put, for historical reasons, under a sector or industry award.*

137. This is in line with the comments of the Full Bench of the AIRC in the Award Modernisation process that "*it is desirable that, so far as practicable, the terms and conditions for [an] occupation are consistent across the relevant industry awards*".<sup>135</sup> In this case, it is desirable that so far as practicable, professional scientists have the same terms and conditions, which are the PEA. The Full Bench acknowledged an exception to this rule when employers were part of an industry with established relativities – however, while this may justify the different conditions for research scientists at universities, independent MRIs are **not** part of the higher education industry or any other industry with such relativities.

138. In respect of the NTEU's criticism of multiple award coverage, AAMRI and APESMA again draw the Commission's attention to the EY report into "majority clauses" in modern awards, explored in relation to multiple modern award coverage. The ACTU,

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<sup>134</sup> Transcript of 20 October 2016 at PN8098-101.

<sup>135</sup> *Award Modernisation* [2008] AIRCFB 1000 at [289].

AiG and ACCI jointly submitted that there was little value in exploring such clauses, agreeing with the report that it was a "*solution for a problem that may not exist*".<sup>136</sup> Research commissioned by the Commission, and employer and employee responses to the question of multiple award coverage, clearly demonstrates that there is no problem to be fixed. In these circumstances, the NTEU cannot sustain the contention that coverage by only two awards is preferable – at least not such that, in the words of the ACTU, AiG and ACCI joint submissions, it is "*'necessary' in the sense in which the word is used in section 138 of the Fair Work Act*".<sup>137</sup>

139. The NTEU Applications will clearly increase the regulatory burden of independent MRIs. They involve the imposition of two awards onto a range of organisations that are not currently covered by those awards, in circumstances in which most independent MRIs have not been covered by similar classifications, terms and conditions. Independent MRIs are very diverse compared to the homogeneity of universities.
140. No independent MRIs are currently covered by the Higher Education Awards. The NTEU Applications, if successful, would lead to a seismic shift in the modern awards system and disrupt the occupational coverage of several awards. There is no reason to disrupt this coverage when there are no practical problems with it. Taking into account the need to ensure a stable modern awards system, the NTEU Applications undermine the modern awards objective.

### **Separate Award**

141. AAMRI and APESMA note the NTEU's proposal for a separate award or awards to cover independent MRIs.
142. AAMRI and APESMA maintain that the NTEU has not established any basis for displacing the existing modern award coverage of independent MRIs. It also notes the restrictions in section 163(2) of the FW Act and seeks that the Commission adopt the AAMRI & APESMA Application and vary the coverage of the PEA.

**3 March 2017**

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<sup>136</sup> Submission of ACTU, AiG and ACCI dated 30 June 2016.

<sup>137</sup> Submission of ACTU, AiG and ACCI dated 30 June 2016.



**Association of Australian Medical Research Institutes**

**Association for Professional Engineers, Scientists and Managers, Australia**