IN FAIR WORK COMMISSION

MATTER NO: AM2015/6

Fair Work Act 2009

NTEU Submissions in Reply – 24 March 2017

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1 Introduction and Reliance on Previous Submissions

1.1 These submissions are made by the National Tertiary Education Industry Union (**NTEU**), and are filed pursuant to the Amended Directions of the Fair Work Commission (**Commission**) issued on 22 March 2017.

1.2 These submissions are made in response to the Submissions in Response filed by the Group of Eight Universities (**Go8**) and the Australian Higher Education Industrial Association (**AHEIA**) on 8 March 2017, and by the Australian Association of Medical Research Institutes (**AAMRI**) and the Association of Professional Engineers, Scientists and Managers Australia (**APESMA**) on 3 March 2017.

1.3 The NTEU has previously filed detailed submissions in respect of the NTEU Claims, dated 11 March 2016 – **Exhibit B** in these proceedings – and 3 February 2017 – **NTEU Final Submissions.** Those **Previous Submissions** analysed each of the NTEU claims and identified both general and specific reasons why the NTEU Claims should be accepted by the Commission, in the context of the legislative scheme.

1.4 These submissions in reply do not repeat the matters set out in Exhibit B and the NTEU Final Submissions, which continue to be relied upon in full. NTEU also relies on all written and oral evidence filed and heard in these proceedings.

1.5 The weight of the evidence in these proceedings supports and reinforces the matters set out in our earlier submissions, and the reasons why the NTEU claims should be accepted.

1.6 Each of the award variations proposed by NTEU is necessary for the Higher Education Awards together with the NES to meet the modern awards objective under s.134 of the *Fair Work Act 2009* (Cth) (**FW Act**).

2 Provisions, Principles and Task of the Commission

2.1 In relation to a concept of a "fair and relevant safety net of terms and conditions", it is uncontroversial that:

(a) each award needs to be considered in conjunction with the NES;

(b) "fair" needs to take into account fairness from the perspective of both the employer and employees;

(c) a "relevant" safety net needs to be appropriate to the circumstances of the particular industry (in the case of industry awards) and the circumstances of the employers and employees in that industry;

(d) each award, in conjunction with the NES, provides the safety net for the purposes of the BOOT, as well as being directly relevant in its own right for those employees whose terms and conditions are from time to time directly regulated by the award.

2.2 While the overwhelming majority of employees and employers in the higher education industry have been and continue to be covered by enterprise agreements, the NTEU notes the current application mentioned by the AHEIA at [10] for the termination of the Murdoch University Enterprise Agreement. Thus even in an industry where there has traditionally been “wall to wall” enterprise agreement coverage, the awards must now be considered as instruments of practical application, and not just in terms of their role as a safety net for bargaining.

2.3 The Go8 submit at [19] that:

> *“Employees are not reliant upon the awards for their actual terms and conditions as there are comprehensive, "wall to wall" enterprise bargaining agreements, marked by high rates and comprehensive, beneficial terms, all of which exceed the award conditions.”*

It is self-evidently not the case that *all* the terms in enterprise bargaining agreements in this industry exceed award conditions. The agreements as a whole have been held to meet the BOOT, but there are specific conditions in enterprise agreements that are lower than those in the awards. Examples are longer spans of ordinary hours for general staff and a wider range of circumstances for the use of fixed term contracts for both academic and general staff. Assessing agreements against the BOOT requires considering the agreement as a whole, and in the absence of award regulation of some matters, changes in conditions in relation to those matters cannot be weighed in consideration of the BOOT.

2.4 The Go8 go on to say at [20] that:

> *"Considered objectively, the awards have fulfilled their role in the industrial regulation in the higher education industry and operated effectively as a relevant safety net underpinning bargaining for the actual terms and conditions of each university and its staff (as set out in their enterprise agreements and supplemented by policies and procedures)."*

This submission seems to be founded on nothing more than the fact that there *are* collective agreements in the industry. That fact does not tell the Commission anything useful in relation to whether the awards *operate effectively as a safety net*. In the face of extensive evidence of widespread long hours of work, uncompensated overtime, lack of payment for casuals for all the work they do and employer reliance on employees to pay the cost of information technology connections used for work purposes, it is a better conclusion to draw that the awards are currently *failing* to provide such a fair and relevant safety net. In relation to such conditions of employment, workers in this industry are bargaining *for* a safety net, rather than *from* a safety net.

2.5 Further, the reference to policies and procedures invites the Commission to give weight to unilateral employer practices which in this industry are generally prescribed in contracts of employment and in the policy codes themselves as being binding on staff but not enforceable as a condition of employment. These are not a relevant consideration for assessing whether the awards constitute a fair and relevant safety net.

2.6 At [24] the Go8 submit that "the test is not whether additions would be moderate or reasonable, nor is the test that the Commission should adopt variations because they may have limited adverse impact upon employers." NTEU does not advance submissions about the moderate nature of the proposed clauses or about the limited impact upon employers in support of such purported tests. The moderate and a reasonable nature of the claim is relevant to the question of whether the proposed variations are necessary to achieve the modern awards objective, or go further than is necessary to do so. NTEU submits that the clauses it has proposed go no further than is necessary to bring the awards into better compliance with the modern awards objective. Submissions and evidence as to the extent of any likely impact on employers is relevant to the question of fairness.

Onus and the approach of the parties

2.7 The Go8 complain at [68] and [69] that the NTEU's proposed variations reflect the Union's industrial agenda and are aimed at the bargaining leverage rather than

being directed at the terms and conditions for staff to whom the awards apply. This is a confused and illogical submission. The NTEU has identified areas in which the awards fail to provide a fair and relevant safety net of terms and conditions of employment. Of course, amending the awards to provide such a safety net is part of the Union's industrial agenda. Nor is it surprising that the Union has also sought to improve regulation of these areas through enterprise bargaining. It is self-evidently the case that if the awards are varied to extend the safety net to matters on which they are currently silent, then that should have an impact, through the BOOT, on bargaining. Neither of these facts should weigh one way or another in the current proceedings. Neither of these facts supports the conclusion urged by the Go8 that the NTEU's approach in these proceedings is disingenuous.

2.8 The employers conveniently overlook that avoiding any award regulation of working hours for academic staff is part of their industrial agenda. As explained by Mr Picouleau:

Andrew Picouleau	PN6711 The university has a concept of a full-time workload?---Yes. PN6712 Presumably you need that in order to consider what a part-time workload might be? ---Yes. PN6713 Is it simply the introduction of the word "hours" into the label that - I mean, in the way that that concept is described in the union's clause, I put to you that it is exactly the same thing. It's a label for a full-time workload based on an assumption about how long that workload will take rather than a measuring of the hours of work?---Look, the problem for me is this is introducing the concept of these - well, one of the problems is introducing the concept of the ordinary hours of an academic. It's just not a concept that's been used or I'm familiar in the context of academic employment and it raises a number of issues which I have tried to identify in my statement. (emphasis added)

2.9 The NTEU has presented a substantial and substantive merits case in support of the variations it proposes. Having discharged the onus to do so, the NTEU submits that the almost complete absence of industry data, research or analysis provided by the employer parties in these proceedings invites the tribunal to conclude that such data would support the NTEU's applications.

2.10 The employers frequently cite the fact that the provisions being advanced by the NTEU do not reflect the way that hours of work or the performance of duties outside ordinary hours or outside the workplace are regulated in other awards.

2.11 This ignores the particular characteristics of this industry. With almost all academic employment and a large proportion of general staff employment, the work is individual, largely unobserved, and subject to high levels of professional discretion. This makes it easy, and financially convenient, for the employer to require more work than is paid for, or than can be completed in paid hours, and to foster work practices (and student expectations) that allow work to bleed into employee personal time.

2.12 Much work will necessarily be performed when it best suits the employee to do so. An employer cannot put someone at a desk and say "do your complex thinking now and only now". Nor can the pressures of high workload peaks and urgent deadlines be managed in a way that most benefits the employer and causes least inconvenience to the employee, without allowing a high level of autonomy in deciding how, when and where the work will be done.

2.13 Employees exercising their individual judgement about how, when and where to perform their work benefit from the flexibility and autonomy involved. But that flexibility and autonomy can also be a source of exploitation. The work performed is still work. It does not become a hobby or voluntary labour just because the employee exercises their own judgement about working from home, after hours, away from campus, in excess of their "ordinary hours" or using their home internet.

2.14 Leaving aside arguments about the *actual* working hours of university staff and the *causes* of those hours, there is ample evidence of the *perception* among both academic and general staff that they have are working very long hours. Professional flexibility and autonomy can assist employees in managing those workload and working hours pressures, and the evidence of several witnesses (such as Professor Andrews and Professor Leach) was that this is their practice.

2.15 Particularly in an industry where the work practices described above are endemic, it is insufficient for the employer to say "we do not compel you to make those choices, therefore we disavow all knowledge of the fact that such practices occur or responsibility for their impact." Unless the employer expressly directs staff *not* to do so (which universities do not), then it is an industrial reality that employees will (and do) engage in those practices as a normal part of their employment

2.16 In establishing a fair and relevant safety net of terms and conditions of employment, these characteristics of the industry should not be ignored.

NTEU expert witnesses

2.17 The NTEU concedes that the statements of Professor Strachan, Associate Professor Junor and Dr May were not compliant with Practice Note CM7 of the Federal Court. Nevertheless, the content of each statement was attested to by their authors, each of whom had relevant expertise based on their conduct of independent, peer-reviewed research into relevant characteristics of the industry. The statements clearly identified the relevant expertise of the witnesses, the factual data upon which their research conclusions were based, and were subject to extensive cross examination during which the research processes and the basis for the authors' conclusions were explained in detail.

2.18 Their evidence is reliable and should be given weight in these proceedings. The research conducted by these three witnesses is robust, and provides the Commission with strong evidence of patterns of working hours and related issues in this industry.

2.19 At [77] – [88] Go8 challenges the integrity of the evidence of these witnesses, and at then goes on to draw unsubstantiated conclusions about NTEU witness material in general.

2.20 In relation to MFI-1, which compares one section of the statement of Associate Professor Junor with one section of the statement of Dr May, there is no basis for the Go8 submission at [79] that "Essentially the reports had been produced by the NTEU or a combination of authors and copied with minor modifications made". While it is clear that the sections extracted in MFI-1 were propositions put to those two witnesses by the NTEU which they amended prior to attesting to their veracity, the evidence of both May and Junor is clear that the balance of their witness statements was their own work.

Dr May	PN2062 On that basis, your statement is based upon your academic research and reflects your personal view as a former academic?---Aside from section 3, which were a series of statements put to me by the union which I attested to, the remainder is my research, section 4 in particular. Section 1 and section 2 obviously goes to my personal details and my publications. PN2063 VICE PRESIDENT CATANZARITI: Sorry, Mr Pill, I don't want to interrupt your cross-examination, but I just didn't follow that last answer. Can we have that - - - PN2064 MR PILL: I'll explore the answer and there is good reason for doing so. PN2065 Section 3, you indicated, were a number of propositions put to you by the union which you attested to. Is that right?---Yes.

	PN2066 Otherwise, the statement is prepared by you?---By myself, yes. PN2067 Including, for example, on page 1 where you refer to yourself in the third person?---I do. PN2068 Yes?---I simply lifted a bio that I had for other purposes, yes. … PN2085 You accept that at least in relation to section 3, that's not what has occurred here?---No. As I explained, they were matters put to me which I attested to and adjusted in some cases. … PN2087 To the extent that they're not reflected in here and they also appear in Dr Junor's - perhaps I'll ask Dr Junor about that. Are there any other parts of the report that were written for you?---No. PN2088 Do you accept that nowhere in your report have you attributed the content to the NTEU?---No, but I say, "I attest to the following", so I guess I attested to those statements. PN2089 Yes. You would accept that if you were doing an academic report or submitting a document for publication - with respect, Dr May, you've presented this and Dr Junor presented a similar document - there would be words being used like "plagiarism"?---I didn't consider this an academic document and to the extent that the words are there, they are verified either by my research or my understanding of the literature, so - - - (emphasis added)

2.21 When asked about the inclusion of identical wording to Professor Strachan in describing elements of their joint research project, Dr May explained that she had used “a fairly standard set of words that were used every time we refer to this survey, for the purposes of clarity more than anything else” (PN2098). This is indicative of the common practice in relation to team research projects to agree upon a set of words to describe the project that will be used by all participants when reporting about it. It is hardly surprising, and no adverse implication should be drawn from the fact, that both Professor Strachan and Dr May would have observed this convention when preparing their witness statements.

Associate Professor Junor	PN2622 Now, you mentioned, as part of that response, that section 2 statements, and the section 2 is entitled to claim for a disciplinary currency payment, where did those statements come from? Did you write those?---I responded to a set of questions from the NTEU and wrote them up as like a way of organising the material in the rest of my submission. So they're partly my wording as I, if you like, adapted the questions that I used to organise my thoughts, and in fact what I have I think they're a convenient way of organising thinking about a disciplinary currency payment, and I've cross-referenced those questions to specific pages in my statement in sections 3 and 4.2, which I'm hoping to be able to sort of take you through point by point today. PN2623 Well, we'll come to that. Do you accept that on the face of the document nowhere does it

	indicate that the NTEU contributed to your content?---Well, I wouldn't call that content. I would call that a list of headings or topics to be addressed by content. PN2624 Just to be clear, Dr Junor, you're referring to all of the numbered paragraphs in section 2?---I'm saying that they are conclusions that can be drawn from my research, and that based on my academic research and my own experience, so it's both research and experience, I agree with those propositions. PN2625 Right. So they're the propositions that have been put to you that you're agreed with based on your research and experience?---That's correct. (emphasis added)

2.22 At [82] Go8 assert that Dr Junor "had various notes and other documents with her to which she was referring." Dr Junor admitted to having made handwritten notes on her statement (PN2841), but there is no basis on which to assert that she was referring to other documents.

2.23 In relation to the evidence of Associate Professor Hepworth, Go8 accept that his evidence can be relied upon as expert evidence. The NTEU does not in these proceedings seek to portray the NTEU State of the Uni Survey as having a representative sample of respondents, nor to draw conclusions of fact from the survey about actual hours worked or actual uncompensated hours worked. Therefore it was not relevant to produce expert evidence on those points.

2.24 The NTEU submits that there was no "fundamental deficiency" in the preparation and integrity of the evidence of these or other NTEU witnesses. They provided reliable evidence on the findings of their research and their knowledge of other relevant published research in the field, or in the case of Associate Professor Hepworth, on his expert analysis of the NTEU survey questions.

2.25 The propositions at [89] that there is a general concern about the preparation of the NTEU's witness statements generally and the reliance and weight that can be placed upon any of the written statements, is an outrageous submission to make at this point in the proceedings, without having put questions about the preparation of statements to witnesses. Each witness attested to being the author of their statement and adopted it as their evidence in these proceedings. Without having challenged witnesses on that question, it is improper to now draw a general allegation that all the NTEU evidence should be considered unreliable.

2.26 In these proceedings there was a very long delay between the filing of proposed award variations, the filing of evidence and the actual hearing dates. In such circumstances, particularly where witness statements report personal experiences, it is not unusual that witnesses seek to update their evidence to take

account of things which have changed since their statements were written or lodged.

2.27 At [91]-[92], Go8 infer from one comment by Mr Wilkes that "matters and content driven by the NTEU, rather than by the witness, have been included in statements filed in the Commission." This inference is not supported by an examination of Mr Wilkes evidence as a whole, where he describes the process of development of his witness statement and explains that as a result of the long delay between its initial preparation and its eventual review prior to lodging, he had failed to pick up some minor matters of detail that had changed in the interim (one example being that a reference to a change occurring recently was no longer recent by the time the statement was finalised). There was nothing in his evidence to suggest that he was not the author, nor that he had reviewed and finalised the statement. The sentence referred to by Go8 in their submissions is taken out of context of his longer evidence on the point:

Anthony Wilkes	PN844 You've mentioned a couple of times that there are some things in your statement that aren't quite right. Can I ask, in terms of the content of this statement, are some of these matters - do they arise from a discussion in recent times or do they arise from a discussion a couple of years ago?---I think I know what you're asking. To answer the question, there's two parts to this - to this document. There was the original conversation I had over the phone where information was taken and then sent back to me as a record of what I'd said and asked if this could go into a witness statement. Being that it took quite a while to get back to me, significant changes had happened in my workplace and I felt the need to update the document. So it does highlight some of the problems in the early days and then also signifies the changes that have happened since then as well. Does that answer your question? Is that what you were asking? PN845 That was what I was asking. I was trying to understand how it was that there was material in your statement that had come up two years ago. Are there any other parts of your statement that you do with to qualify or correct?---There was the PDR issues, and there was just in paragraph 23 and it's not that significant but it says in paragraph 23 that we recently began having weekly meetings and I'd overlooked this when I was reviewing the document. That was a couple of years ago, we'd recently started. We've actually been having them for a few years now. (emphasis added)

2.28 In relation to Dr Kenny, again a very long bow is drawn by Go8 from the fact that Dr Kenny prepared his statement in reply while overseas without access to his notes, and subsequently sought to qualify a single sentence in that statement (PN5870 – PN5880). Nothing in this justifies a broader concern about the veracity or accuracy of Dr Kenny's evidence, or that of other NTEU witnesses.

Surveys

2.29 The employers' submissions address the NTEU surveys at length, focusing on straw-man arguments. The NTEU does not contend that either the State of the Uni Survey or the survey of Dr Kenny are based on representative samples. The employer assertions about the character of the survey participants is highly speculative. For example they focus on the over-representation of union members to presume that non-members' voices are not reflected in the survey responses (Go8 [110]), despite the evidence indicating that 41 percent of the respondents to the State of the Uni Survey said they did not belong to any trade union (Exhibit 25, Doc 12, pg.5). Dr Kenny reported that his survey sample was drawn from respondents to the State of the Uni survey and was distributed to both members and non-members of the NTEU (Exhibit AB, para 36).

2.30 At [111] Go8 portray the NTEU's reliance on the qualitative responses to these two surveys as authentic voices from the respondents as somehow a last-minute invention. These qualitative responses were clearly put in NTEU evidence from the outset of the proceedings, in the witness statements of Mr McAlpine (Exhibit G, Attachments H and I - see for example the 1165 individual qualitative answers from academic respondents to Q45 "Do you have any comments you wish to make about working hours" at pp577-622 of Attachment H) and Dr Kenny (Exhibit AB, para 41). These responses reflect the voice of a significant number of employees in the industry.

2.31 In general, the employer submissions of the about the surveys focus only on the evidence of Professor Wooden, without considering the contrary views on many points expressed by Associate Professor Hepworth, despite acknowledging that Associate Professor Hepworth's evidence was expert evidence. This is particularly so in relation to conclusions about the extent to which the questions, the materials inviting participation in the survey, or the characteristics of the survey respondent group might lead to either confusion for respondents or a bias in the answers. Associate Professor Hepworth's specialist expertise in the design and analysis of surveys is extensive and high level. His evidence should be preferred.

3 Academic Hours of Work

3.1 The NTEU reaffirms our previous submissions about the nature of academic work which makes the unusual form of regulation proposed by the NTEU in these proceedings appropriate and necessary.

Does s.62 of the FW Act provide an effective protection for academic staff?

3.2 S.147 of the FW Act requires that "A modern award must include terms specifying, or providing for the determination of, the ordinary hours of work for each classification of employee covered by the award and for each type of employment permitted by the award".

3.3 In the context of the Academic Award, the **classifications** of employee would include teaching and research academics Level A – E, and research academics Level A – E. The **types of employment** would include the categories set out in clause 11, which include ongoing, fixed-term and casual, full time and part time.

3.4 The current provisions addressing the requirement of s.147 are cl. 22, which provides: "For the purpose of the NES, ordinary hours of work under this award are 38 per week" and the words at cl. 11.2 which provide: "Part-time employment means employment for less than the **normal weekly ordinary hours** specified for a full-time employee."

3.5 Thus, for the purposes of the NES, the "ordinary hours of work" provided for in the award are 38 hours for all classifications and for all types of employment other than part time employees. For part time employees they are something less than that.

3.6 Without a limit on **maximum** working hours or any provision for overtime, penalty rates, days off, or other compensation for the working of **hours in excess** of ordinary hours, it seems the effect of cl. 22 is merely to provide a point of reference for the calculation of leave entitlements under the NES. Ordinary hours have no meaning if there are no consequences for exceeding or going outside ordinary hours.

3.7 This provision is inadequate in relation to an occupational group where no effort is made to measure or regulate the hours actually worked – indeed, where employees are not requested or directed to work any particular number of hours per week – but rather working time is at best managed by proxy, through the allocation of work *load* and performance expectations, according to standardised assumptions rather than consideration of individual work rates.

3.8 The consequences are that the reference to “ordinary hours of work” in cl. 22 (or to “more than [38 hours] in a week” in s.62 itself) has no enforceable effect with respect to s.62 – Maximum Weekly Hours because the employer does not request or require that hours be worked, only that work be done .

3.9 It has been suggested by the employers in these proceedings that an employee aggrieved by their hours of work would have a right under s.62(2) to refuse to work *unreasonable* hours, and that the absence of applications under s.62 is indicative that there is no regulatory problem (see Go8 [157] and AHEIA [23]).

3.10 The NTEU submits that on the contrary, the absence of such applications highlights the regulatory hole in the current award safety net. The employers argue that:

(a) the needs of university workplaces require academic work to be regularly performed outside 9-5, Monday to Friday – ref. s.62(3)(c);

(b) academic wages are an annual salary, fixed, at “a level of remuneration that reflects an expectation of, working additional hours”- ref. s.62(3)(d);

(c) since academic workload is largely planned annually, staff are given adequate notice of any requirement for long hours of work – ref. s.62(3)(e);

(d) the usual pattern of work in the industry is such that long hours and work across seven days of the week is normal for academic staff, and hours necessary to complete required duties will vary across the year, particularly between teaching and non-teaching weeks – ref. s.62(3)(g);

(e) the nature of academic work lends itself to work being done at odd hours when inspiration strikes – ref. s.62(3)(h);

and also urge that

(f) it is a relevant matter that academic staff have significant control over precisely how and when (if not how much) work will be performed – ref. s.62(3)(j).

If the employers are correct about these points, and particularly when combined with the ready deniability on the employer’s part of requiring any number of hours to be worked, it is clear that s.62 does not provide any meaningful right to refuse unreasonable additional hours (at least in the absence of a proximate health and safety risk or an unusual personal circumstance). If the employers are right in their characterisation of the issues, then the current award taken together with the

NES provides no meaningful regulation of working hours for academic staff, since no number of additional hours of work would be unreasonable.

Role of the NES and the BOOT

3.11 The fundamental weakness of the employers' argument about s.62 of the FW Act is that s.62 is aimed only at limiting hours worked. It does not deal with the issue of remuneration at all. NTEU puts squarely and without apology that it seeks additional remuneration for the working of long hours by its members, if those members are receiving nothing more than minimum award wages.

3.12 The NES at s.62 is of no value in relation to the BOOT. If an enterprise agreement trades, for example, job security (continuing employment) and provides for or allows the employer to direct longer hours of work, in exchange for (say) an agreement rate 10% above the award, only the loss of job security would count in the balance when the BOOT was considered, as hours of work would be completely irrelevant in the assessment of the agreement under the BOOT.

3.13 The modern award objective at s.134 requires the Commission to create a minimum safety net made up of both the NES and the modern awards. Whatever value s.62 might have, it cannot be part of the safety net under which the BOOT is assessed, except to the extent that an agreement itself attempts to explicitly *exclude* the NES.

3.14 Section 62 provides no relevant protection of fairness of remuneration, and provides no appropriate comparator for the BOOT.

3.15 Section 62 is not activated until an employer requires an employee to work unreasonable *additional hours.* As stated in previous submissions, university employers never express their requirement as a requirement to work additional *hours*. Rather, the employer simply increases and then increases again the *workload* requirements. Moreover, the NTEU cannot advise its members collectively to exercise their rights under Section 62, as this could expose the Union and its members to penalties for taking unprotected industrial action. See *Victoria University v NTEU, 2 March 2017 [2017] FWC 1199.* This is a Decision where the Union advised its members not to continue to agree to perform certain tasks in circumstances where it maintained that the employer was acting contrary to the Agreement. Commissioner Bissett found in that case as follows:

> *"[29] To the extent that paragraph 3 and paragraph 5 purport to be a direction to NTEU members to not do work that is properly within their skills and experience and is work generally required of them under the workload allocation frameworks, then it is industrial action in that it is a*

restriction on the performance of work or a refusal to perform work. That work, in this case, being course or unit co-ordination tasks.

[30] This difficulty is not cured by the introductory words that the NTEU "tender the following advice." The words in each of the paragraphs is clear. Paragraph 3 says "don't do these tasks". That is an apparent direction. Paragraph 5 advises that staff "can advise your…Dean that you no longer wish to do this role" because of the incorrect allocation. These clauses do indicate an intent that there is some restriction on the performance of work should be imposed and that these restrictions are countenanced by the NTEU."

Part-time work hours set by reference to full-time hours

3.16 Similarly, the current award provides no fair safety net for part time workers. Part time hours are defined by reference to the "normal weekly ordinary hours" worked by full time workers (Academic Award cl.11.2). If full time staff can be expected to work 50 hours or more a week, all treated as ordinary hours, then it becomes possible for universities to require part time staff to work more than 38 hours a week.

3.17 This is illustrated by the Go8 at [301]: "the employment of part-time academics can and does occur and is based upon a notional number of days as a proportion of full time. Accordingly, a 0.6 part-time academic would work the equivalent of three days a week rather than five days a week and relevant work allocation regarding teaching would be adjusted accordingly." When full time hours are unlimited, spread across seven days and are frequently worked into the evening, then this is really talking about three fifths of a piece of string. What is "the equivalent of three days" when the employers declare themselves unable to determine the equivalent of 38 hours a week? If the work of the part-time employee is spread across the full week, with the employer disowning any responsibility for ensuring the workload is achievable in any particular number of hours, then part time academics have no fair safety net in relation to hours of work.

Professor Vann	PN5441 Does [Charles Sturt University] collect any data about the actual hours worked by part-time academic staff?---Not to my knowledge. PN5442 So when an academic staff member is working part time, employed as a fractional employee, whether that's a new appointment or a variation in their existing appointment, what metrics or assumptions are brought to bear to work out what fraction they will be employed at?---So, I'm somewhat removed from the daily practice of this, but as I understand it, it's mediated through the academic workloads mechanisms and whatever the fraction of employment is, the workload that is assigned to the academic would be appropriate to that fraction.

	PN5443 Okay?---And conversely, I guess, in discussions of either employing someone part-time or varying someone's contract to go from full-time to part-time, the reference would be to the relevant school's workload policy in considering that. PN5444 Okay. And that would be a fraction across all aspects of that person's workload allocation?---Well, there's obviously some flexibility in our enterprise agreement around what portions of time are devoted to various thing and they vary by staff member, by semester. So you wouldn't necessarily - you wouldn't necessarily pro rata a standard down. There might be some discussion about, you know, the proportions changing somewhat, but broadly speaking, yes.
David Ward	PN9254 When the university appoints a part-time academic staff member what metrics do you bring to bear in order to work out what fraction of full time they are?---So, the appointment would be based on a particular fraction of full-time work and then that fraction would flow into the workload allocation model. So, if somebody for instance was employed to work as a 60 per cent fractional full-time academic their teaching contact hours would be 60 per cent of that allocated to a full-time person. PN9255 The teaching contact hours allocated to a full-time person can vary quite widely, can't they?---It can, yes. PN9256 You have a 40/40/20 presumption in a lot of your schools and faculties, is that right?---I probably should say that's the starting point but, yes, that's right. PN9257 But from that starting point there can be quite significant variations?---That's right. PN9258 Can I ask you again in relation to a fractional employee, a part-time employee, how do you go about working out what fraction they should be paid at?---Yes, but I mean we're starting from the same starting point, if you like, of the 40/40/20 arrangement and basing it on that presumption.

3.18 At the same time, the employer position in relation to part time workers exposes a fundamental inconsistency in their assertions about the unworkability of the NTEU's proposed clause. They say that it imposes an impossible task on the employers – making a reasonable estimate of the time academics will need to spend to get their workload done. Yet again and again, employer witnesses conceded that the entirety of current workload regulation, in relation to teaching, administration and research, is based on exactly that approach, and that it is not only possible, but uncontroversially easy to correlate a fractional workload allocation to fractional hours of work.

The use of informed assumptions to estimate academic working time is not novel

3.19 All current academic workload allocation is based on assumptions, estimates and averages, including teaching allocation.

Professor Vann	PN5452 Okay. That's as a percentage of the working time that will be devoted to those activities. Is that right?---Well, broadly speaking, but I think it tends to be fuzzier than that in that, you know, teaching is usually the thing that is most closely managed. Often administration - you know, the way I often put it is that there is basically a market price for the work inside - that's done inside a department and for example, I'll just go back to thing from my own professional experience, but you know, for example, running the second year surveying camp in a civil engineering department attracted a relatively high workload, because it was something that nobody really wanted to do, whereas supervising a PhD student was kind of discounted in terms of workload model, because it was something that everybody did want to do, because it was intrinsically rewarding and also it was it was probably seen to be - you know, for better or worse at that time it seemed to count more towards your career aspirations. So it is - one of the difficulties about academic workload management is that it is not really a time allocation. It's kind of a market price for the things that academics are willing to spend their time doing, and this goes back to the very - you know, the flexible nature of academic work, the high degree of autonomy that academics expect to have in terms of determining their own workload. PN5453 Well, you've said that. Can I ask you to look at clause 30.9(i)?---Yes. PN5454 Now, there is a very specific time allocation there, isn't there? 1035 hours per annum?---Yes, there is. PN5455 For teaching and teaching -related activities. Now, is it fair to say that it's unlikely that any particular academic allocated 60 per cent for teaching, would teach exactly - or teach and do , teaching -related duties for exactly 1035 hours?---I think that is correct. As I said, they are kind of notional hours, a bit like the discussion we had about casual academics and to be honest, I believe the reason that explicit hours figures have showed up in enterprise agreements has been the inclusion of the 40 hours within the modern award and the insistence of the NTEU in particular that explicit hours figures were introduced to enterprise agreements. So I don't personally feel that that has been very helpful. When I was in school, there was a point system. It seemed to work very well. There was - you know, it wasn't - no-one pretended that they were hours, but there was agreement about the relative kind of price, if you like, of academic time and that was seen to be a fair mechanism within the discipline. So in discussions I've had at my previous university, actually I think after the hours were introduced into enterprise agreements and probably the round before this or the round before that, one of the heads of faculty talked about "hour-oids". You know, they are not actually hours, they are notional hours or fictional hours which are done to manage workload allocation, but no-one believes that they are - that you would pull up stumps at the end of 1035 hours or that that's a crisp definition of how many hours are expected to be involved. It's rough. It varies by discipline. It varies by subjects you teach and, as I've said, academics by and large, I think the thing that they would hate more than anything would be to be asked to fill in a time sheet. PN5456 Well, I think we are on common ground there?---Good. PN5457 So the teaching and related duties is allocated according to an allocation

	of hours, but in practice, you are saying that that it's actually based on - in the same way as casual academic work is allocated, it's based on an estimated average time for that - those particular bundle of duties?---Yes. Something like that. PN5458 And that average will be inaccurate in most specific instances as averages tend to be?---Yes, as averages have to be, I think. But yes, it's an indicative figure and it's not very productive to argue about whether it should be 1035 or 1040, or 1038. PN5459 And if a workload model has worked out, for example, that each lecture will be allocated three hours within the model, then it's going to be the case, isn't it, that even one academic might spend more than three hours on one lecture and less than three hours on the next. You can't say, "This academic takes this long and that academic takes that long." It is very much dependent on the specific activity that they are doing at that time?---Yes. It tends to be highly variable and, as I mentioned before, certainly my experience as an academic in terms of preparing lectures was that there is a certain amount of time that you have to invest in about how the whole course plays out. There will be ups and downs in terms of materials you might have to prepare or source. So it is pretty variable. That's where I say, I think most workload allocations have operated as what is seen to be a fair figure to the assembled community and that's usually at the school level. It can be at the faculty level sometimes, but it has tended in the past to be more at the school level.
David Ward	PN9251 Does UNSW have any data about the actual hours worked by academic staff?---No. We have workload models in place but obviously give - tie regulation to some aspects of academic work, for example face-to-face teaching hours but particularly around research time and how much time academics spend doing activities like that, we don't have academic staff for instance fill in timesheets or things like that. PN9252 And in fact even in relation to teaching time you don't actually measure the time worked, do you, you only measure what has been allocated according to broad assumptions?---Yes, the workload allocation model is based on a set of broad assumptions which is about the work that is allocated to an individual. PN9253 And both assumptions make estimates about what is a fair amount of time to allow for something rather than actually considering each specific lecture or tutorial and how much work might be involved in that?---Yes, I mean that's true to say, although - I mean I should emphasise that those workload allocation models are developed by general agreement of the staff within the work unit, so that obviously puts a very heavy level - fairness on to the models.

3.20 The proposition which underlies the NTEU proposed clause – that it is possible and reasonable to make an estimate of "that amount of required work such that employees at the relevant academic level and discipline or group of disciplines could with confidence be expected to perform that work in a competent and professional manner within an average 38 hours per week" – is entirely consistent with the employer evidence about how they calculate and allocate existing workloads, including research output requirements, under existing EBA provisions, and how they then calculate those same matters for the determination of part time fractional employment. Their submissions to the effect that this task is unreasonably complex and difficult, if not impossible, do not stand up to the

evidence about their current practice, which claims to do exactly that, and which employer witnesses attested worked fairly and well.

Excessive workloads – the elephant in the room

3.21 That academic staff work long hours is not contested (AHEIA [23], Go8 [224]). Nor can there be any doubt of this on the evidence, which includes census data, reports of qualitative and quantitative research, the self-reported hours of survey respondents, the direct evidence of NTEU witnesses about their own working time experiences, and concessions by employer witnesses about the issue. The employers argue against regulation not on the basis that the work is not being done, but on the basis that it is not their responsibility.

3.22 Without attempting to be exhaustive, both AHEIA and Go8 offer a variety of explanations for the long working hours of academic staff, many of which are systemic or reflect management practices, yet they abrogate any responsibility for the results. These explanations (Go8 [224], AHEIA [21], [22]) include:

(a) The "passion, pride, perfectionism' of individual academics, and their love of the work;

(b) Individual choices of academics to pursue personal goals such as promotion or enhanced academic standing;

(c) It is a by-product of the independence academics enjoy;

(d) Some academics are less efficient than others, and take longer to get their work done;

(e) Some academics do more than is strictly required of them by their employer;

(f) Variety in individual approach to work will result in various time taken to perform it;

yet fail to acknowledge other, systemic and organisational drivers of long working hours, such as excessive workload requirements imposed by employers.

3.23 This selective approach to the evidence reveals a fundamental flaw in the approach of the university employers to academic working hours, as revealed in the cross-examination of Associate Professor Hepworth:

Associate Professor Hepworth	PN9002 Yes. And would you agree with this, it requires an estimate by the staff member of the average hours they spend on university work but does not include a definition of "university work"?---That's correct. PN9003 Yes. And do you accept that if there was clarity around the concept of

university work that that would be a less ambiguous question and more likely to elicit comparable responses across the respondents?---I would take "university work" as being fairly well understood by the respondents, being in that most people have a pretty good idea when they're doing work that's required by their employer and this is a fairly intelligent audience, so I didn't see great ambiguities with it.

PN9004

Okay, but you accept that a definition of "university work" would have removed that potential for ambiguity?---Yes, if there was a potential for ambiguity, yes. Any definition is going to help that but - - -

PN9005

Yes, both in relation to whether the work or a particular activity is university work, but also given your response that you've just given previously, whether it was work that's required by the employer or part of a discretionary effort by the employee?---I'm not sorry, I'm not clear on what you're saying.

PN9006

Well, the answer you gave when I asked you about whether there should be a definition of "university work" or that that would remove ambiguity, your answer was to the effect that staff would generally have a clear idea of what work is required by their employer. So you're actually - - -?---I'm sorry, I said that they'd have a good understanding of what was university work, not that's a separate issue from "what's required".

PN9007

All right.

PN9008

VICE PRESIDENT CATANZARITI: Sorry, can I I'm not sure I understand the distinction between if I understood your response correctly, there is a distinction between university work and what is required by the university?---Well, the way I would understand it is that if I'm, say, doing some research that my employer has not specifically instructed me to do, that falls within my working definition then that would be clearly university work. But I'm not going to be disadvantaged in a tangible sense if I don't do it. So that's how I would draw the distinction there, that I would know that I was undertaking university work but whether it's required or not is a bigger framework, or a separate issue.

PN9009

MR PILL: Yes. Perhaps, and it will be flushed out, Senior Deputy President, but given we've touched on it, do you accept that as an academic staff member that part of what you do is work that you're specifically directed to do?---(No audible reply).

PN9010

You just need to verbalise your answers for the transcript, say, "yes", rather than nod?---Sorry. Yes.

PN9011

And then there might be work that you're not directed to do but you believe there's an expectation on you to perform?---The whole sort of requirement and expectation is very ill defined when it comes to in my experience, when it comes to university work, so I'm not trying to clarify the distinction here but to say that I don't want to highlight that I would in relation to this question that I believe people answering it would know clearly what's university work, even if what's required or expected is a bit harder to define.

PN9012

Yes, and in addition to what's required, what's directed and what's expected, there might also be work that I'd call university work, that I choose in my discretion to do or to passionately pursue, but it's part of my academic work in a general sense?---Absolutely.

PN9013

	And therefore seen as part of the university work in a general sense?---Sure. Yes. (emphasis added)

3.24 Associate Professor Hepworth's comments show the fact that academic staff understand all the work they perform – whether directed, required or self-initiated without regard to performance expectations – to be university work: that is, *work performed in the course of their employment by the university*. They are correct in this understanding. Pure industrial simplicity would favour counting all academic work performed as working hours.

3.25 The nature of the work and the nature of the industry make this problematic, however. First, with rare exceptions, it is difficult to keep track of *actual hours worked* because thinking occurs at odd times (such as while mowing the lawn). Second, any attempt by employers to constrain or limit the time worked in an absolute sense would be strongly resisted. The NTEU proposed clause provides a practical compromise which we submit achieves the modern award objective in a manner suited to the industry: a regulation of the hours which the employer *requires* to be worked, bringing to bear the existing approach to hours measurement in the industry – informed assumptions about what is a fair amount of time to allow for the completion of particular work expectations – while leaving employees unrestricted in their choice to do additional work beyond that which is required.

3.26 In these submissions, the employers are trying to argue two inconsistent propositions:

(a) The first is that academics are employed on a salary that applies to all the work they perform in a year, no matter how many hours that work takes them, and whilst employed are expected to exercise independent judgment about how they undertake their duties and (with some exceptions) which duties they will take on.

(b) The second is that when academics exercise independent judgment about how they undertake their duties and which duties they will take on, they are somehow acting outside the employment relationship, such that the employer has no liability in relation to the hours worked.

3.27 For example, they rely on evidence that *some* employees are able to achieve their work within an average 38 hour week to conclude that anyone who fails to achieve that has only themselves to blame (see AHEIA [20] – [22]). This reflects a deeply flawed view of the employment relationship and the role of an award safety net. Setting workloads at a level where less-experienced employees will

necessarily need to work additional hours beyond an average of 38 in order to complete work which more experienced staff complete faster than them, is indicative of wilful management blindness to actual working hours rather than of any exercise of professional flexibility by employees. Staff do not *choose* to be less experienced. It is a necessary characteristic of part of the workforce.

The nature and determination of research

3.28 Many of the arguments set out from Go8 [235] on have already been dealt with in the NTEU's Submissions of 3 February 2017.

3.29 Much of the employer arguments about research rest on a misunderstanding of the NTEU's position, and about the nature of academic work.

3.30 First, from first principles, to the extent that the academic employee is genuinely autonomous about what work they have to perform – i.e. a self-directed and self-selecting autonomous professional, then the regulation proposed by the NTEU has no work to do. For example, as previously stated, at ANU there are no "performance expectations" (either inputs or outputs) set by the University in relation to research (See Go8 [251]). If this is so, then, unless the teaching allocations were exceptionally onerous at ANU (which they are not) then there could never be any circumstance in which an employee would qualify for overtime, nor, as a question of practical reality, would the employer ever have to "measure" or calculate anything.

3.31 Second, the regulation proposed by the NTEU does not require the employer (or more likely the experienced supervisor) to make an estimate of how long each and every element of "required work" would take. What it does is ask such an experienced supervisor to look at the totality of the *"required work"* and make an assessment about whether that can "with confidence" reasonably be done by that type of employee in an average 38-hour week. It is a fair analogy with the task of the Commission in applying an objective statutory test such as the better-off-overall-test. The Full Bench in NTEU's appeal against Lawler VP's decision to approve an agreement, quoted with approval His Honour's words;

> *"[96] . . . Obviously enough, the BOOT calls for an overall assessment. Comparing monetary terms and conditions is, at the end of the day, a matter of arithmetic. There is an obvious problem of comparing apples with oranges when it comes to including changes to non-monetary terms and conditions into the "overall" assessment that is required by the BOOT. In such circumstances the Tribunal must simply do its best and make what amounts to an impressionistic assessment, albeit by taking into account any evidence . . ." [2011] FWAFB 5163, 10 August 2011*

3.32 NTEU's clause calls not for an estimate of how long each element of work will require, but calls for a reasonable *impressionistic assessment, albeit by taking into account any evidence,* as to whether the total package of workload can be done in a particular time, of the type that academic supervisors make all the time, and especially in relation to part time employees. (See evidence at NTEU Final Submissions cited at paragraph A51.)

3.33 Third, there is difficulty in using performance outputs as a basis for measuring performance. However, it is employers who have decided to use *research outputs* as a workload measure, so in seeking to regulate workloads, the NTEU has little choice but to follow their lead. Sydney University uses its research expectations, which are output-based to account for the required duties referred to in its enterprise agreement in relation to research. Professor Garton, from Sydney University, gave the following evidence.

Professor Garton Exhibit 9	PN4723 And it would be a pretty idle exercise, wouldn't it, to say - to say to somebody, "I want you to publish a book and I can tell you how many hours that that's going to take. That would be a fairly pointless exercise, wouldn't it? --- Yes, PN4724 But nevertheless, it must follow from our earlier discussion that the University has to form the view that those minimum research expectations can be met within the 690 hours that's allocated for research. That's correct, isn't it? --- That would be the expectation, yes.

3.34 Any difficulty in equating research expectations with workload estimations (and there are some) is because of choices made by the University to account for research by the use of research-output measures, rather than using these only for the appropriate purpose of performance management. Measuring *research inputs* is, we agree, a preferable way of accounting for research workloads and ensuring that workloads are not unsafe or unreasonable. To the extent that the regulation proposed by the NTEU might tend to have this effect, the NTEU considers this to be an additional benefit. However, it is ultimately a matter for the employers, and Professor Garton believes that measuring research outputs against hours is the expectation at one of Australia's leading research universities.

3.35 NTEU again draws the Commission's attention in this regard to the evidence cited from employer witnesses about this issue at paragraph A51 of its Final Submissions.

3.36 The claim is made by the employers that the existing performance expectations relating to research are either only "guidelines" or that the Policy Frameworks cited do not include specific quantitative expectations. NTEU says performance

expectations are just that – expectations imposed by the employer on the employee. They may be "guidelines" in the sense that failure to meet them does not get an employee dismissed as a matter of course. This will be so of many employer instructions in all types of employment settings. However, they are what the employee is told is expected of them. Moreover, the actual expectations of performance or output may in fact be set by the employee's supervisor *under* a policy, not set by the policy itself. Further, the suggestion that performance management and workload allocation are separate (Go8 [273]-[274]) does not necessarily contradict the NTEU's position at all. While Professor Garton claims such a separation (Go8 [273]) he agrees in the evidence cited above, that meeting performance expectations in relation to research is what the employees have to do within their 690 hours allocated for research. While it may well be true that workload allocation and performance expectations are separate conceptually, it cannot seriously be doubted that the level of performance expectations has great implication for how many hours an employee will have to work.

3.37 There can be no mistake that academic staff realise the implications of performance expectations, as is indicated from the evidence of Go8 witness Mr Picouleau from Monash University (PN6678 - PN6680):

> *It is the case, isn't it, that Monash University aspires to continually improve its research productivity levels?---It certainly is.*
>
> *Is it the case that in recent redundancy and voluntary severance processes at Monash University that research output has been a factor in identifying academic staff for redundancy?---Yes.*
>
> *Is it the case that fixed-term contract academic staff who fail to meet research output expectations may well not have their contracts renewed?---Yes, I suppose that's a possibility, yes.*

Comparable professional awards

3.38 The conclusion urged by the employers – that because academics are professional workers and are in receipt of a salary, they are appropriately compensated for any number of hours worked in any pattern across any distribution of days – is not consistent with the approach the Commission has taken in fixing a fair and relevant safety net in relation to hours of work for comparable professional employees.

3.39 At Go8 [190] and [203] the submission is made that relevant comparison occupations are professions such as engineers, scientists, doctors and academic teachers, all of which are paid an annual salary. NTEU has examined the award provisions relating to hours of work for comparable salaried professional

occupations. That examination reveals that the Higher Education Academic Award is the only award applicable to such employees which provides no regulation of working time beyond the mere statement that for the purposes of the NES ordinary hours will be 38 per week.

3.40 The following table summarises the provisions to be found in other awards for salaried professionals. Attachment 1 sets out the relevant Award clauses in full.

Award	Hours Provisions	Full Time Salary Range
Air Pilots Award 2010 [MA000046]	**24.** Cap on total hours per 30 days and per year. Minimum rest periods Guaranteed day off after rostered duty. Two consecutive days free of duty per week. Minimum rest periods and minimum breaks between rostered duty. No flying duties if all duties exceed 90 hours in any fortnight.	**Schedule B1.1 and 1.2** $34,981 – $165,842
Architects Award 2010 [MA000079]	**19.** Ordinary hours of duty must not exceed 38 per week. Span of ordinary hours. Overtime or TOIL at time and a half.	**15.** $47,720 – $58,584
Educational Services (Post-Secondary Education) Award 2010 [MA000075]	**21.2 (for academic teachers).** For the purposes of the NES, ordinary hours are 38 per week. May be annualised. For the purposes of determining the number of hours worked by an academic, each lecture and tutorial will count as three hours' work (or two if a repeat). **21.4.** Meal breaks.	**14.1** $48,280 - $82,508
Educational Services (Teachers) Award 2010 [MA000077]	**19.** Annualised hours. Ordinary hours variable as between teaching and non-teaching periods. Maximum attendance days per year (205) with limited exceptions. 6 months written notice of attendance days. **Schedule B (early childhood teachers).** Ordinary hours 38 per week averaged over four weeks. Span of hours and days. 10 hour maximum in any day. Minimum breaks between duty. RDOs, overtime, TOIL and shift work.	**14.** $46,782 - $64,732 **14.2** extra 4% on salary for long day care centres in lieu of access to overtime.
Medical Practitioners Award 2010 [MA000031]	**20 – 26.** Ordinary hours 38 per week can be averaged or worked in sessions (longer hours per day, fewer days per week). 2 days per week or 4 days per fortnight free from duty. Span of hours and days. Penalty rates for all weekend work. Overtime penalty rates for all except Senior Doctors (ie up to $92,000). Senior Doctors get 10% superannuable allowance on total salary instead. Minimum payments and penalty rates for recall. Shift work provisions. Rostering provision.	**14.** $49,356 - $116,617
Professional Employees Award 2010 [MA000065]	**18.** Ordinary hours 38 per week. Can be averaged over a regular cycle. Compensation required for time worked in excess of ordinary hours, on afternoon, night or evening shifts. Compensation may be form of money or additional time off.	**15.** $46,764 - $68,001

Award	Hours Provisions	Full Time Salary Range
	Compensation must include consideration of penalty rates applicable to other employees in the workplace. Compensation must be reviewed annually to ensure it is set at appropriate level.	

3.41 It can be seen that the Air Pilots Award and the Medical Practitioners Award both include salary ranges that encompass the full range in the Academic Award ($48,280 - $106,098), while the other awards all have substantial overlap. It is evident that these Awards all contain some mixture of provisions which either protect employees from a 24/7 working life, or provide for additional compensation in circumstances where hours are not regulated and employees do not have access to overtime or TOIL.

3.42 It is also important to note that the lack of hours regulation or overtime currently applies to all classifications in the award. Level A academics begin on an award salary of $48,280 p.a. The question of whether the hours regulation (or lack thereof) provides a fair and relevant safety net in the context of rates of pay must be considered in relation to all classifications covered.

Work value of salary rates not affected by overtime claim.

3.43 There is no suggestion or authority for the proposition at Go8 [187] that the full-time rates, simply by being expressed as annual salaries, are somehow "loaded rates". Such rates do exist in other awards and have in-built assumptions about the working hours required which give rise to the additional salary rate. (See for example, the *Seagoing Industry Award 2010*, Clause 13 and the *Medical Practitioners Award 2010* Clause 24.2 (c).)

3.44 In the Academic Award, the new graduate level (4-year degree), at Level A1 ($48,280) is set at a comparable level to other awards for which paid overtime is provided, for example the 4-year-degree rate in the Professional Employees Award 2010 ($47,962), or the *Social, Community, Home Care and Disability Services Industry Award 2010*, ($47,794), which would indicate that the Academic Award rates have never been loaded on work-value grounds or otherwise in consideration of long working hours.

3.45 Moreover, the casual rates are set on a basis of a divisor of 38 hours. In order for the work-value equivalence of the casual rates to have any integrity, it must be that the working-hours assumption in relation to a full-time employee is 38 hours.

3.46 In addition, the proposal by the employers, and accepted by the Commission in 2010, that "for the purpose of the NES, ordinary working hours are 38" in the Academic Award, would be a swindle against employees in relation to their

entitlements under the NES if the ordinary hours assumed for other purposes were greater than 38.

3.47 The suggestion that the academic salary rates have been set on the basis of long working hours is novel and without foundation, as is the suggestion that an entitlement to additional compensation for long working hours requires a reassessment of work-value. For it to be substantiated, there would have to be something *in the award* which entitled the employer to require additional hours, as there is for example in the Medical Practitioners Award Clause cited above.

3.48 The statement at Go8 [185] that the modern award compensates employees for all their hours of work is a statement of trite legal truth in the sense that their salary is all they are entitled to, even if their contract of employment requires them to work 80 hours per week. This tells us nothing one way or the other about whether this constitutes a *fair and relevant safety net*. The same goes for the cited evidence in support of this proposition.

3.49 At Go8 [187] it is suggested that introducing a payment for overtime requires a consideration of work-value of the base rate. Changing the remuneration for additional hours in the absence of evidence that the base rate is a loaded rate, would be no more justified than re-examining work value levels consequent on the reduction in penalty rates in the Commission's recent Decision regarding certain hospitality and retail awards ([2017] FWCFB 1001).

A simpler Clause (Go8 [345])

3.50 For an employee to be entitled to an overtime payment under the proposed Award clause, the employee would need to show:

(a) That the workload in question was ***only*** a result of the direction or requirements or performance standards imposed by the employer; *and*

(b) That the workload was such that the employer could not have objectively considered, or with confidence expected, that employees in the relevant classification and discipline or group of disciplines would be able to perform the duties in up to 40 hours per week.

Then and only then would an employee be entitled to additional payments, and even then, only to the extent that the employee was not already receiving the relevant total amount as an over-award payment.

3.51 The alleged “complexity” of the proposed NTEU Clause reflects the fact that it gives so many free passes to the employer, and severely limits the circumstances in which overtime would be payable.

3.52 The employers claim that even if the many concessions to the employers were removed, thereby making the clause simpler, it would still involve a significant regulatory burden on employers. They then make the apparently unconnected but correct point that the meeting of the modern award objective needs to be considered not solely from the point of view of employees. It is hard to know what to make of this submission, given that the many carefully drafted “complexities” of the NTEU proposal are aimed at making it fair to employers as well as employees.

3.53 However, a simpler clause might read something like this, stripped of the many provisions aimed at protecting the employer’s interests:

> *The ordinary hours of work for a full-time employee shall be 38 hours per week. Where the employer imposes workload requirements on an employee such that the employee cannot reasonably be expected to meet those requirements in an average 38 hour week in any calendar year (inclusive of leave), then the employer must either proportionately increase remuneration to maintain the employee’s hourly rate of pay (annual salary divided by 1982), or provide additional time off work, based on a fair estimate of the time required to meet those workload requirements. This clause applies pro-rata to part-time employment and to employment for less than a full calendar year.*

3.54 This is similar to the provision in the *Professional Employees Award 2010,* but unlike that award, it does not imply the payment of overtime at greater than 100% of normal pay.

3.55 NTEU argues for its more “complex” clause as it believes it is fairer to both employees and employers for all the reasons previously argued, but the words above indicate that if simplicity is elevated above those other considerations, a clause can still be readily achieved.

4 Policy Familiarisation and Discipline Currency for Sessional Academics

4.1 Go8 attempt to characterise the NTEU Claim as a claim to increase the **rates of pay** for casual academic staff (see, for example, Go8 [351], [Part 7.3 generally]). This is clearly not the case. NTEU's claim is for the payment of additional hours of work at the lowest relevant existing rate of pay. Submissions relating to the principles for establishing a new rate of pay are irrelevant in relation to this claim. The claim is for payment for time worked, not for a change in the rate of pay. For example, if the Union was able to show that due to the tripling in student numbers in tutorials, the required "associated work" attached to one hour's tutorial delivery was now unrealistic, and that the payment should therefore be increased from 3 hours to 3.5 hours, this would not be an increase in the *rate of pay*, but in the amount of time being paid for.

4.2 This misconception on the part of the employer is again apparent in Go8 [369]. They misunderstand the different rates of lecturing (Basic, Developed, Specialised) by suggesting that these represent different skill levels, whereas as is apparent from the Award itself, they simply represent different amounts of assumed time. All are fixed at the work value level of Level B, Step 2.

4.3 Also in Go8 [368c] the employers suggest that the 25% loading for casual employees is paid for entitlements which casuals do not receive. However, this loading is for award entitlements such as leave, which they are denied by the award system. It cannot be compensation for time worked but not paid.

4.4 The task before the Commission is not the fixing of a new work value level for other academic duties performed by persons employed on a casual basis to deliver lectures or tutorials. That is already fixed in the Modern Award by clauses 13.2(b) and (c). The task before the Commission is determining:

1) Is it the case that casual academic staff employed to perform more than a few lectures or tutorials are, by virtue of the terms of their contracts and the nature of the work, required to be familiar with employer policies relevant to the performance of their work, and to maintain their discipline currency?

2) If yes, does time spent in meeting these requirements constitute work time, for which they should be paid?

3) If yes, does the Modern Award ensure that such work will be paid?

4) If not, what changes should be made to the Modern Award to ensure that the requirement to provide a fair and relevant safety net is met?

Policy Familiarisation

4.5 In response to question 1, the Go8 acknowledge that there is a requirement on casual academic staff to know and understand university policy. However, they say there is no need for that work to be contemplated in the safety net, because:

- the volume of the work is small;
- much of it is done prior to the commencement of employment;
- some workers may already be familiar with some policy;
- some employers already provide paid induction programs, which cover some policies;
- universities provide systems which make it easy for staff to access policy information as and when they need it; and
- to the extent that this work is done outside paid induction programs, it is encompassed within the "associated working time" paid for lectures and tutorials.

4.6 Go8 at [380] make the unremarkable suggestion that a requirement to learn policies is widespread at many workplaces. However, given the character of casual employment and casual academic employment in particular, university employers are uniquely able to get this work done without having to pay for it. No doubt, full time academics also familiarise themselves with policies when they commence, but when they do they are at work and being paid. A casual shop assistant gets paid for all time worked, and if the employer wants them to learn the policies they would have to tell them to do it and pay them whatever they claimed in hours, or else set aside a certain number of hours and direct them to spend that time reading the policies. Casual academic employees, by the structure of the award itself, are *not* paid for all the time they work, and it is easy to issue a generalised instruction to "learn the policies" without saying how long should be spent, and therefore without paying anything. The evidence showed this is the practice.

Extent of requirement to be familiar with policies.

4.7 NTEU witnesses agreed that casual academic staff do not read the full volume of university policy libraries. Indeed, their evidence was put on that basis. For

example, in relation to Policies at the University of Melbourne, Dr Nurka stated at NTEU AR, paragraph 8:

> *8. While I would not claim to have read all of the policies listed at paragraph 5, I have read a number of them closely, including Assessment and Results Policy (particularly important); Equal Opportunity Policy; Health and Safety Policy; Responsible Conduct of Staff Procedure; Responsible Conduct of Students Procedure; Student Academic Integrity Policy; Student Complaints and Grievances Policy; and Student Support Procedure. I have needed to refer to some of those several times, and have looked through many of the others to check whether there is anything in particular which I need to note.*

4.8 There was a clear difference in the evidence as between HR managers (who generally disavowed any close knowledge of the work of casual academic staff, yet offered vague presumptions about what they might do in particular circumstances), who emphasised the organisational culture policies characterised by Mr Pill as "core" policies, and the evidence of working academics, including casual academics themselves, who pointed to the need to be familiar with and comply with a range of policies related to teaching and assessment, plagiarism, student conduct and complaints, and so forth. Dr Dix explains at NTEU AU paragraphs 53-56:

> *53. As a casual academic employee of SUT, I had always been required to know the university policies, procedures, regulations, etc., which relate to the work of academic staff and to the academic work of students, and to ensure they are complied with by myself and my students.*
>
> *54. There are some policies I have only needed to consult occasionally, but I am expected to know what policies there are to consult, and have a general knowledge of the circumstances in which they come into play.*
>
> *55. There are other policies which are integral to the work of all academics with teaching duties, including sessional academics. These include policies relating to teaching, assessment, plagiarism, and other matters relating to the design, delivery and assessment of courses, policies regulating the use of university facilities, such as library and information technology policies, policies about conduct and misconduct, including those relating to discrimination, inclusivity, bullying and harassment, academic misconduct, research misconduct and integrity, and policies dealing with student progress, 'show cause' , grievance and appeals procedures.*
>
> *56. There are also policies which relate to my obligations as an employee, such as workplace health and safety and some of the human resources procedures, which I am expected to understand and comply with.*

4.9 The limited evidence provided by the employer and NTEU witnesses as to the content of induction programs indicates that while they touch on some policies and provide links to more, they do not generally go to the full range of policies regulating the conduct of teaching and assessment. The evidence of Ms Thomas is useful in this regard. Compare her assertions at PN3989 - PN3992 that policies

relating to the performance of academic duties would be covered in faculty induction with Attachment 2 to AHEIA 8 – the program for a faculty induction which Thomas provides to illustrate her evidence about such programs. It is very light-on in relation to policy issues, and understandably focuses much more on supporting the professional development of sessional academics.

4.10 In any case, the NTEU claim proposes that all time spent in paid induction activities should be deducted from any policy familiarisation allowance otherwise payable. The relevance of the evidence about the content and duration of induction programs, then, as for example in Go8 [402] – [409], is whether the shorter duration of some paid induction programs demonstrates that less than ten hours is required to become familiar with all the policies relevant to the work of casual academic staff.

4.11 However the employers also concede that casual academics spend time in a variety of other contexts becoming familiar with relevant policies and how they apply to their work. This includes:

- accessing and reading policies on line;
- seeking guidance from supervisors about which policies apply in particular circumstances, and how they should be applied;
- seeking guidance from HR, faculty managers and student support services, central administration, health and safety officers, etc, about which policies apply in particular circumstances, and how they should be applied;

4.12 There seems to be an assumption that because information about policies and the obligations of casual academic under those policies is obtained by means other than sitting down and reading a policy manual from cover to cover, that it takes no time. As Dr Dix explained:

> *57. Some of this has been achieved simply by sitting down and reading a policy. Some of it has been picked up through information provided at induction sessions. Some of it has been through time spent checking with colleagues or supervisors about their understanding of which policies apply and how they work. Some of it has been through completing SUT compliance training, which is compulsory for all SUT academics. In most cases, my familiarity with SUT policies has been gained through some combination of all four. All four take time. (NTEU AU)*

4.13 NTEU witnesses, who all agreed that there were multiple ways of accessing information about policies, also all gave evidence from their direct experience about the amount of time they, and those they supervise, spend in such work.

That evidence should be accepted. There was not a single employer witness on this issue who gave evidence about being a casual academic.

4.14 The evidence of the university witnesses in relation to how much policy casual academics are required to be familiar with is not consistent with their own contractual requirements on casual staff, their own policies about who is required to comply with policies, and the evidence of casual academics and supervisors of casual academics, which supports the conclusion that the extent of time spent in becoming familiar with, and remaining conversant with, university policies on:

- general matters of risk management, compliance and conduct;
- matters to do with the employment relationship, forms, IT system access, etc; and
- extensive and detailed policies regulating the conduct of teaching and assessment, management of student conduct issues, grievance and complaint-handling, etc;
- is rarely less than ten hours for each new appointment, and often more.

4.15 It is not clear from the submissions of the Go8 at [399] - [401] that they appreciate that, in general, the proposed Policy Familiarisation Allowance is only payable in the first year of employment.

4.16 The suggestion that employees should familiarise themselves with policies before commencing work (Go8 [410-412]) suggests a mind-set aimed at undermining a fair safety net. This activity is work. It should be paid for. The *Live Performance Award 2010* at Sub-Clause 24.7 provides in certain circumstances for the payment of a potential employee for auditions. In similar vein, if an employee spends 8 hours reading the policies before commencing employment, and accepts the job, they should obviously be paid for that work.

4.17 It is suggested at Go8 [413-415] that some students will be familiar with some policies. Although this evidence was somewhat speculative, even if is made out, it explains why the Union has set the amount of the claim, as an average, so low.

4.18 At Go8 [424-425] it is said that other employees such employees in other industries employed on a casual basis would be expected to familiarise themselves with Policies. NTEU agrees, the difference is that they would be paid.

4.19 The Go8 at [438] suggest that the cost may be in the order of $30 million at award rates. NTEU submits that, if so, is because there is that amount of work which is

currently unpaid. Nevertheless, for the reasons set out at B52 in the NTEU Submissions of 3 February 2017, the Go8's cost estimate is inflated.

Professional and Discipline Currency

4.20 It is clear that:

- Casual academic staff are unlikely to be appointed unless, at the time of appointment, they have a good and current knowledge of the discipline in which they will be teaching.
- The rate of pay for casual lecturing and tutoring includes a component for "associated working time" (most commonly two hours for each hour of delivery). That time is commonly understood to include payment for some time spend in preparation for the hour of delivery.
- Preparation may include some reading or other activity which has the effect of updating discipline currency in relation to the specific subject of the lecture or tutorial to be delivered.
- Preparation does not encompass time spent in reading or other activity to maintain a general currency in the discipline beyond what can be anticipated as necessary for the preparation of particular classes.
- There are developments in all disciplines which occur during the course of any session of casual employment, and casual staff are expected to maintain their currency.
- Some casual staff also need to maintain professional registration as a condition of their employment, which also requires undertaking specific professional development activities. This is not encompassed within the concept of "preparation time".
- Universities do not pay for time spent in professional and discipline currency activities, and would not consider paying for it using the "other required academic activities" rate unless it was the subject of some specific direction. (see Picouleau, PN6736-39)

4.21 It is disingenuous for the Universities to suggest that, (with the exception of paid induction,) the "other required academic activities" rate of pay is available for any of the time spent in policy familiarisation or professional and discipline currency activities. The costings provided by Mr Picouleau and Mr Ward as to the potential impact of these payments on the employers did not make any reference to

payments already made, however small scale, on these activities already. Nor was any instance of such a payment suggested other than in the most hypothetical of terms.

4.22 The employers object to the NTEU claim on the basis that it "would provide payments to all casual academics whether or not they familiarise themselves with university policies or keep up to date in their disciplines" (AHEIA [13]). They are unconcerned, it seems, by the flip side of the NTEU provision – that it would cap payments to all casual academics, even if they spend more time engaged in such work than the proposed award provision would pay for.

4.23 They argue that such a provision should find no place in modern award system. This submission ignores the fact that the existing casual rates regime, which has not been contested, is built on exactly that approach. The existing rates for lecturing and tutoring make no inquiry as to the actual time worked. Instead, they pay for the same number of hours of work to all employees and for each lecture or tutorial delivered, regardless of whether an individual has worked more or fewer than the assumed number of hours. This "swings and roundabouts" approach necessarily underestimates the working time of many staff, and perhaps overestimates the time of others. NTEU's proposal for payment for policy familiarisation and professional and discipline currency work is entirely consistent with the existing approach, and will reduce the regulatory burden on the employer.

4.24 The particular characteristics of the rates of pay for casual academic teaching work (lecturing and tutoring) which distinguish them from the way other award-regulated work is paid are:

(a) Employees are not paid for the t*ime actually worked*, but for the time *presumed to be worked* in order to deliver an agreed number of contact hours. Thus, for example, for a basic lecture, clause 18.2 provides that an employee will be paid for one hour of delivery and two hours of associated working time; and

(b) It is the individual duties which are classified, not the total job to be performed by the employee. Thus, a single casual academic on a single contract in the same pay period can be paid at Level A with respect to hours of tutoring and at Level B with respect to hours of lecturing. Therefore, whatever the mix of lecturing and tutoring in their contract, it will be a Level A rate of pay which applies to any other work which they are paid for.

The time assumed to be worked

4.25 Clause 13.1 of the award prescribes that casual academics "will be paid per hour 1/38th of the weekly base rate derived from the relevant classification plus a loading of 25%" and 13.2 sets out which classifications are relevant to which forms of casual work. However the actual rates of pay for lecturing, tutoring, musical accompanying and undergraduate clinical nurse education at clause 18.2 are not 1/38th of the weekly base rate, but rather a multiple of that number based on assumptions about how much time is actually likely to be worked in "associated working time" for each hour of actual delivery.

4.26 They may be paid for additional time spent in other activities (such as subject or unit coordination, marking or attending Open Day) but such additional duties will generally be set out in their contract of employment.

4.27 Clearly it is not the intent of clause 18.2 that *any and all* other work is considered to be encompassed within "associated working time". An examination of the history of the rates shows that the concept of associated working time is a direct restatement of what was previously more clearly defined in the pre-reform award as time spent in preparation, marking and student consultation *directly associated with* the lecture or tutorial delivered:

> *Higher Education Academic Salaries Award 2002, Schedule. A, for example"*
>
> ***A.2.3 Tutoring***
>
> ***A.2.3.1*** *A casual academic required to deliver or present a tutorial (or equivalent delivery through other than face to face teaching mode) of a specified duration and relatedly provide directly associated non-contact duties in the nature of preparation, reasonably contemporaneous marking and student consultation, will be paid at a rate for each hour of tutorial delivered or presented, according to the following table:*
>
> (emphasis added)

Now the employers seem to suggest that work which is not *directly associated* with any particular lecture or tutorial, but is general work performed in the course of employment, can be encompassed within the "associated working time" which has already been paid for [368a].

4.28 The argument is put by the employers (for example Go8 [446-452] that employees should not get paid because they are highly skilled professionals upon engagement, or that it is not required work (Go8 [467-482]). However, the full-time continuing employee are paid to maintain their discipline currency. They

must do so continuously. The argument that somehow casual employees should not get paid on the same basis as continuing employees for this necessary work was dealt with comprehensively at B31 to B44 of the NTEU's Submissions of 3 February 2017.

4.29 At Go8 [467] it is suggested that the maintenance of discipline currency is only required by universities where an employee is required to prepare for the delivery of lectures or tutorials. Lecturing and tutoring are, of course, the only duties with respect to which the NTEU proposes that the allowance be paid. The Union does not propose that it be paid, for example, for demonstrating or marking.

4.30 At Go8 [468]-[482] it is suggested variously that the maintenance of discipline currency is not required, or that estimates of how much of it is required are unreliable. It is true that, as the highly skilled autonomous professionals the employers are constantly asserting academics are, the estimate of how much time is required, or indeed what is required will vary from academic to academic. That is why the NTEU has set the proposed rate at which this allowance is paid at such a conservative level, generally far below the estimates of what is required, with a maximum amount payable in a year (40 hours) payable only for employees with unusually high work levels for casual employees.

This work is not paid as "Other required academic activity"

4.31 The employer witnesses, who included HR directors from university employers that employ thousands of casual academic staff, did not point to a single instance where an employee has been paid for time spent in maintaining their discipline currency. To suggest that this is merely a question of enforcement might be credible if such a payment had ever been made to anyone. The evidence shows, however, that it is the universal practice of university employers to assume that all time spent by casual academics in maintaining their discipline currency is either done in the course of preparation for a particular lecture or tutorial, or is performed outside the employment relationship. In the face of uniform employer failure to pay for time spent in such activities, and given the inherent insecurity of casual employment, it would be a brave casual indeed who would risk their future employment prospects by making a claim for a payment which has never been paid before.

4.32 The fact that there is no evidence of any such payment ever being made by a university in Australia supports the conclusion that the current award fails to provide a fair safety net in this regard.

4.33 The argument that a casual needs discipline currency in order to be employed is akin to a building contractor arguing that because a tradesman is expected to supply their own tools, and would not have been employed if they did not do so, there is no obligation on the employer to pay a tool allowance for the maintenance of those tools during the course of the employment. The evidence overwhelmingly demonstrates that casual academic staff are expected to maintain their discipline currency during the course of their employment, and that it takes time to do so beyond the time spent in preparation for teaching. The employers, however, argue that this is not "required" and presumably would therefore conclude that it does not fall within the concept of "other required academic activity".

Cost, the regulatory burden, and the modern award objective

4.34 NTEU submits the cost to the employers, as a proportion of the total salaries bill, would be tiny. Even as a proportion of the cost of casual employment, the cost impact is limited.

4.35 The regulatory burden, other than cost, is very small, as the allowance can be paid as a one-off payment.

4.36 The proposed allowance manifestly meets the modern award objective as it is necessary to ensure that work which is required to be performed, is performed, and that work from which the employer benefits, is paid for.

5 Academic Salaries, Promotion and the MSALs

5.1 The employers' objections to the NTEU's proposals are largely unresponsive to the central argument, which is about what constitutes a *guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through . . . modern awards* (Section 3 (b) of the Act).

5.2 Put again, that argument proceeds from the following principles:

- Modern Awards provide for different classifications with different rates of pay. The differences between these rates of pay are based upon work-value. That is what makes those differences *fair and relevant*.
- The appropriate minimum rate of pay for any employee to be determined by objective considerations, and is not ultimately to be determined by one or other of the parties to the employment relationship. Less still, can such a minimum be "negotiated" between those parties.
- In this industry, by general consent, promotion on academic merit grounds is the preferred method of assessing the work value necessary to justify an employee being classified above the two minimum levels specified in the Award (Level A, Step 1 and Step 6).
- It cannot be that an employee who does not have access to promotion has a fair safety net of minimum wages and conditions, if that employee has a statutory bar against having his or her classification considered against the very work-value levels specified in the Award.
- The present Award allows the employer unilaterally to discontinue access to promotion for any or all employees if it chooses to do so. This cannot be fair.

5.3 By reference to the Submissions of the employers, NTEU makes the following response:

Go8 - 531

> *As became evident during the course of the proceeding, the NTEU's claim is predominantly concerned with employees who are not eligible for promotion under existing academic promotion policies currently in place*.

Go8 – 533

> *The NTEU have not established a merit case supported by probative evidence.*

AHEIA – 102

When asked Mr McAlpine described this as a "small problem".

5.4 The AHEIA mis-characterises the evidence of Mr McAlpine, as can be seen from the transcript [PN1922 - PN1928].

5.5 It is certainly true that the NTEU is concerned about some categories of employees who are currently denied access to promotion, and that this is a small, if not insignificant group. However, the Union's position is far more fundamental and relates to *all employees*. The current Award allows the employer unilaterally to suspend the operation of the classifications in the Award, except in respect of employees *at appointment*. This has not been contested, and does not require *probative evidence*, as it is plain on the words of the Award itself. Professor Coaldrake (quoted at (AHEIA para 108) acknowledges that such a situation would not be fair, but says that an institution *"would lose staff to other institutions"*. This may or may not be true, but this is no reason why the employer should be permitted by the safety net itself to do this.

AHEIA 107 (Quoting earlier submissions of 6 June 2016;

> *99. Deputy President Duncan, in his Decision of 15 February 2001 [inserting the MSALs into the Award] , noted that:*
>
> > *"[It] may, however, have that effect if reclassification claims came to replace merit promotion and as discussed under a later head there is tension between classifications dependent on PCS and merit promotion. There is a risk that this tension might be resolved in favour of the reclassification process."*
>
> . . . .
>
> *98. In considering the inclusion of the words "MSALs will not be used as a basis for claims for reclassification by an employee" in subsequent proceedings on 7 November 2001, Deputy President Duncan said:*
>
> > *[10] In considering what should be done I am influenced principally by the conclusion found in paragraph [64] of the earlier decision which is set out in paragraph [7] above. I intend nothing be done which encourages or even permits competition between merit promotion and the MSAL.*
> >
> > *[11] This is particularly important because the parties are agreed on it.*
> >
> > *... and*
> >
> > *[19] However I think that the reason the first sentence of the paragraph is there is worth being adapted as a guide to its application. Having heard the parties I indicate that the first sentence in the third paragraph of the preamble arose out of the parties agreement that there should not be two methods of promotion and that*

> *tension between the MSAL and merit based promotion should be reduced. To that end the sentence is incorporated and it should be applied in every case from that point of view.*

5.6 There is no inconsistency whatever between the approach taken by His Honour SDP Duncan in the quote above and what is now being proposed by the NTEU. His Honour put forward the principle that there should be no competition between academic promotion and a system of classification which is a standard feature of all other awards. NTEU agrees with that. That is why what the NTEU has proposed only that where an employee is denied access to a system of academic promotion, he or she should be able to use the MSALs in a dispute about classification.

AHEIA 110

> *A person on a series of fixed-term contracts would have an opportunity to renegotiate their appointment level at the beginning of each contract*

5.7 This should have no relevance to a safety net. One does not "negotiate" the classification of a job. One might negotiate the duties, but that is not the same thing. It is unlikely that any employee can know whether the job they are performing is correctly classified until after they commence. A person who is deciding whether or not to accept an offer of employment is of generally vulnerable, and is most unlikely to notify a dispute, before accepting the job, and the day after they start they have of course lost the right to dispute their classification.

Go8 – 541

> *As is evident from a plain reading of Clause 18, if the employee acquires extra skills and does work at a higher level and increases their academic standing during the course of their employment, the employee could not be required by the employer to utilise or fully utilise those additional acquired skills unless appointed to the higher level and the employee can choose to remain at their current level and to perform work at this level.*

5.8 This is an important submission and may well explain why the parties are so far apart on this issue. Looking at the matters that may be included in modern awards, in Section 139 (1), nowhere can one find the regulation of duties which may be performed by employees, nor any rights of employees to refuse duties of a particular level. This is important to understanding the following words in Clause 18 of the Award:

> *An academic appointed to a particular level may be assigned and may be expected to undertake **responsibilities and functions** of any level up to and including the level to which the academic is appointed or promoted.*

5.9 NTEU has always taken the view that this provision is to be read down by its purpose, which is to define classifications. If the employers think that this gives employees the right to refuse responsibilities or functions above their classification level, this would constitute a profound change to the understanding of employees in the sector. The employers here seem to be arguing that an academic employee at Level B has a *workplace right* not to, for example, be assigned work which would involve;

> "*mak[ing] a significant contribution to the discipline at the national level."*

or the other functions found at Level C but not Level B, and that therefore any action against an employee because they refused such work would be adverse action.

5.10 NTEU does not agree with this interpretation. The purpose of Clause 18 is to assist in reading and understanding the MSALs, not to create legally enforceable rights about what duties an employee can be assigned. While such a provision might arguably be incidental to matters listed in Section 139 (1), it can hardly be said to be essential to making the award operate in a practical way.

5.11 Academic staff perform such duties and work which they are assigned under their contracts of employment by their employers. These contracts do not limit the work that can be assigned to employees, and employees are at common law required to perform such duties as are safely within their competence.

5.12 The interpretation for which the employers contend is also completely at odds with the way academic career progression is structured, and why promotion is so important, and supported by employees. In this regard, the following words from Clause 18 of the Award are instructive:

> *In addition, an academic may undertake elements of the work of a higher level in order to gain experience and expertise consistent with the requirements of an institutions promotion processes.*

5.13 In this sentence, NTEU submits, is a clue to the reason why promotion is an assumed part of the classification scheme of the Award. Academic promotion, and any progression under the Award, relies on the employee substantially establishing that he or she is already performing work at the appropriate academic standing. For example, employees are not assigned as a duty or responsibility that they

> "*will make an outstanding contribution to the governance and collegial life inside and outside of the institution and will have attained recognition at a national or international level in their discipline"* (from the MSAL for Level D in Schedule A of the Award).

5.14 Rather, the academic performs his or her work and then it is assessed as meeting this standard. In this respect, the employee's classification clearly flows *from* the work performed *to* the classification level. The exception to this is the initial appointment where there are only *expectations* rather than actual work to assess.

5.15 Subject only to this exception, employees are generally expected to perform at the highest level possible, and work at this level may result in merit-based promotion. This is completely at odds with the reverse notion that an employee's duties are a function of his or her classification.

5.16 NTEU does not exclude as a possibility that the employer may say to an employee *"You are to do this and nothing more."* In such circumstances, this employee would not have access to career progression under either the promotion or reclassification model. Where the employer has *not* done this, an employee is entitled to perform at the highest level he or she can, and to have his or her classification assessed under the Award – by promotion, or if that is denied, by an objective assessment of their work. This arrangement supports productive and efficient workplaces and should not be permitted to be abandoned by the unilateral action of employers, as is permitted by the current award.

5.17 If the Commission does not accept the employer's contention that Clause 18 of the Award creates a right to refuse work at a higher level, the NTEU asks what advice it should give to an employee who is excluded from the employer's promotion system, is directed by her employer to perform work at a higher level than her current classification, and does that work. At the moment, such an employee has no rights, and indeed no employees have any rights conferred by the Award itself.

AHEIA – 114

> *The NTEU submissions refer to the changes in the Act, particularly the removal of the general dispute settling powers of the Commission about "classifications … and skill based career paths". Part of the answer to the NTEU on this point is that an employee concerned that their academic classification and/or rate of pay could take that matter to the Fair Work Ombudsman*

Go8 – 546

> *The NTEU argues that the "framework has changed" since it agreed to the current wording of this clause (on the basis that disputes about reclassifications can no longer be resolved through the general Commission dispute processes. As noted above:*
>
> *(a) the clause was been included in award since 2002 during the life of the Workplace Relations Act 1996 (Cth); and*

(b) notwithstanding this, the NTEU could not recall any disputes about employee classification raised in the last 30 years.

5.18 This is a critical issue which goes to the heart of the matters in dispute. From the time of the establishment of the five-level classification structure, there have been classification standards corresponding to the five levels. Under the MSALs were inserted into the Award, there were previously *Position Classification Standards*, which were not. This was of no real consequence, because at all times the union itself had the power to raise, and if necessary have arbitrated, a dispute about classification of academic employees. The provision in the current Award – preventing an employee from using the MSALs as the basis for seeking reclassification - has a profoundly different effect never within the contemplation of the parties or the Commission at the time of its insertion in 2002. For example, there can be no doubt that the union could have notified the existence of a dispute about either a promotion freeze or promotion quota, or indeed about the classification of an individual employee or any class of employees, and the Commission had full power (within the constraints of the then Act, to settle such a dispute by conciliation or arbitration. Even without any classification standards in the Award, the Commission had the power in 2002 to deal with a dispute about, for example;

- The failure of an employer to provide for a promotion round in a particular year;
- The classification of academic employees generally or in a particular case;

on the basis of a notification of a dispute *by the Union*. This is no longer the case.

5.19 The current wording of the Award, in the present legislative framework seems quite bizarre. There could be no question that an employee is entitled to initiate a dispute, under the dispute settling procedure in Clause 9 of the Award, about *a matter under this award.* The employee's classification must be such a matter. In doing so, however, it seems that the employee cannot rely upon the MSALs in such a dispute. This means that while the employee can raise such a dispute, and even have it arbitrated, he or she cannot rely on the guidance the Award provides as to what might be the correct classification.

5.20 The AHEIA's view is even odder. It seems to be saying that, while an employee could not use the MSALs to dispute her or his classification, the Fair Work Ombudsman could prosecute for underpayment on the basis that the employee is under-classified, and in doing so the FWO could use the MSALs. If such a course

of action is open to the FWO, it must also be open to the union. The existing provision makes no sense in the current legislative context.

5.21 The significance of the capacity of the Union to raise general disputes about employee classification, which capacity provides the backdrop to the Award provisions when they were made, is shown with the following examples;

- In 1998, the Commission arbitrated a dispute notified under Section 99 of the Workplace Relations Act 1996, about the correct classification and rate of pay of employees of the University of Sydney employed at the Orange Agricultural College (Print Q5395). It did so on the basis of the then *Position Classification Standards* (predecessor or the MSAL) even though these were not included in the Award, and were therefore not enforceable aspects of the Award. A copy of the Decision of the Commission is Attachment 2.

- On 12 August 1997, Commissioner Leary handed down a Decision concerning the classification of Captain Fred Stein, an academic employee of the Australian Maritime College (Print P3971). The Commission decided against the Union, but clearly had the jurisdiction to settle a dispute about the application of the classification structure. The Decision is at Attachment 3.

5.22 The words proposed by the NTEU continue the existing exclusion, but only for employees who have access to a bona fide system of promotion. The employers seem to be conflating what the NTEU is proposing – a mere limitation on an exclusion – with a *right* to reclassification or career progression. NTEU is proposing no such right. The right to make a claim or notify a dispute about one's classification, bases upon the terms of the Award itself, does not confer any such right. Questions of merit and the particular circumstances of the case would still enter into any consideration by the employer, or indeed any dispute entertained by the Commission. What the existing clause does is to simply to deprive an employee of the right to have those matters of merit considered.

AHEIA - 108

It is a nonsense to suggest that universities might abandon or freeze their promotions schemes, as the NTEU does in its submissions.

5.23 There have indeed been disputes about universities facing financial problems not running annual promotion rounds in order to save money. For example, there was a dispute under an enterprise agreement in 2002 between the NTEU and the University of Adelaide, which was the subject of a Decision by SDP O'Callaghan

(Print 924190, 30 October 2002). In that Decision, which is Attachment 4 to these submissions, His Honour records that the University of Adelaide asserted that it was its prerogative whether to conduct a promotion round, and at paragraph 10 of the Decision;

> *[10] The University advised that the decision not to offer an academic promotions round in 2002 was the result of financial exigencies confronting the University and the University's desire to avoid further redundancies.*

5.24 Murdoch University's current application to terminate the *Murdoch University Enterprise Agreement 2014,* if successful, would empower it to suspend promotion indefinitely, as part of its industrial and legal campaign against its own staff. If this were to occur, NTEU and its members would have no recourse to be classified at a level which reflected their work value, unlike employees covered by every other Award.

6 Changes to Sessional Academic Rates Schedule

6.1 Go8 at [559] and AHEIA at [117] state that they no longer oppose the inclusion in the Academic Award of the proposed definitions which were set out at D15 of the NTEU closing submission.

6.2 NTEU submits that for the reasons previously advanced, the definitions should be inserted in the Award.

7 General Staff Hours of Work

Changes to Clause 21

7.1 The AHEIA (at [120]) and Go8 (at [562] – [565]) oppose the changed introductory words for **cl. 21 – Ordinary hours and spread of ordinary hours** proposed by NTEU, saying that the current clause is sufficiently clear and therefore no change is necessary.

7.2 The proposed change achieves two improvements in clarity for the Award:

(a) First, the more accurate expression is "**maximum** ordinary hours", rather than "ordinary hours" since ordinary hours for part-time workers are less than those prescribed in the table.

(b) Second, the phrase "spread of hours" is industrial relations jargon unfamiliar to the majority of workers, and particularly so in the higher education industry where the common usage, to the extent that there is one, is "**span** of hours". The words proposed by the NTEU are clearer in their meaning and effect: "the spread of hours during which ordinary hours can be worked".

7.3 NTEU is not strongly wedded to any particular formulation, but submits that these two improvements would contribute to making the operation of the clause clearer to the lay reader. The set of words proposed by the NTEU achieve this.

Proposed new clauses 23.2 and 23.3 - Overtime

7.4 At [578], Go8 submit that the question the Commission must answer is:

> *"Is it necessary to achieve a fair and relevant safety net of minimum conditions that awards include provisions that impose obligations on employers to prevent employees from undertaking work outside of or in addition to their ordinary hours without specific authorisation?"*

7.5 Unlike Go8, NTEU says the answer to that question is "yes". However Go8 have not correctly stated the issue. This is not a common claim, but a claim specific to one award, and made in the context of circumstances specific to one industry. The proposed clause does not impose a requirement for "specific authorisation" but "authorisation". The question properly put is:

> "Is it necessary to achieve a fair and relevant safety net of minimum conditions for general staff, in light of the evidence about existing work culture and practice in the higher education industry, that this award include provisions that impose obligations on employers to take reasonable steps to prevent employees from undertaking work outside of or in addition to their ordinary hours without that work being authorised and compensated?"

The answer to which is “yes”.

7.6 At [597] Go8 mis-characterise the NTEU’s position:

> *“As stated by the NTEU advocate, Mr McAlpine, when cross examining a number of witnesses, the claim is essentially to insert into the General Staff Award an obligation to demonstrate "good management practice".”*

7.7 It is true that at PN9520 Mr McAlpine put to Ms Chegwidden that having a policy requiring employees to report to their supervisor if they were working outside the span of hours would be a good idea as a question of good management practice, a proposition with which Ms Chegwidden agreed. NTEU put to several management witnesses the proposition that it was fair that if people do work they should either be paid for that time or receive time off in lieu or flex time. NTEU does not resile from the fact that the clause we propose is:

(a) Fair to employees;

(b) Good management practice; and

(c) Does not impose an unreasonable burden on employers.

Of these three, it is fairness that is the *purpose* of the clause. Good management practice and no unreasonable burden are characteristics of the clause, not its purpose, and are characteristics which go to demonstrating that such a clause is also fair to employers and relevant to the industry.

Permitted matter under s.139 and s142? Yes.

7.8 At Go8 [582] – [590] and AHEIA [149] – [150] the employers assert that the proposed clauses 23.2 and 23.3 are not permitted matter for a modern award.

7.9 As dealt with in our Previous Submissions, the proposed clauses 23.2 and 23.3 are permitted either directly or as incidental to arrangements for when work is performed (s.139(c)) or overtime (s.139(d)), and are necessary for the award to operate in a practical way and to achieve the modern awards objective.

Evidence – Existing entitlement, processes and support

7.10 At Go8 [591] – [602] and AHEIA [128] – [146], the employers argue that existing regulation and systems are satisfactory in that:

(a) Agreement clauses, policies and procedures dealing with authorised overtime, TOIL and flex time are widespread.

(b) General staff who work authorised overtime have access to overtime, TOIL or flex time.

(c) Many general staff are paid overtime payments under current arrangements.

(d) Some lay witnesses agreed with the proposition that there were problems with enforcement of the current agreement provisions.

7.11 NTEU does not dispute that all these things are true, but submits that they are largely beside the point. The proposed clauses are not directed at the working of additional hours that are authorised. The current award provisions, which are largely reflected in enterprise agreements, are clear in relation to authorised overtime work. The problem identified in the evidence and addressed by the proposed clause 23.2, is the widespread working of "unauthorised" overtime, which cannot be addressed through enforcement of the current clause.

7.12 The attack on the evidence of Professor Strachan in relation to her research about general staff experience of compensation (or lack thereof) for overtime worked (AHEIA [124] fails to damage the credibility or importance of her evidence. Professor Strachan acknowledged that her data included some staff who are eligible only for TOIL rather than payment for overtime, but she also reported that over 30% of HEW 1 – 4 respondents reported receiving no compensation for overtime worked. Her research does not give us a precise figure, but it does demonstrate that there is a real and significant problem, with a disturbingly large number of general staff reporting that they work uncompensated overtime hours.

7.13 At AHEIA [135] the conclusion is drawn from a variety of evidence *"that flexible working arrangements for general staff at universities are widespread, and that this is valued by staff, and greatly to their benefit."* NTEU does not dispute this. There are many aspects of working for universities which our members value. Nevertheless, this is not relevant to the question of whether the award safety net should provide for compensation for overtime worked. If the current Award does not effectively do so, and NTEU says the evidence shows it does not, then that should be fixed.

7.14 The fact that several witnesses attested to arrangements in their own work areas which had been successful in reducing or eliminating the incidence of unauthorised overtime is indicative that the proposed clause would not impose any significant burden on the employers.

7.15 Materials relied upon by the employers fail to show that their current policies and procedures deal with all overtime worked. For example, Attachment AP-4 to Exhibit 12 (Picouleau) which is the Monash University policy document

"*Remuneration and Benefits Overtime and time off in lieu (Professional Staff)*" states on page 1: *"A staff member cannot work overtime unless instructed by his/her supervisor."*

7.16 At [598] Go8 mis-characterise the NTEU evidence. NTEU witnesses did not contend that universities have not made substantial overtime payments. Once again, this reflects the employers' confusion between payment for *authorised* overtime and an unwillingness to pay overtime for hours worked which were not authorised in advance. There was witness evidence that employers have encouraged or pressured staff to take TOIL instead of paid overtime, but at no point was it suggested by NTEU that the universities do not pay overtime at all, or that the cost of such payments to the universities is not substantial.

7.17 At [599], Go8 assert that there is no objective evidence of staff being fearful of claiming overtime or toil. NTEU relies on paragraphs E19 and E20 of the NTEU Submission of 3 February 2017, and the evidence mentioned therein.

7.18 In relation to Go8 [602], NTEU submits that the employer evidence about whether universities currently take active steps to restrict the incidence of uncompensated overtime falls into two types. Mr Picouleau represented a university where terms similar to those now sought by the union have been included in enterprise agreements. He was able to point to active steps Monash University takes. Mr Ward also gave evidence of reasonable steps UNSW take to instruct supervisors to ensure that overtime and TOIL hours are claimed. Interestingly, both these witnesses also reported that there is a significant amount of overtime actually paid at their institutions. The other employer witnesses made vague assertions about what "should" happen in hypothetical situations, but gave no actual evidence of active steps having been taken, nor any evidence of the amount of overtime actually paid or TOIL actually taken at their institutions. This supports the NTEU contention that, in the absence of a provision such as that proposed in these proceedings, the approach of most university managements is one of wishful thinking at best.

7.19 In relation to Go8 [503], the evidence shows that the forms and systems universities have available for recording additional time worked generally relate to "authorised" additional time, and employer witnesses generally agreed with the proposition that their institutions do not record the actual time worked including any additional time for which overtime, TOIL or flex time was not claimed. That is, to the extent that working time is recorded or measured, the onus is entirely on general staff themselves to do so. The assertion at AHEIA [136] that recording of

actual hours worked would be resisted by staff is an unsupported assertion not based on evidence.

Is “reasonable steps” an unfair standard?

7.20 In relation to Go8 [604] – [609], NTEU submits that “reasonable steps” is terminology which is found in industrial regulation. NTEU relies on its earlier submissions on this point, and in particular E23 and E24 of the Submissions of 3 February 2017.

Not found in other awards

7.21 At AHEIA [122] and Go8 [610] – [611] the employers point out that the provisions sought by NTEU in these proceedings have no precedent in other awards. This is because the provisions reflect the specific characteristics of this industry and the nature of the work performed.

Clause 23.2 restricts the application of the overtime clause

7.22 Go8 at [615] - [616] seek to characterise the proposed clause 23.3 as a “de-facto claim for overtime” and say that if it is not, it cannot be necessary. NTEU has put 23.3 forward as a restriction on the circumstances in which a claim for overtime can arise, and say that as such it is clearly incidental to a clause regulating overtime.

The statutory scheme

7.23 In response to the Go8 submissions at [617] – [627], NTEU relies on paragraphs E25 – E34 of the NTEU Submissions of 3 February 2017.

7.24 AHEIA’s submission at [154] suggests that the NTEU submission that the award scheme “should not provide an employer with the opportunity for unjust benefit” is not a submission about the entitlement of employees. This is hard to understand, as the NTEU is referring to an unjust benefit gained by employers at the direct expense of employees.

7.25 The proposed clauses are simple and easy to understand. They impose a very light regulatory burden on employers, giving effect to what their witnesses agreed would be good practice. There was clear and direct evidence from NTEU witnesses of the working of uncompensated overtime for which the current award would provide no right to payment. Their experiences were not only of past practices now fixed, but of ongoing problems.

7.26 Enforcement of the current Award cannot eliminate the culture of working unauthorised overtime. Only active measures by university employers to change that culture will result in supervisors and staff amending current practices to ensure that all overtime proposed to be worked is properly compensated for, either through payment or TOIL. It is disappointing that the employer parties are so resistant to acknowledging the existence of the problem, or engaging with a simple and practical step towards a solution.

7.27 Ms Chegwidden paraphrased the principle as follows: *"if somebody works additional hours if authorised, they should be compensated, or not authorised, they shouldn't be worked"* (PN9516). The evidence shows that the requirement for "authorisation" in this formulation has led to a workplace culture wherein the obligation to compensate for *some* hours worked is avoided due to a failure to "authorise".

7.28 The NTEU does not propose to remove the award requirement that work must be authorised as a prerequisite for an entitlement to overtime, but merely seeks to combine the requirement for authorisation with a concomitant requirement on the employer to take active measures to prevent employees from performing unauthorised work. To reformulate the principle advanced by Ms Chegwidden, *"If someone works additional hours on authorised work, they should be compensated. They should not work additional hours unless it is authorised work, and because our industry has a problem with this happening, employers should do what they can to stop it happening."*

7.29 The NTEU proposal is a key element of the safety net because it is necessary for the award to act in practical way to ensure that people either get compensated for the extra hours they work, or do not do the work.

8 General Staff Wages Link to Classifications

8.1 NTEU relies on its Previous Submissions in relation to this issue, and in particular Part F of the Submission of 3 February 2017.

9 Clarifying Categories in Types of Employment

9.1 This issue was resolved in the Exposure Draft process.

10 ICT Allowance

10.1 The employer submissions, while acknowledging that information technology is a rapidly developing field and increasingly a standard expectation of working life, and that many university staff do use their own information technology connections and hardware in the course of performing work, argue that this work-related expense is not a proper subject for award regulation because:

(a) Employees can salary package or claim such expenses against their tax (which is not a basis for an employer to evade responsibility for avoiding the expense falling to the employee at all – and in any case, some employees, particularly some casuals, would not earn enough to pay tax).

(b) Not all employees need to access the internet for work related purposes out of hours or away from campus (but of course the claim for an allowance only relates to those who *do* need to do so).

(c) Universities provide on-campus computers and Wi-Fi that staff can use, including casual staff who apparently ought to attend campus to do their preparation work even on days when they have no classes, hot-desk facilities for sessional and libraries where staff visiting from other institutions can access computers. (They ignored the ample evidence about the unsuitability of such facilities for many aspects of work, coming back again and again to the mantra that it is simply a matter of choice.)

(d) Universities loan some IT equipment to some staff in some circumstances (but of course the claim for an allowance only relates to staff who are not provided with connections by the employer).

(e) Universities give IT equipment to some staff in some circumstances (but of course the claim for an allowance only relates to staff who are not provided with connections by the employer).

(f) Universities don't direct their staff to perform work when away from campus. (They don't need to, since it happens anyway. The evidence demonstrated a widespread incidence of work practices which encouraged or, in some cases, necessitated the performance of work

when away from campus, including from home on weekends or in the evening.)

(g) Most employees provide and maintain their own IT equipment and connections for personal use, and the marginal cost of work use is arguable (which is why the proposed clause only goes to one small aspect of the overall costs – that of maintaining a connection – while leaving all hardware and software costs to one side – the proposed clause is fair to both employees and employers.)

(h) The cost of the cheapest adequate service in the geographical area will be debatable (although a readily ascertainable fact in any particular circumstance).

(i) Technology is rapidly changing and this clause may become obsolete thanks in part, apparently, to smart refrigerators, (although this acknowledgement also appears at odds with their submission that nothing has changed in relation to the use of information technology in university work since the making of the Modern Awards).

(j) The quantum of the allowance may vary from one employee to another (which is hardly a new phenomenon with allowances based on reimbursement of actual expenses.

(k) If employees work for more than one university, it would need to be decided which employer would bear the cost of the allowance (which is hardly a new phenomenon).

(l) Performing work when away from the workplace is entirely a matter of choice, and particularly academic staff could choose to remain on campus at all hours when they perform university work (ignoring all the evidence about the objective pressures which mean people will need to perform work from home.)

(m) It would be a new allowance.

10.2 In all of this, the employers' only substantive argument against the proposed allowance is that in many circumstances people would maintain home internet for personal use in any case. First, the fact that there may be some portion of personal use involved does not relieve the employer of an obligation to meet work-related expenses. Second, the evidence shows that the extent of personal IT equipment and connections maintained by university staff is greater than they would need for personal use. The proposed allowance, while focussing only on

the internet costs, is a fair and readily ascertainable contribution by the employer to this total cost borne by the employee.

10.3 At Go8 [661] – [665] the argument is made that university employers do not (generally) expressly *direct or require* their staff to use personal IT connections or perform work when away from campus, and that if staff do so the employers are simply allowing them to exercise their discretion in doing so. However, at Go8 [669] reference is made to Professor Vann's evidence that *"now so much of our time is bound up in mobile technology and on the internet, but it's more or less an expectation of a functioning adult that they are online."*

10.4 NTEU submits that it is more or less an expectation of a functioning university employee that they are online, and no express direction is required to this effect. The evidence cited by NTEU in previous submissions about the objective organisation of work and the need for both academic and many general staff to maintain a home internet connection in order to perform their work efficiently, demonstrates that this requirement arises from the nature of the work and from custom and practice, rather than from express directions or instructions.

10.5 The clause proposed by NTEU is suited to this circumstance, such that the allowance will be appropriately paid for those staff for whom their work, either by express requirement or by the nature of the job, requires them to maintain a personal internet account, while not applying to those staff where there is no need to do so (such as Mr Wilkes), or those for whom all such expenses are already met by the employer (such as Professor Vann).

10.6 The employers argue that existing policies and entitlements are sufficient to address this issue. This is not consistent with the evidence of Mr Ward, who acknowledged that the current practice of his university was not to cover home internet expenses:

David Ward	PN9244 Is it the practice of UNSW to provide or fund the cost of home internet connections for your staff?---No, it's not. PN9245 Not for any of your staff?---Look, I can't say that we don't do it for any of our staff, but the normal practice would be that we don't fund that. PN9246 It is fair to say that nearly all the employees who use such connections or facilities pay for them themselves?---Yes, I think that's fair to say. PN9247 And it is likely that they use them for private as well as work purposes?---Yes. Sorry, I probably should have answered that by saying I assume that a number - perhaps a large number use it for work purposes as well as private but I'm not specifically aware of what that number would be.

10.7 The policies pointed to by the employers in support of the proposition that staff already have access to university-funded IT facilities and resources, should they only ask, are generally heavily qualified in the extent of access. The evidence of witnesses demonstrated how frustrating and inadequate such shared resources generally are for the performance of professional work. The propositions that staff should return to campus to work from a bank of computers in the library when they are struck by an idea (perhaps while mowing the lawn) that needs to be recorded immediately, and that casual staff should attend campus on days they are not otherwise required to do so in order to use the University wifi, only need to be stated for their absurdity to be apparent, and demonstrate the readiness of university employers to deny the practical reality of their employees' working experience. The Commission should not take seriously the employer submissions that there is any real world expectation that workers should engage in such inefficient and absurdly inconvenient work practices. In fact, the employers know and accept that their staff will continue to work from home. Their pretence otherwise is a fig leaf designed to avoid any obligation to contribute to the inevitable costs of that fact.

10.8 The fact that a lay witness such as Dr Nurka does not know how employer responsibility for payment of an allowance would be addressed if a person worked for more than one employer is of no probative value in assessing the workability of the proposal.

10.9 There is no basis on which to conclude that the situation of Dr Kirkman, who purchased an internet connection for work purposes, is "exceptional", as urged by Go8 at [671].

11 Context or Content

11.1 NTEU relies on its Previous Submissions in relation to correcting this longstanding typographical error, and in particular on Part K of the Submission of 3 February 2017.

11.2 We note that the AHEIA does not make any submission on this issue, and that the submissions of the Go8 have not pointed to any problem that would arise from the error being corrected.

11.3 An industry-specific redundancy scheme in a modern award may be varied in accordance with Subdivision B of Part 5 (s.141(3)(b)) and that Subdivision allows variation to correct an error (s.160). The Previous Submissions of the NTEU clearly set out how the error originated, and it should now be corrected.

12 Award Coverage for Independent Research Institutes

Award Modernisation and historical coverage – general submissions (Paragraphs 11-15 of AAMRI/APESMA Submissions of 3 March)

12.1 In considering the issue of historical coverage, the AAMRI/APESMA submissions misconceive the issue of Award coverage. They do so in at least two important ways.

12.2 First, they do not consider the historical award coverage of medical research institutes (MRIs) *per se*. Although they note that only some independent MRIs were covered by awards that also applied to universities, in doing so they miss the main point. They are proposing to recognise, in their revised version of the *Professional Employees Award 2010*, an industry of *medical research institutes*. NTEU agrees that one can characterise MRIs as an industry. If this is the case, then if we look at historical award coverage, AAMRI/APESMA completely fail to look at the very large portion of that industry which is constituted as parts of universities, and which has also been covered by higher education awards.

12.3 Second, in relation to the all-important question of appropriate minimum rates of pay, set by a Full Bench with research institutes specifically under consideration, this has only occurred in the case of the establishment of appropriate minimum rates in relation to the *Universities and Affiliated Institutions Academic Research Salaries (Victoria and Western Australia) Award 1989* [Print J8559]

AIRC consideration of coverage of research institutes
(Paragraphs 16-19 of AAMRI/APESMA Submissions of 3 March)

12.4 At paragraph 17, AAMRI/APESMA cite an extract of the final Decision (4 September 2009) in which the Bench states it has considered all submissions and proposals. However, the reality is that the Full Bench had already dealt with (or not) the coverage of the student unions, controlled entities and research institutes in its earlier Decision of 22 May 2009.

12.5 AAMRI/APESMA cite a number of cases at paragraph 18 of their submission supporting the fairly straightforward proposition that the fact that a Decision does not expressly refer to a matter does not mean that the relevant tribunal has not considered it. All of the cases cited involve judicial review, and this principle may well be established in that context. However, the Commission here is not asked to engage in narrow judicial review of errors of law, but is rather enjoined by the Act to look at *equity, good conscience and the merits of the matter* (Section 578 (b)). Applying these principles it is plain from the NTEU's Submissions of 3 February

2017 (paras L.6-L13) that while the Commission did consider student unions and controlled entities, it gave no consideration to the issue of research institutes. Moreover, as Deputy President Smith in the 2014 Award Review stated in the Commission's Decision;

> *"The history of the Professional Employees Award 2010 [MA000065] would reveal that research scientists in MRIs were not in contemplation when consideration was given to the terms of that award. This is not to pronounce on the coverage of the award but simply to reflect the considerations which gave rise to the award".*

Whether the Award Modernisation Decision met the requirements of the award modernisation request.

(Paragraphs 20-30 of AAMRI/APESMA Submissions of 3 March)

12.6 AAMRI and APESMA again mischaracterises the NTEU's arguments about the consideration of MRIs. NTEU is not arguing that as a question of *law*, the Full Bench did not exercise its powers in relation to the Modern Award request when it comes to medical research institutes. Plainly, as a question of industrial reality, only one specific proposal was put to the Commission about the coverage of modern awards for medical research institutes, which was put by the ACTU, the NTEU and the CPSU. No other proposals were put. NTEU contends that that proposal met all the requirements of the Modern Award Request, and that the Commission did not consider the Request in the context of what APESMA and AAMRI's own submissions now say is a distinct industry – MRIs.

12.7 NTEU has put these arguments not as a question of legal validity, merely as cogent grounds why the Commission should consider the matter afresh, despite the entirely proper presumption that the modern awards made in 2009 *do* meet the modern award objective.

12.8 Otherwise on this issue, NTEU relies on its earlier submissions.

Whether 2009 Decision was consistent with historical coverage

(Paragraphs 31-35 of AAMRI/APESMA Submissions of 3 March)

12.9 AAMRI and APESMA claim that some previously operative state awards and an occupational federal award will have had some coverage of some research employees employed by some MRIs. An analysis of how these awards applied and to whom is not provided, nor is any analysis provided of what other occupational awards might have applied, or whether they constituted a fair safety net in combination with the cited awards.

12.10 However, while NTEU concedes it is highly likely there was some coverage of these awards, it sees no reason why the same difficulties did not attend these awards in their application to MRIs, as are set out in detail in the NTEU's

Submissions in Reply (3 March 2017), and as is the necessary implication of the AAMRI/APESMA application in this matter.

12.11 No such difficulties attend the NTEU's proposal for award coverage.

12.12 At paragraph 34 AAMRI and APESMA assert, with no analysis or evidence, that the majority of non-research employees were covered by pre-modern occupational awards.

Whether 2009 Decision was consistent with treatment of university-controlled entities

(Paragraphs 36-42 of AAMRI/APESMA Submissions of 3 March)

12.13 The claims of AAMRI and APESMA in this respect are of limited relevance. However, it should be noted that was is stated by Mr Mendelssohn for the CPSU, and supporting the NTEU's position regarding university-controlled entities before the Award Modernisation Full Bench (paragraph PN2713 of AM2008/1 – included in MFI 42), the Unions were only proposing that controlled entities *engaged in the provision of education services* should be included in the higher education modern awards. No such entities were in fact covered by the variety of "occupational awards" as assumed in the Full Bench's Decision and AAMRI's submissions, as they were all covered by the *Educational Services (Post-Secondary Education) Award 2010.* Hence all of the contentions in AAMRI/APESMA's submissions at sub-paragraphs 37 (b), (c) and (d) are incorrect. In fact, the advent of the *Educational Services (Post-Secondary Education) Award 2010* brought many employees in the private post-compulsory education sector within the ambit of an education industry award for the first time. That Award also applies to universities themselves, in respect of Language Teachers they employ.

12.14 The logic discernible from the Full Bench's Decision - (2009) AIRCFB 450 at [63] appears to have been that teaching or educational service should be covered by a general post-secondary education award unless it was actually university education. The decision did not deal with research activities one way or the other.

Whether the NTEU can justify coverage by the Higher Education Awards – General Submissions

(Paragraphs 43-51 of AAMRI/APESMA Submissions of 3 March)

12.15 NTEU agrees entirely with the submission of AAMRI and APESMA that the scope of industry awards are based on the industry of the employer. Indeed in the early Decision on modern awards [2008 AIRCFB 717 the Commission said:

> *[6] Each modern award will have an application clause indicating to whom it applies and on whom it is binding. Modern industry awards will be expressed, so far as practicable, to apply to an employer industry. . . . . Each award will be expressed to bind employers and employees to whom it applies. . .*

12.16 AAMRI attempt to confuse two quite separate purposes that "industry" clauses and definitions have in Awards.

12.17 Each of the two higher education modern awards, relevantly apply to the "*higher education industry (as defined)"*. The higher education industry is of course simply a definition of certain types of ***employers****.* It is ***not*** a description of the industry of those employers at all, or of the various industries or parts of industries in which they engage.

> ***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.*

12.18 This is manifestly a particular definition used for the purpose of distinguishing the type of employer from other types of employer with which it could also be confused. In particular, it is to distinguish these employers from the many others who are also *providing undergraduate and postgraduate teaching leading to the conferring of accredited degrees* such as TAFE Colleges, Divinity Colleges, private non-university providers and others.

12.19 This can be distinguished from, for example, the *Manufacturing and Associated Industries and Occupations Award 2010,* in which the definition of industry is used in a quite different way, for example in part of Clause 4 of that Award:

> *(a) the following industries and parts of industries:*
>
> *(i) the manufacture, making, assembly, processing, treatment, fabrication and preparation of:*
>
> - *the products, structures, articles, parts or components set out in clause 4.10; or*
> - *the materials or substances set out in clause 4.10; or*
> - *any products, structures, articles, parts or components made from, or containing, the materials or substances set out in clause 4.10.*
>
> *. . . .*
>
> *(ii) the coating, painting, colouring, varnishing, japanning, lacquering, enamelling, porcelain enamelling, oxidising, glazing, galvanising, electroplating, gilding, bronzing, engraving, cleaning, polishing, tanning, dyeing, treatment and finishing of any of the items referred to in clause 4.9(a)(i).*

(iii) the repair, refurbishment, reconditioning, maintenance, installation, testing and fault finding of:

- *any of the items referred to in clause 4.9(a)(i); or*
- *floor covering; or*
- *plant, equipment and buildings (including power supply) in the industries and parts of industries referred to in clauses 4.9(a)(i) and (ii); or*
- *plant, equipment and buildings (including power supply) in any other industry.*

(iv) mechanical and electrical engineering.

(v) space tracking.

(vi) farriery (other than in the racing industry).

(vii) bottle merchants.

(viii) the printing and processing of photographs from film.

. . . . .

4.10 For the purposes of clause 4.9(a)(i), the products, structures, articles, parts, components, materials and substances include:

all products made from, or containing, steel, iron, metal, sheet metal, tin, brass, copper and non-ferrous metal.

- *melting and smelting of metals.*
- *articles made from wire and the drawing and insulation of wire.*
- *industrial gases.*
- *ships, boats, barges and marine vessels of all descriptions, and components.*

. . . .etc.

12.20 While this is also a list of *industries of employers*, it covers employers to the extent that their business or undertaking or *industry* is constituted by these activities.

12.21 What this important distinction means is that, in the case of higher education institutions (as defined) there is no need to define the industries or part of industries in which that defined group of employers is engaged. In the sense in which it is used in the Manufacturing Award, *higher education* would include (to name a few):

- Undergraduate and postgraduate teaching;
- The provision of welfare and health and psychological services to students;
- The provision of medical and dental services to patients (hence the clinical loadings included in Sub-Clause 18.3 of the modern award for academic staff);

- The conduct of commercial consultancy services (such as that provided by Dr Hepworth in these proceedings);
- The operation of commercial Public Gyms, Pools and sporting facilities for students and members of the public;
- The operation of commercial catering and accommodation services open to the public;
- The provision of veterinary, dental and medical services;
- **The conduct of medical research for the public good, including by the operation of medical research institutes**.

12.22 These are just some of the *industries* in which the defined group of employers known as higher education institutions, are involved, and which the higher education awards cover. About two-thirds of employees in the "higher education industry", including about 27% of academic staff, are not involved in teaching in undergraduate or postgraduate courses. The two *higher education* modern awards are actually awards for universities, not an award describing particular activities.

12.23 So the question is not whether MRIs are involved in *higher education* (though they are).

12.24 The question is whether the *industry of medical research institutes*, in which higher education institutions are centrally engaged, is relevantly similar or different from independent medical research institutes.

12.25 In the case of many of the "industries" as described above, there are clearly other industry awards which apply outside the walls of *universities*, but not so with medical research institutes.

12.26 This means that the Awards for academic staff and general staff have to be sufficiently flexible and broad to encompass the multiple industries (activities) of the employer. For example, the Academic Award needs quite specifically to cover and describe and classify the work of academic *staff who are not involved in higher education at all,* such as those who work in their medical research institutes. This is why it has separate classification descriptors for these staff.

12.27 At paragraph 48 of their Submissions of 3 March, AAMRI/APESMA attempt to make a comparison in relation to working hours between the modern award for academic staff and the *Professional Employees Award 2010* (PEA). While it is ultimately a matter for the Commission, NTEU accepts that the question of workloads and working hours for academic staff in MRIs has not been the subject of evidence or other submissions, NTEU does not expect that any working-hours protections which are determined for employees of universities should automatically extend to employees of academic employees of MRIs.

Collaboration and affiliation

(Paragraphs 52-63 of AAMRI/APESMA Submissions of 3 March)

12.28 It is common ground that there is significant collaboration between universities, medical research institutes and hospitals (particularly teaching hospitals) in the conduct of medical research for the public good.

12.29 In the absence of historic arrangement of industries and award coverage it is even possible that *medical research* could have been its own industry with its own modern award.

12.30 However, it makes sense that there be awards covering the health system, which while they predominantly cover (and are defined for the purpose of award coverage) the delivery of health services (treatment) to the public, also cover a large number of *medical research employees*.

12.31 Similarly, a very large proportion of medical research employees are employed by *higher education institutions* (as defined).

12.32 All of these activities, along with that in medical research institutes, constitute the *medical research industry*, which try is also part of the *research industry*, the *health industry* or the *science industry* depending on choices of definition. In all these sectors, research training, particularly through the supervision of research higher degree students, takes place. NTEU notes, however, that while there are modern industry awards for education and health, there is not industry award for science.

12.33 The common evidence was that research is a collaborative exercise, involving all these sectors. It is also acknowledged that affiliation arrangements exist between MRIs and hospitals.

12.34 AAMRI/APESMA mischaracterise the significance which needs to be attached to the question of affiliation and collaboration for the NTEU's case to succeed. The affiliation arrangements between universities and MRIs are clearly important evidence about their kindred character. For example, the Walter & Eliza Hall Institute website (as at 19 March 2017) http://www.wehi.edu.au/about/collaborators/university-melbourne states as follows:

> *The University of Melbourne is one of Australia's premier scientific and medical universities, it is consistently ranked among the leading universities in the world.*
>
> *The university's Faculty of Medicine, Dentistry and Health Sciences educates more health professionals, graduates more research*

and higher degree students and attracts more nationally competitive funding than any other Australian university

Department of Medical Biology

The institute is the Department of Medical Biology in the Faculty of Medicine, Dentistry and Health Sciences of The University of Melbourne.

Our scientific staff are honorary academic staff members and our students are enrolled through the university.

We also enjoy a research relationship with the university; our scientists work collaboratively on projects and share scientific resources.

12.35 This speaks for itself. However, NTEU does not believe such affiliation alone can justify the award coverage it seeks.

12.36 Affiliation to a university is proposed as part of the definition of the type of employer it is suggested should be covered by the Award, to ensure that the Award would not capture organisations unintentionally. It is not suggested that such affiliations are the only links which MRIs have nor that this is critical to the case. At paragraph 58, AAMRI/APESMA make the fairly trite point that it would be possible for an MRI to disaffiliate from a university. NTEU accepts this but notes that there was no evidence of this occurring in the many decades of the existence of the sector.

12.37 As regards the use of academic titles, again their inclusion in the definition of *research institute* is primarily to distinguish the type of employer, to ensure that the higher education modern awards would not unintentionally capture bodies which they are not intended to.

12.38 Nevertheless, taking the evidence as a whole, there appeared to be no circumstance in any of the evidence where an employee of an MRI did not use a title conferred by a university where one existed, nor where the employer did not do so. Although not much turns on it, the evidence of Professor Hilton that the term "research fellow" has its origin in the NHMRC is mistaken. The term *fellow* and consequently research *fellow* has long historical origins in the English universities, as is shown in one of the the definitions of *fellow* to be found in the Oxford Dictionaries:

3. member of a learned society.

'a fellow of the Geological Society'

3.1 British, An incorporated senior member of a college.

'a tutorial fellow'

*3.2 also **research fellow,** An elected graduate receiving a stipend for a period of research.*

3.3 A member of the governing body in some universities.

https://en.oxforddictionaries.com/definition/fellow

Whether the industrial character of the work justifies coverage by the modern awards applying to higher education institutions.

(Paragraphs 64-92 of AAMRI/APESMA Submissions of 3 March)

12.39 NTEU acknowledges that questions of historical award coverage and what should or should not have happened in the award modernisation proceedings can only be secondary considerations given the requirements of the current award review. In the end, the Commission has to form its own view about whether the existing coverage and content of modern awards meets the *modern award objective*.

12.40 In large part, the Submissions-in-Reply of the NTEU (3 March 2017) are relied upon to show that what is proposed by AAMRI/APESMA would fail to meet the modern award objective, for research/academic staff and for the other employees in a range of occupational groups, and by changing the character of award coverage it would make things even worse for some employees.

12.41 Nevertheless, it is clear from AAMRI/APESMA's submissions that there is at least common ground that the existing dispensation and content of awards fails to meet the *modern award objective*.

12.42 NTEU submits that, unless the Commission considers there is no need for any change, the Commission needs to look at a rational division of industries and/or occupations to achieve a fair and effective guaranteed safety net of conditions of employment which is simple, stable and easy to understand, and which neither covers *classes* of employees who have traditionally been award free nor deprives employees of award coverage.

12.43 There also seems to be common ground that medical research institutes constitute an industry or part of an industry, though there is a different opinion about how that should be characterised *vis-a-vis* the health industry and universities and private sector science generally. Nevertheless we agree with AAMRI and APESMA that an industry-of-employers approach needs to be taken (although note that AAMRI/APESMA do not propose this approach for non-research employees such as health practitioners, technical staff, or other staff).

12.44 A central contention we put to the Commission is that, if an industry-of-employers approach is to be adopted, the Commission should look to those modern awards which have applied to medical research institutes as an industry. It is clear from

the evidence, including that of AAMRI's membership list that medical research institutes exist in four forms (at least):

- Those which are part of universities;
- Those which are state agencies;
- Those which are part of hospitals; and
- Those which are independent.

12.45 NTEU submits that in the overall scheme of modern awards, if an industry-of-employer approach is to be adopted, the Commission has two feasible choices. It can either create an industry award for medical research institutes (or some of them), or it can attach medical research institutes (with or without special conditions) to an existing industry award.

12.46 If it creates an industry-of-employer award or awards, it (or they) should be such that those classes of employees who have traditionally been covered by awards are still covered. This ensures a simple, stable and fair set of terms and conditions with internal and consistent work-value relativities and a single set of conditions. Such an award or awards would need to be considered afresh, but in establishing pay and classification scales, regard would need to be had to existing rates in the most comparable awards.

12.47 This is not the approach the NTEU is proposing. NTEU submits that the obvious thing to do is to attach the independent research institutes to an award which already applies to existing medical research institutes which are part of universities.

12.48 This background is necessary in order properly to consider the matters raised by the AAMRI/APESMA Submissions of 3 March.

12.49 NTEU accepts that as a question of law and fact, there are many research employees of MRIs who are covered by the PEA. However, in paragraphs 65-67 AAMRI/APESMA make a number of assertions that are not supported by the evidence.

12.50 First, they have not provided the data on which their assertions are based. They have not told the Commission how they defined research staff, and to what extent health professionals were included or excluded. There is no proper analysis, even of a selection of positions.

12.51 Second, and more importantly, they conflate those who have science degrees with those for whom a science degree is required for the discharge of the duties – the definition in the PEA itself. We simply do not know how many of the jobs

could be done by a person with a medical degree or a health professional degree or some other degree, as well as by a person with a science degree. Unless the holding a science degree (rather than some other degree) is necessary, then the employee is not covered by the PEA. It is easy to imagine there would be many such research positions, given AAMRI/APESMA describe the work done by these other employees as *"the same or similar to the work of the other scientists (sic) covered by the PEA".* They cannot have it both ways.

12.52 The second major ground on which they suggest coverage by the awards applying to university MRIs is inappropriate is that somehow independent MRIs are somehow radically different from university MRIs.

12.53 Before dealing with their specific claims in this regard, NTEU's primary submission is that even if all these claims were established, there is nothing whatever in what is put by AAMRI/APESMA that establishes anything more than the type of diversity of employers that could be found within any industry award.

12.54 The *Manufacturing and Associated Industries and Occupations Award 2010* covers employers whose manufacturing undertaking of toys occurs primarily for the purpose of providing work for those with severe mental disability, and which while run on commercial manufacturing lines, are essentially charitable in purpose. The same award, could also cover high-technology toy manufacturing firms employing mainly high-skilled engineering staff.

12.55 Within education for example, the *Educational Services (Post-Secondary Education) Award 2010* covers non-accredited adult education courses providing basic English training to refugees, and it also covers for-profit private providers of Master and PhD programmes charging upwards of $100,000 for courses.

12.56 This distinctions between MRIs based in universities and even university research in medicine and science generally, on the one hand, and independent MRIs on the other are relatively trivial within a framework of modern awards required to cover all significant industries. Research as an industry is no more diverse as manufacturing or education.

12.57 As demonstrated above, the two modern awards for higher education are in fact awards for universities. The different "missions" of universities and MRIs a key contention of AAMRI/APESMA. However, their witness Professor Hilton acknowledged that universities have a wide range of diverse missions including education and research across a wide range of fields. (Transcript PN7777), that for example, the John Curtin School of Medical Research, being sufficiently independent, it has its own mission distinct from the mission of the university if

which it is a part (PN7778), and that if we were looking at the mission of those who work in university medical research institutes and those who work in independent medical research institutes, we'd be comparing the mission of the medical research institutes, not the mission of the university as a whole.

12.58 At paragraph 68 and in subsequent paragraphs, of the AAMRI/APESMA Submissions of 3 March, it is argued that there are "important differences" between the work of independent MRIs and medical research work done at universities. For the reasons given above, NTEU's primary contention is that even if the position was as stated by AAMRI, they are insignificant in the context of an overall system of modern awards.

12.59 At paragraphs 70 and 71, it is said that the work of MRI employees is similar to the work of only a small proportion of university employees. However applying the same fine grain of difference, it would also be true that the work of most MRI staff is unlike the work of most MRI staff. Indeed, at PN7758 and PN7801 of transcript, Professor Hilton stressed the diversity of AAMRI's members themselves. . The same would be true of the modern award for manufacturing.

12.60 AAMRI and APESMA emphasise an alleged distinction between the translational research of the MRIs and the presumably "non-translational" research of universities. All of this evidence, recounted at paragraphs 72 to 75, was essentially opinion and conclusion. AAMRI and APESMA meticulously refrained from drawing on the wealth of statistical and other research about the nature and purpose of, for example research grants from the NH&MRC or the Australian Research Council, or the published data about these matters. For example, there was no comparison presented of patents gained by university MRIs and independent MRIs. In fact, there was no evidence or very scant evidence making the most relevant comparison - between MRIs at universities and independent MRIs. Such quantitative evidence as there was did not tend to support their assertions about the relative emphasis on translational research by independent MRIs as compared to universities. At pages 251 and 252 of MFI41. That document, put to Professor Hilton, shows that during the period 2003-2012, while universities received 73% by value of the grants for medical research from the National Health & Medical Research Council (NH&MRC), the universities received 81% by value ($274m) of the grants described by the NHMRC as being for "aiding the Translation of research results into policy and practice". While 5.2% of grants by the NHMRC to universities were for translational research, only 2.8% of grants to independent MRIs were for this purpose. At the absolute minimum, this indicates that it is highly probable that university medical research

plays a major role in translational research. No contrary quantitative evidence was provided, The assertion of Professor Hilton, cited at paragraph 73 (e), that patents are not valued as part of the academic promotion system in the same way as they are at independent MRIs, cites no quantitative or even documentary support, whereas it is the type of evidence which could readily have been presented. Despite this, while trying to make a different point, Professor Crabb acknowledged the role of university academics in translational research, at PN9829;

> *So as university departments evolve into that sharp health focus as opposed to a tertiary education focus, there is that pressure. We have them approach us at AAMRI, now with my hat on as the former president of the Association of Australian Medical Research Institutes, we have those organisations approach us for membership, and I'd regard those as in transition. Groups like the Peter Doherty Institute, the Translational Research Institute in Queensland, the Kirby Institute from the University of New South Wales. So they do exist. I would argue that they're either transitioning toward independent MRIs or they're serving the university's mission, but the university's primary purpose of fundamentally different to ours.*

12.61 The claims about the different significance attached to publications is essentially subjective conclusion evidence. Whatever *significance* is allegedly attached to peer-reviewed publications, all the evidence - most obviously to Curriculum Vitae attached to the Witness Statements of Professors Crabb and Hilton - show that the undertaking of research which actually leads to the production of peer-reviewed academic papers is widespread and prolific. Professor Crab at transcript PN9821 - PN9823 acknowledged the importance of publication output, and Dr Higgs gave uncontested evidence that unless MRIs published in journals, they would not get their research grants (PN7361)

12.62 Again, the primary submission of the NTEU is that whatever differences of emphasis exist between university research generally, and MRI research are of limited significance - the evidence showed that universities and MRIs do all of basic, translational and applied research and publish both peer-reviewed and other publications.

12.63 The evidence about the diverse range of functions carried out by MRIs was scant but clear enough. However there was no real evidence that such diversity was not also to be found in universities.

12.64 In paragraph 83 and 84, evidence from Professor Crabb and Dr Higgs is cited that universities don't have as their "main purpose" the improvement of human health. This is hardly surprising, given the diversity of functions and purposes

universities have, and the fact that different parts of universities have, as was agreed by Professor Hilton (see paragraph 12.57 above).

12.65 It is only at paragraph 85 and 86 of their Submissions in Reply that AAMRI/APESMA turn to the relevant question of how the alleged differences between MRIs and universities actually impact on the work of employees. It is alleged that MRI staff do not enjoy the same level of academic freedom as university academics and that if an employee's work does not fit into the MRI's mission they will encourage the employee to go elsewhere. Given the subject-matter of modern awards, neither of these contentions in themselves would, even if demonstrated, seem enormously relevant to the work performed. However, given the great bulk of university research staff are employed on fixed term contracts, such employees in no real sense enjoy academic freedom, and are also readily "moved on" if their work is not consonant with the mission of the area of the university in which they work.

12.66 At paragraphs 87 and 88 AAMRI/APESMA assert that there are significant similarities between the work of medical researchers in MRIs and the work done in hospitals and some government and commercial entities. NTEU has no difficulty agreeing that the work of medical scientist employed in large numbers by hospitals and the many hospital employees who hold honorary appointments from university who are also engaged in medical research.

12.67 Indeed, given the Modern awards applicable to hospitals provide for appropriate and integrated classification structures covering health professionals, medical scientists, medical practitioners and technical and support staff engaged in medical research engaged in research, NTEU submits that this similarity would support the inclusion of independent MRIs in these awards, in preference to AAMRI/APESMA's substandard proposal.

12.68 NTEU submits that the evidence about the similarity with commercial organisations was relatively speaking, more scant and weak. While it may well be so that there are commercial organisations such as CSL (a former government agency) which have some similarity with MRIs, this does not mean that the industry of the employers or occupations of employees, in commercial organisations are more like independent MRIs than are the great majority of commercial organisations that happen to employ scientists or engineers.

The role of independent MRIs in education

(Paragraphs 93-100 of AAMRI/APESMA Submissions of 3 March)

12.69 Two important points need to be made briefly in response these submissions.

12.70 The first is that it is no part of the NTEU's argument that non-university MRIs' role in higher education means that they are higher education institutions.

12.71 Second, in a strictly technical sense, the inclusion of the supervision of post-graduate students in the definition of the type of employer sought to be included is only to ensure that organisations are not inadvertently covered which are self-styled "research institutes" but are really of a very different character.

12.72 The evidence disclosed that PhD students are academically supervised by employees of MRIs. Much evidence was given about the nature of this supervision, and while the point was correctly made that PhD students are enrolled only by universities, there was no suggestion that the work involved in the academic supervision of a PhD student was otherwise any different in a university MRI as against an independent MRI.

12.73 At paragraph 97 AAMRI and APESMA conflate PHD supervision (which is the academic supervision of a *student*) with the supervision and mentorship of a post-doctoral researcher, which is the supervision of an employee. While the former, which happens at universities and by university accredited research staff at MRIs and hospitals, the examples cited at CSL and GSK are of the latter, which is quite different, as it is not part of research-degree education.

Sources of Funding

(Paragraphs 101-108 of AAMRI/APESMA Submissions of 3 March)

12.74 The Full Bench asked a number of questions about the relevance of funding issues for the fixing of the appropriate instruments. In light of those questions and further consideration, NTEU accepts that the question of funding sources is of secondary consideration, in light of the limited and inconclusive evidence and submissions of the parties.

12.75 To the extent that there are enterprise agreements in the sector, the rates included in those are indicative of the fact that prevailing rates are somewhat higher than award rates, at least for the time being.

12.76 Without necessarily accepting all the conclusions drawn from the evidence by APESMA/AAMRI, NTEU does not think the issue of funding sources is of sufficient relevance to award coverage to warrant a detailed response.

Classification Structure and "academic staff"

(Paragraphs 102-119 of AAMRI/APESMA Submissions of 3 March)

12.77 It has been longer than 7 years since the modern awards commenced. What is most notable about the AAMRI/APESMA submissions-in-reply that is the lack of

any real presence of, mention of, or application of the *Professional Employees Award 2010,* either in the enterprise agreements or even in agreement-free workplaces. Despite the fact that the PEA has had allegedly widespread application, there is still much more evidence of the continuing use and application of the higher education academic and general staff classifications. The Commission is entitled to infer, in the absence of another explanation, that this is because of the continuing relevance of these structures to employers and employees in the MRI sector. Professor Crabb, in his evidence cited at paragraph 114, stated that in his opinion the PEA was "more appropriate". But there was no evidence that anyone uses the descriptors or even titles to classify or describe positions.

12.78 Professor Hilton, from Walter and Eliza Hall Institute in his evidence at PN7792, referred to his staff as follows:

> *. . . . all of **our academic staff, from level B up**, have honorary appointments with the university to enable them to discharge those supervisory duties through the university*.

12.79 In doing so, he reflects the common parlance of the sector. It is also a situation quite different from that cited in AAMRI/APESMA paragraph 115 (b) where universities occasionally appoint an "enterprise professor" in a private company.

12.80 Moreover, Professor Hilton (PN7866) and Professor Crabb (PN9878) acknowledged promotion as being applicable to their research and academic staff.

12.81 The evidence cited at paragraph 112 of the AAMRI/APESMA Submissions, from Professors Hilton and Crabb, and from Debra O'Connor, showed only that they misconceive the nature of general award descriptors designed to capture the appropriate work value levels of what, in any industry or occupational award is always going to be a diverse workforce with different functions. The criticisms of the descriptors for research-only academic and research staff made by these witnesses do not stand up to scrutiny, even on their own terms. For example, it is said that the Academic Award descriptors do not mention *translational research.* Neither do they mention *basic, applied*, or *theoretical* research or *action-research*. They refer to ***research***, and they therefore refer to all of these. There was no suggestion that translational research is not research.

12.82 Similarly, one has only to read the descriptors themselves without the prejudices which the AAMRI witnesses obviously brought about *university employment* to see that there is, for example, no requirement for peer-reviewed publishing at *any* of the classification levels for research-only staff under the descriptors in the

Academic Modern Award. This is not to say that an employer covered by an award could not create an expectation or requirement to publish extensively in peer-reviewed journals, as part of the duties assigned to an academic under her or his contract, or under the particular promotion procedures adopted by an employer for career progression. However, it is plain that this requirement cannot be found in the descriptors themselves. That this is so is reinforced by the fact that the award descriptors are also described in the heading as *"inclusive of creative disciplines"*, where the creation of artistic or literary works is often the *"scholarly activity"* carried on, rather than peer reviewed publications.

12.83 The academic descriptors are, without any amendment, an appropriate way to classify the work of what the AAMRI witnesses themselves describe as *academic staff*. They are currently used, without any apparent or cited difficulty in all the university-based MRIs.

12.84 None of the AAMRI/APESMA witnesses were able to cite any problem in the application of the general staff descriptors used in the *Higher Education Industry General Staff Award 2010*. Professor Crabb for AAMRI described that the way the Burnet Institute classifies staff is as follows:

12.85 *What does your classification structure look like?---Well, for those it looks a little bit like a HEW scale. And so we would we have descriptors around that sort of scale that might be akin to the administrative scale used in many other organisations including university.* (PN9998)

12.86 Professor Hilton gave evidence about the applicability of the general staff modern award to MRIs at transcript paragraphs 7805-7810. Unable to cite any specific difficulties in his experience of having to apply the descriptors in the context of an MRI, he claimed that it could not cover scientific staff, but could cover almost any group. Despite his having worked with these descriptors, Professor Hilton clearly was not well acquainted with their actual terms. His claims do not stand up to proper scrutiny. Any fair reading will show that the descriptors necessarily have broad application, as any proper industry award does. However Schedule B of the *Higher Education Industry General Staff Award 2010* is not a generic award which could apply to any industry. It is not an award which could readily be used to classify staff in the retail, transport or manufacturing industry. It is an award whose descriptors are well suited to a scientific research environment, as was shown by the analysis presented in paragraph L.42 of the NTEU's Submissions of 3 February 2017.

12.87 Of course, MRIs have also the usual range of administrative and professional functions which support their research work, and these are also covered. Most importantly, only an industry award can establish appropriate work value equivalences between the different administrative and qualification-based employment streams. This is particularly so when there are teams of staff working together which include both degree-qualified staff and others whose work value encompasses, for example, a trade qualification with years of technical experience.

University MRIs' membership of AAMRI

(Paragraphs 120-123 of AAMRI/APESMA Submissions of 3 March)

12.88 AAMRI is a representative organisation for an industry. That industry is *medical research institutes.* That industry covers universities, hospitals, government-controlled agencies and independent MRIs.

12.89 As has been demonstrated above, the two modern awards for higher education are, despite their name, awards for universities. Universities have wide and diverse missions. This is borne out by the position of AAMRI. University MRIs are in the same industry as the other MRIs.

12.90 There was no evidence that any of the industry awards (modern awards or state awards) which apply to AAMRI's members were inappropriate to the nature of the work performed, or that in relation to the relevant employees and employers in those institutes, those awards were not meeting the modern award objective because of their being unsuited to the work of medical research.

Regulation and tax treatment of MRIs

(Paragraphs 124-127 of AAMRI/APESMA Submissions of 3 March)

12.91 After reviewing the evidence, NTEU's primary submission is that unless they affect the nature of the work or the characterisation of the industry, questions of tax arrangements and regulation are at best secondary in relevance to the maters the Commission has to decide.

12.92 NTEU does not accept that the charitable tax status of independent MRIs proves the distinct industrial character of MRIs, and notes that the evidence disclosed that:

- Universities and MRIs are both major recipients of grant funding from the NHMRC, and therefore bound by its general grant conditions.
- Universities and independent MRIs are both bound by the Australian Code for the Responsible Conduct of Research (Professor Hilton, PN7916).

Modern awards objective

(Paragraphs 128-140 of AAMRI/APESMA Submissions of 3 March)

12.93 NTEU relies primarily upon its own Submissions of 3 March 2017 to establish that the existing disposition of modern awards does not constitute a fair and relevant safety net of terms and conditions of employment. Those submissions demonstrate why the Commission needs to do something so that such a safety net is established and NTEU will not repeat them here.

12.94 At paragraph 130 of the AAMRI/APESMA submissions, the Explanatory Memorandum Item 518 to the Fair Work Bill is cited, saying that *"terms and conditions will be tailored (as appropriate) to the specific industry or occupation covered by the award"*. NTEU agrees with this, and also agrees with Deputy President Smith who after hearing essentially the same case as part of the two-yearly (2012) Review, found that: *"The history of the Professional Employees Award 2010 would reveal that research scientists in MRIs were not in contemplation when consideration was given to the terms of that award".*

12.95 So far as being tailored to the needs of the industry of medical research institutes, whatever coverage the PEA has is an historical accident. That the medical research institutes are an *industry* is common ground between NTEU and AAMRI/APESMA. NTEU proposes that the industry be covered by two industry awards. AAMRI/APESMA proposes to turn the PEA into an industry award, but only for people with university degrees.

12.96 In response to the AAMRI/APESMA submissions at paragraph 136 and 137, NTEU says (and this is acknowledged by the terms of the proposed changes to the PEA) that the dominant relevant occupation is ***researcher,*** whether or not they have a science degree or not. In this respect, NTEU endorses the Full Bench comments from 2008 quoted in paragraph 137 of the submissions, that *"it is desirable that, as far as is practicable, the terms and conditions for [an] occupation are consistent across the relevant industry awards".* NTEU again draws the Commission's attention to its submissions about terms, conditions and minimum rates in the cognate modern awards which cover such researchers.

Separate Award

(Paragraphs 128-140 of AAMRI/APESMA Submissions of 3 March)

12.97 NTEU relies on its submissions of 3 March 2017.

13 Casual Academic Work Conversion

13.1 The NTEU claim in relation to casual academic work conversion, as set out as clause 13.4 of the proposed variations filed by NTEU on 15 October 2015, has not been withdrawn. That clause is:

13.4 Casual Conversion

13.4.1 Wherever:

(a) 5000 hours or more of casual academic work is being undertaken within a major academic organisational unit (a Faculty or equivalent) in each of two consecutive calendar years; and

(b) In any pay period during that two year, at least twenty percent of casual academic work within that unit was performed by employees whose aggregate periods of service was at least two years,

then

(c) within 12 months of the end of the second of those years, the employer must, subject to sub-clause 13.4.3 below, either:

(i) appoint from among its existing causal employees with more than two years' aggregate service, or
(ii) advertise, either to existing casual employees or openly, and fill;

at least the number of full time non-casual positions in column 2 below or an equivalent combination of part-time positions as follows:

Column 1	***Column 2***
Minimum number of hours of casual academic work in each of two consecutive years.	*Number of positions to be filled on a non-casual basis.*
5000	*1*
10,000	*2*
15,000	*3*
20,000	*4*
For every 5000 in excess of 20,000	*an additional 1*

For the purpose of calculating aggregate service under this sub-clause, teaching from the beginning to the end of either of the two longest semesters at a higher education institution shall count as six months' service.

13.4.2 For the purpose of calculating the number of hours of casual academic work under sub-clause 13.4.1:

(a) *Each hour of lectures shall count as 4 hours' work, provided each hour of repeat lectures shall count as 2 hours' work; and*

(b) *Other casual academic work will be counted according to the number of hours' pay it attracts under sub-clause 18.2.*

13.4.3

(a) *Each of the appointments made under sub-clause 13.4.1 must have the primary effect of converting work previously performed by casual employees to non-casual work.*

(b) *Each of the appointments made under sub-clause 1 must be full-time or part-time continuing or fixed term appointments, subject to clauses 10 and 11.*

(c) *The employer shall not be required to fill positions to the extent that there is no work available to perform. Nor shall the employer be required to make appointments to the extent that, after bona fide attempts to fill the position, including by advertising, there are no or insufficient suitable applicants.*

(d) *In determining the minimum criteria for appointment, the employer may not adopt criteria which would substantially exclude from consideration the persons who have previously been performing the work attaching to that appointment. Provided that an employer may require that applicants hold a PhD, where this is a normal requirement for a continuing appointment within the relevant discipline.*

13.4.4. Where sufficient appointments have been made under this sub-clause, then no further action shall be required by the employer under this sub-clause, until the end of the next two-year period following the end of the two-year period described in sub-clause 13.4.1.

13.2 For the reasons previously stated, the NTEU did not pursue this in the context of AM2014/197 because the distinct character of academic casual work made this award unsuited to the common claims approach on this subject. Nor is it a claim for the conversion of casual employees. Rather it is a claim for the conversion of casual work.

13.3 Nevertheless, the NTEU maintains the position previously put, that the most efficient use of the time of the Commission and the parties will be achieved if this aspect of the matter is not resolved until after the final decision is issued on the casual conversion common claims in AM2014/197, since the principles established in that decision are likely to have a significant impact on the prospects of the NTEU claim in relation to the conversion of casual academic work.

14 Common Claims

14.1 In relation to the model annual leave provision, the NTEU made submissions in September 2015, which we cited in our Previous Submissions in this matter. NTEU continues to rely on those submissions.

https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/am201447-sub-nteid-080915.pdf

14.2 In relation to the model TOIL provision, the NTEU supports the insertion of a clause which reflects the Draft Determination issued in respect to the *Higher Education (General Staff) Award 2010*, [MA000007] as a result of [2015] FWCFB 6847, 6 October 2015 (posted on the Commission's website on 16 October 2015).

14.3 In addition to these submissions, the NTEU relies on its previous submission in respect to AM2014/300 on 30 November 2015.

https://www.fwc.gov.au/sites/awardsmodernfouryr/common/AM2014300-sub-nteu-301115.pdf

14.4 NTEU submits that a requirement for written agreement to take TOIL and a written record of agreed time worked and TOIL taken is appropriate to the industry. The evidence in these proceedings, as cited in NTEU's Previous Submissions and in these submissions relating to general staff hours of work and uncompensated overtime, supports the inclusion of the model clause.

14.5 For the reasons set out in our submission of 30 November 2015, the submissions of the Go8 should be rejected.

Attachment 1

Award	Hours Provisions	Full Time Salary Range
Air Pilots Award 2010 [MA000046]	**24.** Cap on total hours per 30 days and per year. Minimum rest periods Guaranteed day off after rostered duty. Two consecutive days free of duty per week. Minimum rest periods and minimum breaks between rostered duty. No flying duties if all duties exceed 90 hours in any fortnight.	**Schedule B1.1 and 1.2** $34,981 – $165,842
Architects Award 2010 [MA000079]	**19.** Ordinary hours must not exceed 38 per week. Span of ordinary hours. Overtime or TOIL at time and a half.	**15.** $47,720 – $58,584
Educational Services (Post-Secondary Education) Award 2010 [MA000075]	**21.2 (for academic teachers).** Ordinary hours 38 per week. May be annualised. Minimum hours allocated for lecturing and tutoring prescribed. **21.4.** Meal breaks.	**14.1** $48,280 - $82,508
Educational Services (Teachers) Award 2010 [MA000077]	**19.** Annualised hours. Ordinary hours variable as between teaching and non-teaching periods. Maximum attendance days per year (205) with limited exceptions. 6 months written notice of attendance days. **Schedule B (early childhood teachers).** Ordinary hours 38 per week averaged over four weeks. Span of hours and days. 10 hour maximum in any day. Minimum breaks between duty. RDOs, overtime, TOIL and shift work.	**14.** $46,782 - $64,732 **14.2** extra 4% on salary for long day care centres in lieu of access to overtime.
Medical Practitioners Award 2010 [MA000031]	**20 – 26.** Ordinary hours 38 per week can be averaged or worked in sessions (longer hours per day, fewer days per week). 2 days per week or 4 days per fortnight free from duty. Span of hours and days. Penalty rates for all weekend work. Overtime penalty rates for all except Senior Doctors (ie up to $92,000). Senior Doctors get 10% superannuable allowance on total salary instead. Minimum payments and penalty rates for recall. Shift work provisions. Rostering provision.	**14.** $49,356 - $116,617
Professional Employees Award 2010 [MA000065]	**18.** Ordinary hours 38 per week. Can be averaged over a regular cycle. Compensation required for time worked in excess of ordinary hours, on afternoon, night or evening shifts. Compensation may be form of money or additional time off. Compensation must include consideration of penalty rates applicable to other employees in the workplace. Compensation must be reviewed annually to ensure it is set at appropriate level.	**15.** $46,764 - $68,001

Air Pilots Award 2010 [MA000046]

24. Hours of work, days off and rest periods

24.1 Clause 24 does not apply to employees engaged in aerial application operations.

24.2 Hours of work, days off and rest periods will be determined in accordance with the following provided that ordinary hours of work must not average more than 38 per week:

(a) the regulations approved by CASA from time to time;

(b) general or employer-specific exemptions to, or concessions under, the regulations approved by CASA from time to time; or

(c) a Fatigue Risk Management System (FRMS) that has been developed by the employer after consultation with the affected pilots and/or their representatives and approved by CASA to apply to particular employers and employees.

24.3 Where a pilot works in accordance with clause 24.2(a) the following provisions will apply.

(a) A pilot will not fly and the employer will not roster the pilot to fly in excess of l00 hours in 30 consecutive days.

(b) A pilot will not fly and the employer will not roster the pilot to fly as a flight crew member in excess of 900 hours in 365 consecutive days. A pilot engaged in flight instruction will not be required to exceed six hours of flight instructional flight time in any tour of duty.

(c) The flight time in a tour of duty already commenced may be extended to the maximum prescribed by the limitations in CAO 48, CAO 48E, or an approved FRMS.

(d) Where an extension occurs the pilot will receive a rest period on the ground of not less than:

(i) nine consecutive hours which will include the hours between 2200 and 0600 local time, plus one additional hour for each 15 minutes or part thereof by which the pilot's flight time exceeded eight hours; or

(ii) 10 consecutive hours plus one additional hour for each 15 minutes or part thereof by which the flight time exceeded eight hours.

24.4 One or two pilot operation

Clauses 24.5 to 24.7 apply to circumstances where an employer is operating a one or two pilot operation in accordance with clause 24.2(a).

24.5 Reserve time

(a) A pilot on reserve or stand-by duty will be contactable within any scheduled reserve duty period and will report for the appointed duty no later than two hours after being contacted. The employer will specify reserve duty period commencement and finishing times which will be as agreed between the employer and the majority of pilots but the duration of such reserve duty periods will not exceed 11 hours.

(b) On any day a rostered tour of duty will not be immediately preceded by or immediately followed by a period of reserve duty.

24.6 Periods of duty

The weekly duty period will normally consist of five days' duty and two consecutive days free from all duty. By mutual agreement between the pilot and the employer one day free of duty can be deferred. Where a day has been deferred a substitute day will be granted and taken within 28 days unless further deferred by mutual agreement in writing. For the purpose of rotating the roster one two day period may be reduced to single days in each 28 day cycle.

24.7 Periods free of duty

(a) When a pilot completes the maximum permissible flying or duty hours prescribed in CAO 48 the employer will not require the pilot to perform any further duties whatsoever for the remainder of the relevant period.

(b) The employer will ensure that a pilot is rostered at least one weekend off in each 28 day cycle, where practical.

(c) A pilot on a temporary assignment away from home base may elect to defer duty-free days. The pilot will receive the deferred days off immediately upon return to home base.

(d) A pilot will not be rostered for a tour of duty terminating after 2200 hours on the day preceding the rostered day or days free of duty and will not be rostered to commence duty prior to 0600 hours on the day following the day or days free of duty.

(e) Where a tour of duty, rostered to terminate before 2200 hours on the day preceding the day or days rostered free of duty, is extended by delays so that it terminates after 2200 hours, the pilot will be regarded as having worked on a day off. In those circumstances clause 24.7(h) applies, except where a pilot receives six or more calendar days free of duty in any fortnight standing alone.

(f) Where a tour of duty is cancelled and the pilot has been notified of the cancellation by 1900 hours on the preceding day, then the day of the cancellation may be regarded as a day off.

(g) If a tour of duty scheduled to commence after 1200 hours is cancelled, and the pilot has been notified of the cancellation by 2000 hours on the preceding day, then the day of the cancellation may be regarded as a day off.

(h) A pilot will not be required to work on a rostered duty-free day. In the event of unforeseen circumstances an employer may request a pilot to work on a rostered duty-free day. If a pilot agrees to work:

(i) a substitute duty-free day will be arranged within a month of the day worked; and

(ii) the pilot will receive an additional amount of 12.4% of the standard rate for each day worked.

(i) When a pilot on assignment away from home base is not required for duty on any rostered duty day, such day will not be deemed to be a day off.

(j) A tour of duty or period of reserve time at home will be preceded by a rest period on the ground of at least:

(i) nine consecutive hours embracing the hours between 2200 and 0600 local time; or

(ii) 10 consecutive hours.

(k) When an aircraft is scheduled to arrive at such a time that the pilots would be free of duty not later than 2200 hours local time and the aircraft is delayed beyond that time, the nine hour rest period prescribed may be commenced up to 2300 hours local time, provided the succeeding tour of duty does not exceed six hours.

(l) An employer will not roster a pilot for a tour of duty in excess of 11 hours. Where a tour of duty has commenced it may be extended to 12 hours.

(m) Where an extension occurs the pilot will receive a rest period on the ground of not less than:

(i) nine consecutive hours which will include the hours between 2200 and 0600 local time, plus one additional hour for each 15 minutes or part thereof by which the tour of duty time exceeds 11 hours; or

(ii) 10 consecutive hours plus one additional hour for each 15 minutes or part thereof by which the tour of duty time exceeded 11 hours.

(n) Where a tour of duty already commenced exceeds 12 hours or the flight time exceeds nine hours the pilot will have, at the completion of the tour of duty, a rest period of at least 24 consecutive hours.

(o) Where a pilot has completed two consecutive tours of duty, the aggregate of which exceeds eight hours flight time or 11 hours duty time, and the intervening rest period is less than:

(i) 12 consecutive hours embracing the hours between 2200 and 0600 local time; or

(ii) 24 consecutive hours, if not embracing the hours between 2200 and 0600 local time,

the pilot will have a rest period on the ground of at least 12 consecutive hours embracing the hours between 2200 and 0600 local time or 24 consecutive hours, prior to commencing a further tour of duty.

(p) When an aircraft is scheduled to arrive at such a time that the pilot would be free of duty not later than 2200 hours local time and the aircraft is delayed beyond that time, the 12 hour rest period may be commenced up to 2300 hours provided that the succeeding tour of duty does not exceed six hours.

(q) A pilot will not commence a flight and an employer will not roster the pilot for a flight unless during the seven day period terminating coincident with the termination of the flight the pilot has been relieved from all duty associated with the employment for at least one continuous period embracing the hours between 2200 and 0600 on two consecutive nights.

(r) The employer will not roster a pilot to fly when completion of the flight will result in the pilot exceeding 90 hours of duty of any nature associated with the employment in each fortnight standing alone. For the purpose of this clause, duties associated with a pilot's employment include reserve time at the airport, tour of duty, deadhead transportation, administrative duties and all forms of ground training. The operator will designate the day on which the first of the fortnightly periods will start.

24.8 Facilitative provision

Clauses 24.3 to 24.7 may be varied by agreement between the employer and a majority of the employees in the workplace or part of it.

Schedule B—Classifications, Minimum Salaries and Additions to Salaries—Airlines/General Aviation

B.1 Classifications and minimum salaries

B.1.1 Aircraft classification and minimum salaries

Full-time pilots employed by an airline operation or a general aviation employer must be paid at least the following minimum annual salaries:

	Minimum salary per annum	
	$	
	Captain	First Officers Second Pilots
Single engine UTBNI 1360 kg	40,746	34,981
Single engine 1360 kg–3359 kg	42,478	34,981
Single engine 3360 kg & above	49,332	38,509
Multi engine UTBNI 3360 kg	47,443	37,011
Multi engine 3360 kg UTBNI 5660 kg	49,332	38,509
Multi engine 5660 kg UTBNI 8500 kg	52,031	40,160
Multi engine 8500 kg UTBNI 12000 kg	55,972	42,654
Multi engine 12000 kg UTBNI 15000 kg	60,160	45,418
Multi engine 15000 kg UTBNI 19000 kg	65,559	48,720
Multi engine 19000 kg & above—unless otherwise listed	70,141	51,336
Dash 8 100–15650 kg MTOW	65,559	48,720
Dash 8 200–16466 kg MTOW	65,559	48,720
Dash 8 300–19505 kg MTOW	65,559	48,720
Dash 8 400–28998 kg MTOW	70,034	51,336

B.1.2 Larger aircraft classifications and minimum salaries

Pilots employed on larger aircraft will be paid the following minimum annual salary:

Classification	Minimum salary per annum
	$

	Captain	First Officer	Second Officer
Fokker 28	112,728	74,723	
CRJ-50	112,728	74,723	
BAe-146	122,038	80,589	
Fokker 100B	122,038	80,589	
Boeing 717	122,038	80,589	
Narrow body aircraft	127,940	84,260	
Wide body aircraft–single deck	146,891	96,659	58,634
Wide body aircraft–double deck	165,842	109,059	66,075

Architects Award 2010 [MA000079]

15. Minimum wages

15.1 The minimum annual wages payable for employment in the occupation of an architect or upon work of a kind which would normally be performed by an architect must be:

(a) Minimum annual wages

Classification		Per annum
		$
Level 1	**Graduate of Architecture**	
	Entry	47,720
	1st pay point	50,243
	2nd pay point	52,765
Level 2(a)	**Experienced Graduate of Architecture**	55,170
Level 2(b)	**Registered Architect**	
	Entry	55,170
	1st pay point	56,876
	2nd pay point	58,584

(b) In calculating the rates of wages:

(i) the amounts will be taken to the nearest ten cents on weekly rates;

(ii) the weekly rate of pay for an employee will be determined by multiplying the employee's annualised rate of pay by 6 and dividing the result by 313.

15.2 Progression from Graduate of Architecture to Registered Architect

(a) In furtherance of the Graduate of Architectures' progress towards the obtaining of the mandatory experience based on the Prescribed Competencies for registration, there must be an annual review process. As a part of this review process, progress for the previous 12 months must be reviewed and objectives for the next 12 month period should be mutually agreed, and set out in writing. This will also include any necessary training which the employee will be expected to undertake in order to fulfil the requirements of their position. The cost of such approved training will be borne by the employer.

(b) If the employee has reasonably met the objectives arising out of the annual review this must be confirmed in writing by the employer to the employee and the employee must progress to the next pay point within the Level 1 wage range.

(c) The Prescribed Competencies against which the experience is to be documented are as follows:

(i) Element 2.2.2—Prepare architectural drawings with regard to the location, extent of building elements, components, finishes, fittings and systems.

(ii) Element 2.2.4—Co-ordinate the documentation of the project.

(iii) Element 3.1.2—Establish site conditions, site related requirements and limitations and existing facilities.

(iv) Element 3.1.4—Assess applicable codes, regulations and legislation.

(v) Element 3.2.3—Prepare preliminary project evaluations, programs and feasibility studies.

(vi) Element 3.2.5—Establish and co-ordinate specialist consultants, contractors and suppliers.

(vii) Element 3.3.1—Administer the project contract.

19. Ordinary hours of work and rostering

19.1 The ordinary hours of duty of an employee must not exceed 38 per week, to be worked between 8.00 am and 6.00 pm Monday to Friday inclusive. Provided that the spread of ordinary hours may be altered by agreement between an employer and the majority of employees in the establishment, section or sections concerned.

19.2 Overtime

An employer must compensate an employee for all time worked in excess of normal hours of duty by:

(a) payment for such excess hours at the rate of time and a half; or

(b) by such other arrangements as may be agreed so long as the arrangement is not entered into for the purpose of avoiding award obligations, does not result in unfairness to the employee and is recorded in accordance with clause 19.4.

19.3 Time off instead of payment for overtime

(a) An employee and employer may agree in writing to the employee taking time off instead of being paid for a particular amount of overtime that has been worked by the employee.

(b) The period of time off that an employee is entitled to take is equivalent to the overtime payment that would have been made.

EXAMPLE: By making an agreement under clause 19.3 an employee who worked 2 overtime hours at the rate of time and a half is entitled to 3 hours' time off.

(c) Time off must be taken:

(i) within the period of 6 months after the overtime is worked; and

(ii) at a time or times within that period of 6 months agreed by the employee and employer.

(d) If the employee requests at any time, to be paid for overtime covered by an agreement under clause 19.3 but not taken as time off, the employer must pay the employee for the overtime, in the next pay period following the request, at the overtime rate applicable to the overtime when worked.

(e) If time off for overtime that has been worked is not taken within the period of 6 months mentioned in paragraph (c), the employer must pay the employee for the overtime, in the next pay period following those 6 months, at the overtime rate applicable to the overtime when worked.

(f) An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to make, or not make, an agreement to take time off instead of payment for overtime.

(g) An employee may, under section 65 of the Act, request to take time off, at a time or times specified in the request or to be subsequently agreed by the employer and the employee, instead of being paid for overtime worked by the employee. If the employer agrees to the request then clause 19.3 will apply for overtime that has been worked.

> Note: If an employee makes a request under section 65 of the Act for a change in working arrangements, the employer may only refuse that request on reasonable business grounds (see section 65(5) of the Act).

(h) If, on the termination of the employee's employment, time off for overtime worked by the employee to which clause 19.3 applies has not been taken, the employer must pay the employee for the overtime at the overtime rate applicable to the overtime when worked.

> Note: Under section 345(1) of the Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause 19.3.

19.4 Agreements under this clause must be recorded in writing and kept as part of the time and wages records.

Educational Services (Post-Secondary Education) Award 2010 [MA000075]

21. Ordinary hours of work

21.1 Ordinary hours of work—general staff

(a) Ordinary hours of work are defined as those hours worked continuously, except for meal breaks, on any of the days from Monday to Friday (inclusive) between 7.00 am and 7.00 pm and from 7.00 am to 12.30 pm on a Saturday provided that an employee may be required to work until 8.00 pm up to a maximum of eight weekdays within a 28 day period without the entitlement to overtime if the ordinary hours worked do not exceed the number of hours within the nominated cycle. Provided further that the spread of hours may be altered by up to one hour at either end of the spread, by agreement between an employer and the majority of employees concerned.

(b) Full-time employees

(i) The ordinary working hours for full-time employees will not exceed an average of 38 hours per week to be worked on one of the following bases:

- an average of 38 hours over a work cycle not exceeding seven consecutive days;
- an average of 76 hours over a work cycle not exceeding 14 consecutive days; or
- an average of 152 hours over a work cycle not exceeding 28 consecutive days; and
- not more than 10 consecutive hours, exclusive of meal breaks (except if paid for at overtime rates) in any one day.

(ii) Where agreed, and only as part of a 28 day work cycle, a full-time employee is entitled to accrue one rostered day off during that work cycle, which must be taken within that work cycle.

(iii) An employer and the majority of employees at an enterprise may agree to establish a system of rostered days off or a system of flexible daily attendance.

21.2 Ordinary hours of work—academic teachers

(a) For the purposes of the NES, the ordinary hours of work are 38 per week.

(b) The employer will be entitled to annualise the hours of work in such a manner that they are averaged over 12 months, or where the contract of employment is for less than a calendar year, for the period of employment.

(c) For the purposes of determining the number of hours worked by an academic teacher, the following will apply:

(i) a lecture, being the main presentation of course material in a subject, will count as three hours' work for each hour of delivery, and will include associated preparation, assessment and student consultation;

(ii) a tutorial, being a presentation to students in a unit or subject in which lectures are offered will count as three hours' work for each hour of delivery and will include associated preparation, assessment and student consultation; and

(iii) a repeat of a lecture or tutorial, carried out within 28 days of the first delivery, will count as two hours' work for each hour of delivery.

21.3 Ordinary hours of work—teachers and tutor/instructors

(a) For the purposes of the NES, the ordinary hours of work are 38 per week.

(b) The employer will be entitled to annualise the hours of work in such a manner that they are averaged over 12 months, or where the contract of employment is for less than a calendar year, for the period of employment.

(c) For the purpose of determining the number of hours worked by a teacher or tutor/instructor the following will apply:

(i) each contact hour of teaching delivery by a teacher will count as 1.5 hours of work, including administration, assessment and consultation; and

(ii) each contact hour of delivery by a tutor/instructor will count as 1.25 hours of work, including administration, assessment and consultation.

21.4 Where a member of the teaching staff is working annualised hours, the provisions of clause 22—Breaks and clause 24—Overtime will not apply. Save that such an employee will be entitled to an unpaid meal break of not less than 30 minutes after five hours of work.

14. Minimum wages

14.1 Academic teachers

Classification level	Annual salary $
Level A	
A.1	48,280
A.2	50,214
A.3	52,148
A.4	53,962
A.5	55,413
A.6	56,985
A.7	58,558
A.8	60,129
Level B	
B.1	62,549
B.2	64,364
B.3	66,177
B.4	67,995
B.5	69,807
B.6	71,623
Level C	
C.1	73,436
C.2	75,251
C.3	77,065
C.4	78,880

C.5	80,694
C.6	82,509

NOTE: The weekly rate of pay for an employee will be determined by dividing the annual salary by 313, multiplying that amount by 6, and rounding to the nearest $0.10.

Educational Services (Teachers) Award 2010 [MA000077]

19. Ordinary hours of work

19.1 This clause of the award provides for industry specific detail and supplements the NES that deals with maximum weekly hours. This clause does not apply to teachers, including a teacher appointed as a Director, employed in an early childhood service which operates for 48 or more weeks per year, who are covered by the provisions of Schedule B—Hours of Work and Related Matters—Teachers employed in early childhood services operating for at least 48 weeks per year.

19.2 Notwithstanding the NES, and due to the operational requirements of employers in the industry, the ordinary hours of an employee under this award may be averaged over a 12 month period.

19.3 The ordinary hours of work for an employee during term weeks are variable. In return, an employee is not generally required to attend for periods of time when the students are not present, subject to the needs of the employer with regard to professional development, student free days and other activities requiring the employee's attendance.

19.4 The maximum number of days that the employee will be required to attend during term weeks and non-term weeks will be 205 in each school year.

19.5 The following circumstances are not included when calculating the 205 employee attendance days:

(a) co-curricular activities that are conducted on a weekend;

(b) school related overseas and interstate trips, conferences and similar activities undertaken by mutual consent during non-term weeks;

(c) when the employee appointed to a leadership position is performing duties in non-term weeks that are directly associated with the leadership position;

(d) when the employee has boarding house responsibilities and the employee is performing those duties during term weeks and non-term weeks; and

(e) exceptional circumstances, such as the requirement to provide pastoral care to students in the event of a tragedy in the school community, in which an employee may be recalled to perform duties relating to their position.

19.6 The provision of clause 19.4 does not apply to employers that adhere to the calendar and school year of a foreign country.

19.7 The employer will provide written notice of the term weeks and days in non-term times on which the employees are required to attend, six months in advance of the requirement to attend.

19.8 The annual salary and any applicable allowances payable under this award are paid in full satisfaction of an employee's entitlements for the school year or a proportion of the school year. The employee's absence from school during non-term weeks is deemed to include their entitlement to annual leave.

Schedule B—Hours of Work and Related Matters—Teachers employed in early childhood services operating for at least 48 weeks per year

B.1 Ordinary hours of work

B.1.1 Subject to this clause, a full-time employee's ordinary hours of work will be 38 per week.

B.1.2 The ordinary hours of work may be averaged over a period of four weeks.

B.1.3 The ordinary hours of work will be worked between the hours of 6.00 am and 6.30 pm on any five days between Monday and Friday and will not exceed eight hours in duration. Subject to the provisions of clause 7—Award flexibility, by agreement between an employer and an employee, an employee may be rostered to work up to a maximum of 10 hours in any one day.

B.1.4 Breaks between periods of duty

(a) An employee will be entitled to a minimum break of 10 consecutive hours between the end of one period of duty and the beginning of the next. This applies in relation to both ordinary hours and where overtime is worked.

(b) Where an employer requires an employee to continue or resume work without having a 10 hour break off duty, the employee is entitled to be absent from duty without loss of pay until a 10 hour break has been taken, or be paid at double time of the ordinary rate of pay until released from duty.

B.2 Rostered days off

An employer and employee may agree that the ordinary hours of work provided by clause B.1—Ordinary hours of work will be worked over 19 days in each four week period, in which case the following provisions will apply.

B.2.1 The employee will work 152 hours over 19 days in each four week period with one rostered day off on full pay in each such period.

B.2.2 An employee will accrue 24 minutes for each eight hour day worked to give the employee an entitlement to take rostered days off.

B.2.3 Each day of paid leave taken by an employee (but not including long service leave, or any period of stand-down, any public holiday or any period of absence for which workers compensation payments apply occurring during any cycle of four weeks) will be regarded as a day worked for the purpose of accruing an entitlement under clause B.2.2.

B.2.4 Rostered days off will not be regarded as part of the employee's annual leave for any purpose.

B.2.5 An employee will not be entitled to personal leave in respect of illness whilst on a rostered day off. In the event of a rostered day off falling on a public holiday, the employer and the employee will agree on a substitute day.

B.2.6 An employee will not be entitled to more than 12 rostered days off in any 12 months of consecutive employment.

B.2.7 An employee who is scheduled to take a rostered day off before having worked a complete four week cycle will be paid a pro rata amount for the time that the employee has accrued in accordance with clause B.2.2.

B.2.8 An employee whose employment is terminated in the course of a four week cycle will be paid a pro rata amount for the time that the employee has accrued in accordance with clause B.2.2.

B.2.9 Rostered days off will be determined by mutual agreement between the employer and the employee, having regards to the needs of the place of employment.

B.2.10 An employee will be advised by the employer at least four weeks in advance of the day on which the employee is to be rostered off duty.

B.2.11 Nothing in this clause will entitle an employee who works less than 38 hours per week to accumulate rostered days off pursuant to this clause.

B.2.12 Where a service operates for less than 48 weeks per year and the employee receives more than four weeks' paid leave per year, the employee will accrue rostered days off to a maximum of seven days in any 12 months of consecutive employment. Any days accrued in excess of seven will be subsumed into the period of paid leave.

B.3 Breaks

B.3.1 Meal break

(a) An employee will be entitled to a paid meal break of no more than 30 minutes, and no less than 20 minutes no later than five hours after commencing work. Provided that an employee may, by agreement with the employer, leave the premises or elect not to be on call during the meal break. In that case the meal time will not count as time worked and nor will payment be made for such time.

(b) Where an employee is called back to perform any duties within the centre or the break is interrupted for any reason the employee will be paid at time and a half for a minimum of 15 minutes and thereafter to the nearest quarter hour until an uninterrupted break, or the balance of the break, is taken.

B.3.2 Non-contact time

An employee responsible for programming and planning for a group of children will be entitled to a minimum of two hours per week, during which the employee is not required to teach or supervise children or perform other duties directed by the employer, for the purpose of planning, preparing, researching and programming activities.

B.4 Overtime

B.4.1 Overtime rates

(a) An employee will be paid overtime for all authorised work performed outside of or in excess of the ordinary or rostered hours at the rate of time and a half for the first three hours and double time thereafter.

(b) Notwithstanding clause B.4.1(a), part-time employees who agree to work in excess of their normal hours will be paid at ordinary time for up to eight hours provided that the additional time worked is during the ordinary hours of operation of the early childhood service. No part-time employee may work in excess of eight hours in any day without the payment of overtime.

B.4.2 Time off instead of payment for overtime

(a) An employee and employer may agree in writing to the employee taking time off instead of being paid for a particular amount of overtime that has been worked by the employee.

(b) Any amount of overtime that has been worked by an employee in a particular pay period and that is to be taken as time off instead of the employee being paid for it must be the subject of a separate agreement under clause B.4.2.

(c) An agreement must state each of the following:

(i) the number of overtime hours to which it applies and when those hours were worked;

(ii) that the employer and employee agree that the employee may take time off instead of being paid for the overtime;

(iii) that, if the employee requests at any time, the employer must pay the employee, for overtime covered by the agreement but not taken as time off, at the overtime rate applicable to the overtime when worked;

(iv) that any payment mentioned in subparagraph (iii) must be made in the next pay period following the request.

Note: An example of the type of agreement required by this clause is set out at Schedule D. There is no requirement to use the form of agreement set out at Schedule D. An agreement under clause B.4.2 can also be made by an exchange of emails between the employee and employer, or by other electronic means.

(d) The period of time off that an employee is entitled to take is the same as the number of overtime hours worked.

EXAMPLE: By making an agreement under clause B.4.2 an employee who worked 2 overtime hours is entitled to 2 hours' time off.

(e) Time off must be taken:

(i) within the period of 6 months after the overtime is worked; and

(ii) at a time or times within that period of 6 months agreed by the employee and employer.

(f) If the employee requests at any time, to be paid for overtime covered by an agreement under clause B.4.2 but not taken as time off, the employer must pay the employee for the overtime, in the next pay period following the request, at the overtime rate applicable to the overtime when worked.

(g) If time off for overtime that has been worked is not taken within the period of 6 months mentioned in paragraph (e), the employer must pay the employee for the overtime, in the next pay period following those 6 months, at the overtime rate applicable to the overtime when worked.

(h) The employer must keep a copy of any agreement under clause B.4.2 as an employee record.

(i) An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to make, or not make, an agreement to take time off instead of payment for overtime.

(j) An employee may, under section 65 of the Act, request to take time off, at a time or times specified in the request or to be subsequently agreed by the employer and the employee, instead of being paid for overtime worked by the employee. If the employer

agrees to the request then clause B.4.2 will apply, including the requirement for separate written agreements under paragraph (b) for overtime that has been worked.

Note: If an employee makes a request under section 65 of the Act for a change in working arrangements, the employer may only refuse that request on reasonable business grounds (see section 65(5) of the Act).

(k) If, on the termination of the employee's employment, time off for overtime worked by the employee to which clause B.4.2 applies has not been taken, the employer must pay the employee for the overtime at the overtime rate applicable to the overtime when worked.

Note: Under section 345(1) of the Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause B.4.2.

B.4.3 Make-up time

An employee may elect, with the consent of the employer, to work make-up time under which the employee takes time off during ordinary hours, and works those hours at a later time, during the spread of ordinary hours provided in the award.

B.5 Shiftwork

B.5.1 For the purposes only of calculating the loadings provided for this clause:

(a) a weekly rate of pay is calculated by dividing the employee's annual salary, including applicable allowances, by 52.18;

(b) a daily rate of pay is calculated by dividing the weekly rate as provided for in clause B.5.1(a) by 5; and

(c) the rate of pay for a casual is first calculated in accordance with the provisions of clause 14.5.

B.5.2 A loading is payable to employees required to perform shiftwork in accordance with the following:

Shift	% of ordinary rate
Early morning shift (any shift commencing at or after 5.00 am and before 6.00 am)	10
Afternoon shift (any shift finishing after 6.30 pm and at or before midnight)	15
Night shift, rotating with day or afternoon shift	17.5
Night shift, non-rotating (any shift finishing after midnight and at or before 8.00 am or any shift commencing at or after midnight and before 5.00 am which does not rotate or alternate with other shifts so as to give the employee at least one third of their shifts off night shift in each roster cycle)	30
Saturday	

14. Minimum salary

NOTE: A transitional pay equity order taken to have been made pursuant to item 30A of Schedule 3A to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) has effect in accordance with that item. A relevant transitional pay equity order operates in Queensland as provided for in item 30A (6) and (7).

14.1 The minimum salary per annum payable to a full-time employee will be determined in accordance with the provisions of clause 13—Classifications, and the following table.

Level	Per year
	$
1	46,782
2	47,747
3	49,046
4	50,815
5	52,586
6	54,233
7	55,882
8	57,651
9	59,422
10	61,192
11	62,963
12	64,732

14.2 A full-time employee who works in a children's or early childhood service which usually provides services over a period of at least eight hours each day for 48 weeks or more (such as a long day care centre) will be paid an additional 4% on the rates set out in clause 14.1 on the basis that the employee is not covered by the provisions of clause 19—Ordinary hours of work.

14.3 The weekly rate of pay for an employee will be determined by dividing the annual rate by 52.18 and the fortnightly rate by dividing the annual rate by 26.09.

14.4 Part-time employee

A part-time employee will be paid pro rata, at the same rate as a full-time employee in the same classification, in accordance with the provisions of clause 10.4.

Medical Practitioners Award 2010

3. Definitions and interpretation

senior doctor means a Specialist, Senior Specialist, Principal Specialist, Senior Principal Specialist, Deputy Director of Medical Services or Director of Medical Services

14. Minimum annual salaries

14.1 Intern minimum annual salary

An Intern will be paid $46,489 per annum.

14.2 Resident Medical Practitioner

Pay points	Per annum $
Pay point 1	49,356
Pay point 2	51,344
Pay point 3	51,843

14.3 Registrar

Pay points	Per annum $
Pay point 1	56,158
Pay point 2	58,459
Pay point 3	61,127
Pay point 4	62,993

14.4 Senior Registrar

Pay points	Per annum $
Pay point 1	73,390
Pay point 2	76,285

14.5 Career Medical Practitioner

Pay points	Per annum $
Pay point 1	74,144
Pay point 2	76,896
Pay point 3	78,422
Pay point 4	81,306

14.6 Senior Career Medical Practitioner

Pay points	Per annum $
Pay point 1	83,872
Pay point 2	86,539
Pay point 3	89,445
Pay point 4	92,166

14.7 Community Medical Practitioner

Pay points	Per annum $
Pay point 1	74,129
Pay point 2	76,838
Pay point 3	79,319
Pay point 4	81,304
Pay point 5	83,858
Pay point 6	86,505
Pay point 7	89,401
Pay point 8	92,109

14.8 Specialist annual minimum salary

A Specialist will be paid $85,049 per annum.

14.9 Senior Specialist

Pay points	Per annum $
Pay point 1	90,940
Pay point 2	94,063
Pay point 3	97,282
Pay point 4	104,177
Pay point 5	105,657

14.10 Principal Specialist annual minimum salary

A Principal Specialist will be paid $107,811 per annum.

14.11 Senior Principal Specialist annual minimum salary

A Senior Principal Specialist will be paid $111,628 per annum.

14.12 Deputy Director of Medical Services

Pay points	Per annum

	$
Pay point 1	75,114
Pay point 2	82,380
Pay point 3	90,940
Pay point 4	100,668

14.13 Director of Medical Services

Pay points	Per annum $
Pay point 1	85,028
Pay point 2	94,019
Pay point 3	107,811
Pay point 4	116,617

20. Ordinary hours of work

20.1 The ordinary hours of work for an employee will be an average of 38 hours per week and may be worked by agreement between the employer and employee in one of the following ways:

(a) over five days per week or over 19 days per four week period;

(b) over 40 hours in any period of seven consecutive days or 80 hours in any period of 14 consecutive days; or

(c) 38 hours per week or 10 sessions per week over five days per week or, as agreed between the employee and the employer, averaged over four days per week or a longer roster period.

20.2 Senior Career Medical Practitioners, Career Medical Practitioners and Doctors in training

The following provisions apply to these classifications:

(a) These medical practitioners will be free from ordinary hours of duty for not less than two days in each week or where this is not practicable, four days in each fortnight. Where practicable, the days off will be consecutive.

(b) Additional rostered days off will be granted to the extent of one day per calendar month which may accumulate to a maximum of 12 days and which will be granted for periods ranging from one day to two weeks.

(c) Upon termination of employment, any untaken rostered leave will be paid at the medical practitioner’s ordinary time rate.

21. Span of hours

21.1 The span of hours for full-time day work Medical Practitioners except Senior Doctors is 6.00 am to 6.00 pm Monday to Friday.

21.2 The span of hours for Senior Doctors is between 7.00 am and 6.00 pm Monday to Friday. Where normal duties are averaged over a roster period longer than one week, as provided for in clause 20.1, normal duties may be worked between Monday and Friday inclusive.

22. Rest period between periods of duty—Community Medical Practitioners

Community Medical Practitioners will be allowed eight hours off duty between successive periods of duty.

23. Saturday and Sunday work

Payment for all ordinary work performed between midnight Friday and midnight Sunday will be paid at the rate of time and a half.

24. Overtime penalty rates

24.1 Overtime rates

(a) For all Medical Practitioners, except Senior Doctors, hours worked in excess of 38 per week will be deemed overtime. Such hours between Monday and Saturday will be paid at the rate of time and a half for the first two hours and double time thereafter.

(b) Overtime worked on a Sunday will be paid at the rate of double time.

(c) Overtime worked on a public holiday will be paid at the rate of double time and a half.

24.2 On call

(a) Medical Practitioners, except for Senior Doctors, required by the employer to be on call will be paid an allowance equal to 10% of their daily rate for each day on call.

(b) Senior Doctors will be available for reasonable on call and recall duties. Wherever practicable, on call rosters should align with rostered normal duties.

(c) Senior Doctors will remain on duty when patient needs require, notwithstanding the occurrence of normal meal breaks, conferences or the expiration of their normal hours and will be paid an allowance of 10% of their annual base salary. This allowance will be regarded as part of salary for all purposes, including leave entitlements and superannuation.

24.3 Recall

When a Medical Practitioner is recalled for duty, they will be paid an amount equal to 1/38th of their weekly rate as payment for travelling time. In addition, payment for the time worked will be made at the rate of time and a half on weekdays and double time on weekends and public holidays with a minimum payment of three hours.

24.4 Sleepover arrangement—Doctors in training

Where the employer requires a Doctor in training to sleepover, the following provisions will apply:

(a) the employees will be entitled to an amount of 0.08% of the standard rate for each sleepover period. Payment will be deemed to provide compensation for the sleepover and also include

compensation for all work necessarily undertaken by an employee up to a total of one hour duration;

(b) any work performed by the Doctor in training in excess of one hour during their sleepover will attract the appropriate overtime payment as specified in clause 24.1; and

(c) if, during the course of the sleepover, the Doctor in training is called to active duty more than five times, the entire period of the sleepover will be paid as active duty at the appropriate rate instead of the payment prescribed in clause 24.4(a) above.

24.5 Time off instead of payment for overtime

(a) An employee and employer may agree in writing to the employee taking time off instead of being paid for a particular amount of overtime that has been worked by the employee.

(b) Any amount of overtime that has been worked by an employee in a particular pay period and that is to be taken as time off instead of the employee being paid for it must be the subject of a separate agreement under clause 24.5.

(c) The period of time off that an employee is entitled to take is the same as the number of overtime hours worked.

EXAMPLE: By making an agreement under clause 24.5 an employee who worked 2 overtime hours is entitled to 2 hours' time off.

(d) Time off must be taken:

(i) within the period of four weeks after the overtime is worked; and

(ii) at a time or times within that period of four weeks agreed by the employee and employer.

(e) If the employee requests at any time, to be paid for overtime covered by an agreement under clause 24.5 but not taken as time off, the employer must pay the employee for the overtime, in the next pay period following the request, at the overtime rate applicable to the overtime when worked.

(f) If time off for overtime that has been worked is not taken within the period of four weeks mentioned in paragraph (d), the employer must pay the employee for the overtime, in the next pay period following those four weeks, at the overtime rate applicable to the overtime when worked.

(g) The employer must keep a copy of any agreement under clause 24.5 as an employee record.

(h) An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to make, or not make, an agreement to take time off instead of payment for overtime.

(i) An employee may, under section 65 of the Act, request to take time off, at a time or times specified in the request or to be subsequently agreed by the employer and the employee, instead of being paid for overtime worked by the employee. If the employer agrees to the request then clause 24.5 will apply, including the requirement for separate written agreements under paragraph (b) for overtime that has been worked.

Note: If an employee makes a request under section 65 of the Act for a change in working arrangements, the employer may only refuse that request on reasonable business grounds (see section 65(5) of the Act).

(j) If, on the termination of the employee's employment, time off for overtime worked by the employee to which clause 24.5 applies has not been taken, the employer must pay the employee for the overtime at the overtime rate applicable to the overtime when worked.

Note: Under section 345(1) of the Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause 24.5.

25. Shiftwork

25.1 A **shiftworker** is an employee who is regularly rostered to work their ordinary hours outside the ordinary hours of work of a day worker as defined in clause 21.1.

25.2 Payment of shift penalties

(a) Doctors in training

(i) A Doctor in training whose rostered hours of ordinary duty commence or end between the hours of 9.00 pm and 6.00 am will be paid an additional 2.5% of the weekly rate for each such occasion in addition to payment for the hours worked.

(ii) For the purpose of this clause, the pay for the calculations will be based on the rate for first year of experience of each respective classification.

(b) Career Medical Practitioners and Senior Career Medical Practitioners

For ordinary hours worked between the following times, payment will be made at ordinary time plus the appropriate penalty:

(i) between 6.00 pm and midnight Monday to Friday—12.5%;

(ii) between midnight and 8.00 am, midnight Sunday to midnight Friday—25%;

(iii) between midnight Friday and midnight Saturday—50%; or

(iv) between midnight Saturday and midnight Sunday—75%.

(c) Senior Doctors

For ordinary hours worked between the following times, payment will be made at ordinary time plus the appropriate penalty:

(i) between 6.00 pm and midnight Monday to Friday—12.5%;

(ii) between 7.00 am and midnight Saturday—50%;

(iii) between 7.00 am and midnight Sunday—75%; or

(iv) all hours worked on public holidays—150%.

(d) Community Medical Practitioners

For ordinary hours worked between the following times payment will be made at ordinary time plus the appropriate penalty:

(i) for any shift starting between 5.00 am and before 6.30 am and or finishing between 6.00 pm and before midnight—2.5%;

(ii) for any shift or part of a shift which is rostered between midnight and 5.00 am—4%; or

(iii) for shifts permanently worked within the times set out in clause 25.2(d)(ii); **permanently worked** means any period in excess of four consecutive weeks—5%.

(e) Where duty performed attracts more than one penalty, only the higher penalty will apply. For the purposes of this clause, the term penalty will include overtime.

25.3 Shift length—Doctors in training

(a) No shift will be less than eight hours in length on a week day or less than four hours in length on Saturday, Sunday or a public holiday.

(b) No broken or split shifts will be worked.

(c) All time worked in excess of 10 hours in any one shift will be paid as overtime.

26. Rostering

26.1 Doctors in training

(a) Doctors in training will be given at least two weeks' notice of rosters to be worked in relation to ordinary hours. Where practicable, this will include additional (overtime) rostered hours, provided that the employer may change the rosters without notice to meet any emergency situation. This clause will not apply to additional roster leave granted by the employer.

(b) Time worked does not include breaks allowed and actually taken for meals.

(c) Time worked means the time when the Doctor in training is required by the employer to be in attendance.

26.2 Senior Doctors

(a) Development of rosters

The employer, when developing rosters, will ensure that:

(i) Senior Doctors will be consulted and regard will be given to any family, carer or other personal and professional concerns and responsibilities identified by the Senior Doctor to ensure, where practicable, that the Senior Doctor is not adversely affected and that alternative arrangements can be made if possible (e.g. change of childcare or outside practice arrangements);

(ii) Rosters will identify the general nature of the work to be performed on each shift (clinical/direct patient care, administrative, teaching, research or quality improvement) and the facility at which the shift is to be worked; and

(iii) Wherever practicable, the usual pattern of normal duties will be consistent from one roster period to the next.

(b) Notice of changes

(i) Wherever possible, the following notice periods will apply to changes to the normal duties roster:

- three months' notice of an ongoing change; or
- one month's notice of short-term change (e.g. to cover a planned absence or one-off event).

(ii) These provisions do not prevent the employer from varying the roster of normal duties at short notice in an emergency, in response to an unplanned event or to cover an unplanned absence.

(iii) Shifts are to be shared equally amongst the Senior Doctors unless otherwise agreed.

Professional Employees Award 2010

15. Minimum wages

The minimum annual wages payable to full-time employees in the classifications defined in Schedule B—Classification Structure and Definitions are:

Classification	Annual wages $
Level 1 Graduate professional	
Pay point 1.1 (3 year degree)	46,764
Pay point 1.1 (4 or 5 year degree)	47,962
Pay point 1.2	48,768
Pay point 1.3	50,798
Pay point 1.4	53,370
Level 2 Experienced professional/quality auditor	55,168
Level 3 Professional/senior (lead) quality auditor	60,292
Level 4 Professional	68,001

Ordinary hours of work and rostering

18.1 For the purpose of the NES, ordinary hours of work under this award are 38 per week. An employee who by agreement with their employer is working a regular cycle (including shorter or longer hours) must not have ordinary hours of duty which exceed an average of 38 hours per week over the cycle.

18.2 **Employers will compensate for:**

(a) time worked regularly in excess of ordinary hours of duty;

(b) time worked on call-backs;

(c) time spent standing by in readiness for a call-back;

(d) time spent carrying out professional engineering duties or professional scientific/information technology duties outside of the ordinary hours of duty over the telephone or via remote access arrangements; or

(e) time worked on afternoon, night or weekend shifts.

18.3 **Compensation may include:**

(a) granting special additional leave;

(b) granting special additional remuneration;

(c) taking this factor into account in the fixation of annual remuneration; or

(d) granting a special allowance or loading.

Provided that, where relevant, such compensation or remuneration will include consideration of the penalty rate or equivalent and the conditions as applicable from time to time to the majority of employees employed in a particular establishment in which the employee is employed.

18.4 The compensation and/or remuneration will be reviewed annually to ensure that it is set at an appropriate level having regard to the factors listed in this clause.

18.5 Transfers

Where an employee is transferred permanently from day work to shiftwork or from shiftwork to day work, such employee should receive at least one month's notice. However, the employer and the employee may agree on a lesser period of notice.

Attachment 2

Australian Industrial Relations Commission

National Tertiary Education Union v University of Sydney - 1081/98 S Print Q5395 [1998] AIRC 1185; (25 August 1998)

National Tertiary Education Union v University of Sydney - 1081/98 S Print Q5395

Dec 1081/98 S Print Q5395

Dec 1081/98 S Print Q5395

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1996

s.99 notification of industrial disputes

National Tertiary Education Union

and

University of Sydney

(C No. 34712 of 1997)

Various employees Education services

COMMISSIONER JONES SYDNEY, 25 AUGUST 1998
Classification of academic employees undertaking Course Co-ordination duties - private arbitration

BACKGROUND TO DECISION FOR PRIVATE ARBITRATION

1**. THE APPLICATION**
This matter originates from a section 99 notification made under the *Workplace Relations Act 1996* (the Act). The notification submitted by the National Tertiary Education Industry Union (the Union), involves the University of Sydney (the Respondent/US), in particular it's Orange Agricultural Campus (OAC).

Commission proceeding on the issue under consideration, had previously been undertaken before another member of the Commission, the final of those occurring on 8 August 1997, still however without resolution. Further hearings before the Commission as presently constituted occurred on the 5 February 1998 (mention and programming), 23 March 1998 at Orange and 1 May 1998 in Sydney.

The reason for the change in Commission consistency can be ascertained from a US letter to the Commission dated 24 December and which also in part reads:
"*This is to advise you that the parties have reached agreement for Terms of Reference for the proposed private arbitration of the outstanding claims."*
The Terms of Reference mentioned above, are established from the same letter as:
"A) The NTEU and the University agree that the outcome of a Private Arbitration by the Commission of the various claims against the University re the Performance of Course Co-ordination Duties at the Orange Agricultural College will constitute the final and binding resolution of all claims concerning those duties.
B) In order to facilitate and expedite such a resolution, the parties agree that:
1. The NTEU will provide the name of each staff member concerned and full details of each claim to the University as soon as is practicable following agreement to the Terms of Reference being reached.
2. A condition precedent to the Private Arbitration is that each of the claimants consents to be bound by the outcome of the Private Arbitration and joins the NTEU and the University in signing an instrument to that effect.
3. The Commission will arbitrate in the manner it believes appropriate.
4. The date of retrospectivity to apply to all of the claimants will be specified. This will be determined by Private Arbitration if no agreement is reached.
5. The Private Arbitration will determine the quantum to be paid in relation to the claims provided to the University in accordance with Term B(1).
6. Previous offers made by the University and responses made by NTEU are not to be relied upon by any party to the Private Arbitration.
7. All parties will co-operate to ensure an expeditious hearing.
8. The decision will be binding on the University, the NTEU and all claimants and will have no precedent value in relation to employment within the Higher Education Industry."
Further elements of note to the application, are that OAC campus was transferred from the University of New England (UNE) to US in 1994 as well the different terminology used for similar activities/operational organisation etc on the two campuses (refer 5(f) below).

2. THE CLAIM/BACKGROUND
A. The Applicant
(i) The dispute dates back to 1991, the Union though pursued it with OAC in 1992, while it was still part of UNE.
(ii) Despite (i) above, the Union sees the centre of this dispute essentially simple, i.e. it revolves around what should be paid to a OAC staff member perform the duties of a Course Co-ordinator. It is claimed that at varying times, members of Orange campus perform Programming/Course Co-ordinator roles.
Programme versus course co-ordinator
(iii) The role of Co-ordinator at the OAC is alleged to be analogous to that of Co-ordinators found elsewhere within the US operations courses.
The role of (Programme) Course Co-ordinator it is felt, should be classified at Level 3(C) Academic, a

classification which at US, is given the nomenclature of Senior Lecturer. This view is derived from the classification standards for academic staff, developed during a period of 1991 award restructuring involving the union's predecessor. That position was subsequently endorsed by a Full Bench of this Commission, who on 23 July 1991, stated:

"We are satisfied that the changes are consistent with the objectives of the structural efficiency principle and meet the requirements of the work value principle. The special case principle provisions are met. We therefore need to consider the appropriate level of academic salaries.

The starting point in assessing the appropriate rates to apply to minimum rates awards is summaried in the 1989 National Wage Case decision:

.....The minimum rates principle contained in that decision sets out the requirements which must be met..... On this basis we have concluded that the rates agreed between the unions and the AHEIA are not incompatible with the requirements of the 1989 National Wage Case decision and we have decided that the salary rates for Levels A to E (including for casual and research staff) agreed by the parties should be awarded."

(Marsh, Moore, then Deputy Presidents and Frawley C Print No. J8559 - a decision now presented to these current proceedings as Exhibit NTEU 2)

(iv) The union tendered that the US was party to that agreed classifications standards and subsequently incorporated them into their policies, particularly promotions. Both are to be found also in the 1995 and 1997 Academic Staff Enterprise Agreements (tendered and marked as exhibits NTEU 3 and 4 respectively).

Clause 7.1 and 9.3 of NTEU 3 as well as clauses 9.1(b) and 11.3, are considered important, with their references to aspects found in exhibit NTEU 1 - extract from award restructuring agreement 1991

(v) Of additional importance pointed to in exhibit NTEU 1, are the perceived elements emanating from attachment B, containing the position classification standards. Here for each level A to E are described a general standard, followed by specific duties and a basic skill requirement for each of those levels.

At the third star point (NTEU 1), under specific duties for level B academic, is a position of "acting as Subject Co-ordinator". A subject is described as a unit of work undertaken by a student over a semester, one year, or one unit of work, while a course is a programme of study comprising a number of subjects, which eventually lead to a degree or diploma.

In relation to courses, the specific duties required of a level B academic and included at star point 9 [NTEU1], are developments of course material, with the appropriate advice and support of more senior staff. At point 12, [NTEU1], a Level B academic is also required to undertake a range of administrative functions, the majority connected to the subjects to which the academic teaches.

All this makes it clear the Union puts, that the focus for a Level B's academics administrative and co-ordination functions, is based around the subjects taught, rather than course.

It is also contended that some significance comes from the Position Classification Standard for a level C academic. At star point 3 [NTEU1], there appear the words "course co-ordination", with an accompanying duty of co-ordination for a full degree or diploma programme, encompassing a number of individual subjects.

By then linking the above situations, the union sees this as clarifying that on any comparison basis, the Position Classification Standards of both a level B and C academic for co-ordination duties, provide a contention, that campus academic staff who perform the duties associated with course co-ordination, should be classified and paid at the level of C academic.

(vi) The Position Classification Standards may require flexibility by individual institutions in implementing, that is bearing in mind the variation in organisational structures and terminologies. But to then in turn, justify a position, that the course co-ordination duties of level B academic staff at OAC can be so allocated, is not quite correct. It is union contention that the argument US poses fails. By allowing such "flexibility", it defeats the purpose of the Position Classification Standards, in providing an adequate basis to differentiate between the various levels of employment. There would be no visible significant variation between the work of Course Co-ordinators at OAC and Co-ordinators on the main campus, to justify such flexibility of application.

If there is one distinguishing feature, this is, that duties of a Course Co-ordinator at OAC are more complex than those of a similar co-ordinating role on the main campus. Therefore there is felt no justification for treating Co-ordinators at OAC differently to the way main campus Co-ordinators are treated. There is seen no justification for the US's claim, that it should have the flexibility to interpret the Position Classification Standards, to allow course co-ordination duties to be allocated to level B academic staff at OAC.

Of course size/campus differences

(vii) The union states evidence submitted, illustrates that the number of students enrolled in courses at OAC from 1994 to 1998, ranged from a minimum of 14 to a maximum of 348. [Exhibit US2, Appendix 4]. It is also acknowledged that courses at the US main campus could have numbers as small or even smaller. [Transcript page 78, lines 7-10, transcript page 97, lines 9-13 and page 115, lines 22 and 23]. No evidence substantiate US's

claim, that the size of courses at OAC do not fit within the range of those courses offered at the US main campus.

On allowance -v- reclassification

(viii) The union sees evidence, supporting their position, that Course Co-ordinators at OAC should be classified and paid as level C staff. If the Commission were however to deem this as inappropriate, then a responsibility loading should be paid to staff below level C, for the time they perform course co-ordination duties. That responsibility loading should comprise the difference between the individuals substantive salary, with at least recognition of the first step of level C.

The union believes that it has presented sufficient evidence to show that such an approach to OAC campus, would be consistent with the way US academic staff perform co-ordinator duties, or as evidence shows, Head of Department and Dean are likewise treated, that is where below level D and appointed as Heads of Department, they receive a responsibility loading constituting the difference between substantive salary and the first step of the level D salary range. Added to which is an additional amount based on the size of the department. Deans below level E receive the difference between substantive salary and the level E salary range, plus an additional amount depending on the size of the faculty. [Exhibit NTEU 7 page 16].

Although additional payments for Subject Co-ordinators may not be called responsibility loadings, these are viewed to operate on the same principle. Subject Co-ordinators substantive salary are below step 6 of the level. A salary range is the difference between substantive salary and the step 6 rate [exhibit NTEU 7, page 8]. The union sees that such an approach at OAC is the practical way to apply such loadings to academic staff.

US may submit that it is appropriate to pay a higher duties allowance to Course Co-ordinators, comprising the difference between the substantive salary and the level C salary, divided by the proportion of the total duties which are course co-ordination duties. However, a proportional higher duties allowance may be consistent with their approach to general staff, the union puts this as entirely inconsistent with US's approach to other academic staff and impractical, on two counts.

- It would have to rely on highly arbitrary and subjective judgements about how much of an academic's time is spent in the role of course co-ordinator. In theory feasible, in practice difficult. [transcript page 109-110], and;
- It would be impossible to separate the academic's other duties into distinctly level B and level C duties. This is because of what the Award Restructuring Agreement purports, in describing the `multi-skilled" nature of academic duties which involve "an overlap of duties between levels." [exhibit NTEU 1 page 1, part 2].

Because the core duties of teaching, research and administration are performed by all levels of academic staff from level A to level E, when an academic is performing course co-ordination, teaching and doing research and administration, the union asserts that 100% of their duties fall within the descriptor for a level C academic.

A loading, comprising the full difference between the substantive salary and the first step of level C, would be far more practical and consistent with US's policies for academic staff, than the US proposed proportional higher duties allowance.

(ix) Additionally, this claim was tabled by the union on behalf of 13 named academic staff, who are or have been required to undertake the role of Course Co-ordinator, but nevertheless were classified and paid as level B academics. The union's position is that they should have been classified and paid as Level 3(C) academics, with effect from the time they actually commence(d) course co-ordination duties.

If however, the Commission were not of a mind to acquiesce to that position, it should consider an allowance which would take income to at least step 1 of the level C salary range, for all that time required to perform course co-ordination duties. This would then provide consistency with the existing responsibility allowances of University policy, in particular Departmental Heads and Deans.

Retrospectivity/capacity

(x) In view of the length of discussions over this issue, retrospectivity should also apply and, have application back to 1992.

(xi) Evidence indicates the US capacity to meet the claim.

B. The Respondent

In its opening submission, the University opposed reclassification and a responsibility loading. Instead it submitted that there should either be no additional payment for academic staff (below level C) who undertake co-ordination duties, or that such staff should receive a higher duties allowance equal to the difference between their level B salary and a level C salary, divided by the proportion of total duties that make up course co-ordination duties.

The University opposes any retrospectivity.

In presenting its case, US responded to the union's submissions, but which for purposes below as with the applicant, (refer 2A (i) - (xi) above) are in broad outline only.

Position classification (standards/flexibility)

(i) Academic staff at the US are entitled to expect the Position Classification Standards to be applied by the University. However for the US these are described as only having the status of an uncertified agreement between the peak bodies of the industry sector, acknowledging at the same time that:

"the parties have continued to observe the terms of the agreement with respect to the classifications standards..." (transcript p.7, 36-37), and

The union brought forward evidence to indicate the Position Classification Standards received specific mention in both the 1995 and 1997 University of Sydney (Academic Staff) Enterprise Agreements [Exhibits NTEU 3 and 4] and Position Classification Standards therefore form a part of the US's policies. This is not agreed. The "General Criteria" in US policy provides a statement *"The following guidelines on the University of Sydney's..."*. Expectations therefore at each level of appointment, should be read only as such in conjunction with the Position Classification Standards".

Further the union has stated that the Position Classification Standards for academic staff unambiguously define course co-ordination as falling within the range of duties of a level C academic. In using the Position Classification Standards to differentiate between the role of a level B and a level C academic, the single obvious difference that is perceived by the union seems to be, that course co-ordination appears as a level C duty. This is not accepted.

Essentially the terms of reference attached to this case, involves the Commission in determining the quantum to be paid in relation to the duties performed by course co-ordinators at OAC together with the date that payment should ensue. The case in issue, involves consideration of payment to a higher level in the structure. A distinction US states, needs to be drawn between the amount of work performed, and the level or value of that work.

Those terms of reference for private arbitration also rely on the parties having held discussions beforehand, for reaching agreement on date of retrospectivity. US confirms the parties so far have failed to achieve agreement, so this issue is before the Commission.

Regarding the US Academic Staff Enterprise Agreement 1997 and specifically the salaries section (Schedule 1) (exhibit NTEU 4), the fact is, salaries at US reflect the five level academic salary structure paid to all academic staff employed at each university campus.

The five level scale was taken from the underpinning award i.e. the Australian Universities Academic and Related Staff Salaries Award 1987. (A copy of the decision of the Full Bench which led to that award's making, is contained in exhibit (NTEU 2)). The role of the Position Classification Standards are contained in exhibit NTEU 1 at part 2 of that agreement.

US says that, while these may give some guidance to the salary structure contained in the award, they do not form part of the award as the union appears to be saying. They were used rather for exhibit only in that Full Bench case. So they do have the status rather than anything else, of an uncertified agreement between the peak industry bodies of the sector. Despite this, the parties have continued to observe the terms of that agreement with respect to the classification standards.

There is a section referred to in part 2 of the union's exhibit NTEU 1. Where the agreement between the parties actually is mentioned:

"These classification standards describe the broad categories of responsibilities attached to academic staff at different levels. The standards are not exhaustive of all tasks in academic employment, ***which is by its nature multi-skilled and involves an overlap of duties between levels****."*

and

"The standards provide an adequate basis to differentiate between the various levels of employment and define the broad relationships between classifications."

further:

"The PC's may require flexibility by individual institutions in implementation, bearing in mind the variation in organisational structures and terminologies. All levels of academic staff can expect to make a contribution to a diversity of functions within their institutions. Such functions include teaching, research, participation in professional activities and participation in the academic planning and governance of the institution. The balance functions will vary according to level and position over time."

Added to the above, it was also put by a witness:

"They (the PCSs) don't have course co-ordination at Level B, that's true, but the standards are meant to be interpreted broadly and flexibly to some extent if we're looking at a course which is a very small course or one involving a small number of studies. I would be comfortable with that the course co-ordinating duties as part of

that broader course structure could be undertaken at Level B." [transcript page 129].
The union when tabling differences between level A and level B academics, concludes the main difference as, level A academics may act as Subject Co-ordinators and under certain circumstances level B academics also act as Subject Co-ordinators and that level C academics act as Course Co-ordinators. The respondent puts however, that the criteria for progression between these levels relates mainly to increases in teaching and research duties, not just only to the difference of whether one is co-ordinating a subject or co-ordinating a course.
A level of excellence is required to move between levels. For example at level D and E, (top of the scale), so classified academic personnel, still teach and carry out research. It is rather increased work value component, which leads them to progression at those levels, or in other words, entrenched mechanisms that relate to promotion between all of the five levels.
One US witness indicating considerable experience in the promotion area, having had exposure to a vast array of applications for promotion stated, *"Primarily, people are promoted not for what they do but for capacity and ability with which they do it. It is a merit system. Promotion is based on teaching (and) research. You have to be outstanding at one of those before anything else comes into play, I think."* When asked whether a Level B academic would ever be promoted on administrative responsibilities alone, the witness gave a negative response [transcript page 91]
It is US's contention that, the case before the Commission is exactly a situation, which requires the sort of flexibility acknowledged in the preamble of the award restructuring agreement.
Campus comparisons
(ii) In terms of the issue of quantum, the work of Co-ordinators at OAC is quite distinguishable from the work of Co-ordinators who work on the US main campus.
(iii) The course sizes and the content of courses offered at OAC are spoken of, as being quite different to those on the main campus. Therefore the role of the Co-ordinator at OAC varies from the mainstream campus and is not analogous.
Of this union claim, of a analogous situation (refer 2A(iii) above), US contends that the union has failed to make out such a case. Presumably this is from a considered very limited basis of witness evidence, i.e. confined to the experience in an overseeing role, of a single Course Co-ordinator and where the course was co-ordinated by Year Co-ordinators. But here also, it was for an entire course as opposed to a single course co-ordination, with the Head of Department having overall responsibility for the co-ordination of the course, the student size differences and other related co-ordinator responsibilities.
(iv) US while not denying that there are some small courses offered on the main campus, as the case for any large institution, believe their situation illustrates, that the most popular courses that are undertaken by a vast number of student population are those co-ordinated at the Associate Dean level. In addition, further evidence about the main campus and the College, indicates that it is difficult to compare the course and staffing structures of such completely different campuses. However if a comparison must be made, US submits, the role of the course co-ordinator at the College most closely resembles a subject co-ordinator on the main campus.
(v) Further it is believed, witness evidence indicates that the structure of courses offered at OAC are unique to those at US, in that:
* they are multi-disciplinary in nature;
* the "academic group" structure reflects the multi-disclipinary approach;
* course co-ordinators work as part of a team
* nearly all of the courses offered by the College are offered by distance education mode.
(vi) The mentioned workload planning system introduced at OAC, is a review which was union involved and allows for a straightforward calculation to determine the time spent on course co-ordination duties (now called a unit of study). OAC is the only campus of the University that offers distance education courses, hence the nature of the teaching and course co-ordination duties, helps to make the campus different.
(vii) The payment at level C of the salary structure occurs through promotion or appointment, which follows an advertisement. The basis on which staff are promoted is, the entire suite of academic duties being considered, not just the performance of a single activity.
Remuneration position
(viii) While it is quite irregular for academic staff to be paid a loading for carrying out a single duty at a higher level in the structure, US nevertheless puts a compromise position, that staff in question be paid a loading for the additional work carried out.
The quantum of that loading however should, be directly attributable to the time spent performing those higher duties, rather than to any blanket higher duties allowance, which will take staff to the next level in the salary structure.
(ix) It is the US's primary position that Co-ordinators at OAC do not carry out the full suite of duties

contemplated by the Level C descriptors of Position Classification Standards. US accepts that Course Co-ordinators at OAC work lengthy hours and many "beyond the call of duty" in carrying out their functions, but the claims go to the issue of work value. It is a matter for the Commission to consider whether the staff should be paid at Level C for all of their teaching, research and administrative duties.

Remuneration position

(x) US submits a percentage loading, proportional to the amount of time expected to be spent on course co-ordination duties, should be paid, in the event their preferred position of no reclassification is not considers an option. Higher duties allowances are commonplace in higher education and public sector. These allow for the payment of a "partial" or percentage based allowance, for the component of time spent at higher work value than any substantive position.

Where the union argues that if the US's proposal was granted, academic managers would then somehow employ fewer Level C staff, represents considered new material by way of final submission, but is completely denied. Staff apply for promotion and are promoted to Level C on the basis of merit. No quota applies.

(xi) Partial higher duties allowances are seen as common place per se, for non academic duties within universities.

Flow-on potential/retrospectivity

(xii) When looking at the potential for flow on, US's position is that it is by no means easy to compare the structure of OAC with that of US. They see however that the role of the Course Co-ordinator at OAC is distinguishable from the role of those who are involved with co-ordinating courses on the US campus. The nature of course co-ordination at OAC is different for the following reasons:

* nearly all courses run by OAC are offered to external students. No courses on the main campus are offered externally.
* The academic group based staffing structure of OAC is peculiar to the College;
* Course Co-ordinators at OAC conduct their duties with the assistance of a course committee;
* Courses offered by OAC are multi-disciplinary in nature, relying on course committee members, from discipline areas outside their own expertise, to assist;
* Course co-ordination duties are within a workload formula model.

For these reasons, there would be no flow effect that could arise from a determination of the present case, but also it must rely on the terms of reference.

(xiii) On the question of whether a retrospective payment is in order, the respondent's position is that there is no entitlement to retrospectivity. Payment to level C is not seen as constituting a legal entitlement. There is no industrial agreement or instrument requiring this. A simple grading decision should only be prospective, i.e. unless there is very good reason why this should not be the case.

When considering such reasoning this cannot be viable, exampling that in lengthy work value cases, retrospectivity is only granted by the Commission if there are extenuating circumstances present. The Commission should take this into account before determining. The granting of any retrospective payment, could also effect the college's financial budget.

With work value cases, it is acknowledged that the Commission is not bound to follow precedent in private arbitration; nevertheless US believes that it would be proper for the Commission to consider this practice, when determining retrospectivity.

In any case, evidence of pursuit of the claim by the union prior to 1995 is conspicuous in its absence. Such evidence shows that the University has taken steps to resolve the matter and that offers have been made in settlement of the union's claims. There is no evidence to suggest that the University has acted in a manner so as to, either delay the resolution of the matter or fail to treat the claims seriously. US believes that it has actively consulted with the union since the problem was first raised.

Capacity to meet claims

(xiv) Obviously in the present proceedings, the parties are at odds with the actual quantum of the claims. The claims costed by the US are presented in exhibit US3. At no time was an alternative calculation submitted by the union, supported by evidence, or US calculations questioned.

(xv) Of the union's proposal that the US has ample capacity to pay the claim on behalf of the College, that submission is based only on the financial position of the University, as taken from a 1996 Annual Report.

(xvi) From the union's submissions that the University would be financially rewarded if there was a denial of retrospectivity by the Commission, the US response is:

* OAC is in a dire financial situation at present, only to be worsened if the claims granted;
* There is no evidence that US has failed to act in a timely manner.
* The University contends that it has abided by the Award Restructuring Agreement. It has applied the PCSs as intended, having received advice from a party who negotiated the Agreement.

(xvii) US does not wholly submit that it would be unable to pay the union's claims if granted by the Commission, however should the claims be granted and applied retrospectively, the cost impact would necessarily be borne by OAC as it receives each year a one line budget from US, according to a funding formula. On page 123 of transcript OAC's Principal
stated, *"I have no access to any funds other than what are allocated to me and what are our own reserves..."*, causing an alleged detrimental effect on OAC's capacity to offer academic programs and maintain its current complement of staff [transcript page 124].
(xviii) In accordance with the Commission's request, OAC costed for each staff member in question, the effect of applying a higher duties loading for the proportion of time spent on course co-ordination duties. Applying the workload formula, this would amount to $22,874.65 including retrospectivity.

3. WITNESS EVIDENCE

A. General

Over the two days of main hearing, thirteen witnesses gave verbal evidence. Nine of those were called by the applicant, with three supplying statutory declarations in lieu of their personal appearance. The remaining four were called by the respondent. All personal witnesses had earlier submitted statements (see exhibits NTEU 5(i) to (xii) and SU 1 - 4).

Those who gave verbal evidence, spent varying times in presentations, from relatively short to more lengthy periods. In some instances advocates for the parties could be seen as dictating that situation. Through this, process the Commission found itself left with a wide range of assessments, including those who made it.

It should also be a matter of focus here, that there were many instances where witnesses brought with them expertise based on their own exposure within a total US environment. Hence at times there were responses tendered, which displayed considerable local knowledge, without necessarily understanding each others situation i.e. US to OAC campuses or visa versa. It would appear that this perhaps even extends to a situation between Departments, or individual interpretation.

4. CLASSIFICATION/COURSE/SUBJECT - STRUCTURE

(A)
In respect to Course and Subject Co-ordinators roles, these stem from the Position Classification Standards. The relevant ones to this matter, are found at levels B and C where for example in precis form, at:
"Level B
GENERAL STANDARD
A Level B academic is expected to make contributions to the teaching effort of the institution and to carry out activities to maintain and develop his/her scholarly, research and/or professional activities relevant to the profession or discipline.
SPECIFIC DUTIES - (note there are others)
Specific duties required of a Level B academic may include:
* Acting as subject co-ordinators
SKILL BASE
A Level B academic shall have qualifications and/or experience recognised by the institution as appropriate for the relevant discipline area. In many cases a position at this level will require a doctoral or masters qualification or equivalent accreditation and standing. In determining experience relative to qualifications, regard is had to teaching experience, experience in research, experience outside tertiary education, creative achievement, professional contributions and/or to technical achievement."
While a LEVEL C the,
GENERAL STANDARD
A Level C academic is expected to make significant contributions to the teaching effort of a department, school, faculty or other organisational unit or an interdisciplinary area. An academic at this level is also expected to play a major role in scholarship, research and/or professional activities.
SPECIFIC DUTIES - (note once again there are others)
Specific duties required of a Level C academic may include:
* Course co-ordination

SKILL BASE

A Level C academic will normally have advanced qualifications and/or recognised significant experience in the relevant discipline area. A position at this level will normally require a doctoral qualification or equivalent accreditation and standing. In determining experience relative to qualifications, regard shall be had to teaching experience, experience in research, experience outside tertiary education, creative achievement, professional contributions and/or to technical achievement. In addition a position at this level will normally require a record of demonstrable scholarly and professional achievement in the relevant discipline area."

When reviewing on a comparative basis, the other specific duties allocated to the Position Classification Standards and the required skill basis for levels B and C, the difference appears to predominantly lie in the areas of research. In the case of Level C, research undertaken is one of a more significant project and leadership role. Some involvement may also occur with advice and support applications, to Level B personnel in the areas of course material development. At level B only, a requirement is also there for the undertaking of a range of administrative functions, the majority associated with the subject taught.

Skill base differences extend at Level C for a requirement to have more advanced qualifications, significant experience and increased demonstrable scholar and professional achievement elements. Despite those requirements however, words used such as "normally require" and "many cases", seem to imply a more general expectation, but with built in flexibility.

Some Additional Aspects (From Evidence)

(B) A little more specifically when chosen for a Subject Co-ordinators role, tasks may for example, be over a range encompassing:

- Ensuring how the unit runs and course content, ensuring availability and deployment of teaching staff; organising unit aims and teaching processes, ensuring/organising the imparting of relevant information to appropriate personnel; report collating and maintaining communication channels and liaising with other course co-ordinators.

(C) Specifically at the OAC campus, it was put the incumbent when overseeing the operation and implementation of a given programme or course, is also both pro-active/reactive or a combination of both. The position is a focal point for consultation/liaison/counselling for others on the campus and/or within the community. But with course structures on offer, any development at unit level is the responsibility of the appropriate Unit Co-ordinator. The reasons for this is, the development of expertise, which from anyone other than the incumbent, generally can not be found.

(D) As situations and operational strategies have evolved on campus, some changes have crept in, which are admitted, may yet have to be written into strategies. An example being where Course Co-ordinators no longer as practice, specifically advise the Head of Research and Postgraduate Studies of the content of teaching methodology, or assessment of units or resources. This is despite what comments may be asked of. On the other hand, a Unit Co-ordinator's role is increased through the holding of responsibility to all subjects/units delivered within a course structure.

Coupled with that is the individual student's progress across all units, assessments and comparison of results, along with identifying barriers between units. It tends towards an overseeing, team building, resource providing role. There also is a stronger active reporting link to the Head of Undergraduate Studies and Academic Services and a reliance on Unit Co-ordinators input.

(E) Course co-ordination was described as not involving direct supervision, but it may involve others in course deliveries. As previously mentioned there exists a workload formula developed by the Head of Undergraduate Studies and in conjunction with others. This although still in need of fine tuning, attempts to acknowledge a resource need for work allocation (Teaching/Research areas), for those who undertake course co-ordination duties.

(F) Courses were outlined to the Commission as having a natural varying content to meet requirements. For example, with their core elements, optional elements, graduation stipulations and subject/unit numbers. Along with these there are also other defined areas including, required hands on work experience and lecturing time, these vary from year to year or semester, as also course participants.

Further to the above, there is an effect on any given courses current status and rationale, arising from the level of intakes of internal/external students. Here it was stressed that the nature of intakes at OAC bring some unique characteristics, including goals/expectations, physical versus telephone contacts and some on going TAFE liaison.

(G) It may also be a requirement that additional undertakings by an incumbent Co-ordinator, could involve areas of committee involvement, facilitator roles, course promotions, administrative co-ordinating, consulting, guiding, conflict resolution, communications and/or research duties. Consulting and research as factors, are viewed to be two areas which may require some reduction in workload arising from the imposition of the co-

ordinators role.
Attached to either a Course versus Subject/Unit Co-ordinators role is possibly also, the difference of approach based on any incumbents' personal experience at the various required levels. However when questioned, no witnesses expressed boredom with tasks when allocated.
From the piecing together of evidence it would seem also, that any movement from B to C, possesses source derivatives which come through the appointment process i.e. either, individual request, adoption of a relief role, or an application from the calling for and/or a following interview/selection process. Although Course Co-ordinator experience is not seen as the single criterion for promotion, all types of selection eventually bring a "chosen" approach.
(I) The duration in the role appears to vary in terms of the time or overall numbers posted and/or subject to co-ordination of tasks needed at any given time.

5. CONCLUSIONS

What follows below through sections A - I, are some illustrations of observations which I have made. They are however not intended to be exhaustive of all submissions.
(A) Forward
I found little to dispute presented earnestness or detailed evidence provided, nor the attributed skills/work experience etc., individual witnesses brought from their chosen expertise field and/or respective task(s) undertaken as Course or Subject Co-ordinators. Already at 3A - Witness Evidence (above), I have mentioned how I perceived some governing influences. Despite all of this, some of those found differing levels of application/approach, I see as only natural.
I have been careful nevertheless when assessing the overall situation, to pay due regard or disregard as it falls, to the differing disclosed impositions, particularly so with the nature of the jobs held, the applied style or application, method of incumbents delivery and, to all of the disclosed one-off individual situations.
While some areas may have appeared divergent, other aspects can be accepted, as holding total or partial commonality. When combined however, in my opinion they illustrate, along with possibly no doubt others not so disclosed, why it has taken parties so long to reach the stage they now find themselves at. Also due to this length of time, I perceive has come accompanying fixed views.
All above I stress, is in no way mean't to infer that the base for this application, is not presented as a real problem. I would suggest nothing goes for so long a period without possessing some attached elements of reality.
The lengths in time to which this problem seems to have carried, is that in June 1992 the matter was alleged to have been first raised with the College Principal, by the then Sub Branch President of the Academic Union (a witness). Although expressing some disquiet, at the time, the Principal is alleged to have advised the matter should be referred to the University Management Academic Union Liaison Committee (UMAL) forum, established between the University of New England's (UNE) management and the academic union. At that time, the Orange campus was attached to the UNE, but now is assimilated to the University of Sydney (US).
UMAL's response was evidently to adjourn the issue for handling at a not defined later time,. Since then at best, the problem appears to have rolled along at varying pace, a pace which has also included several Commission hearings. No doubt changes over the period with personnel involved also the reporting situations, especially the change from UNE to US, has not contributed to speedy progress.
Putting aside for a moment that such time delay occurred, during the proceedings of the current Commission hearing, there were mentioned aspects which tends to accentuate some conclusion reaching, for example.
(B) Classification/allowances
When looking at the position of the union's current claims, that is a movement to a higher classification level or paid allowance, a question was asked by the Commission of one witness, as to how either of those situations would assist with reducing individual workloads. The response given was probably synonymous of a general situation.
"...I don't think either of them could reduce the workload Commissioner, but I think they recompense you for some of things you do outside normal hours."
"..... you do not believe that is being done now? It is not" [Page 49 of transcript]
and of another witness [page 58 of transcript]
"How would a re-leveling (of) ..... an allowance (be) .. a possible solution, resolve that position for you? It wouldn't solve the solution, but it would just be a heck of a lot nicer than being told that the work we are doing is insignificant."
Again using witnesses evidence for illustration, a particular one addressed the aspects of internal versus external

students. At page 59 of transcript, the following statement was made:
"In many respects I think there's probably more work involved with - it's very hard to cut the cake on that one. I think because the internal students are there around the campus they do have a tendency to raise issues and you do have a tendency to handle them immediately. External students are prone to write in or to phone up. So the mode of contact is different. There's a sense of the internals are there more immediate and perhaps the demands seem to be more than what I find for externals. However, I'm splitting hairs on that one. I'd hate to sort of differentiate between them."
Of the question to a position where there may elsewhere exist a situation, of a responsibility allowances being paid?
"I believe and this would have to be substantiated by probably the principal that at least one of those positions currently is receiving a higher duties allowance and I believe in the past when those positions were created they were given a higher duties allowance.
That allowance was in addition to receiving a reduced teaching ? Yes." [page 23 of transcript]
Another witness indicated that when a member moved from level C to D on a temporary/relief basis, that member received remuneration for the period calculated at a difference ratio (responsibility loading). The Academic Supervisor at OAC, essentially has a designated personnel mentor function, as opposed to the Course Co-ordinator who holds the prime responsibility of looking after the course, and
"was it possible for you when you were acting as course co-ordinator to differentiate a period of time each day where you undertook your course co-ordination duties and then - differentiate that from doing your other duties at other times? This is very difficult because if you were at your desk then calls could come in at any time of day - or sometimes at night - in relation to course matters. So I don't know how you would actually try and separate it out. I think it would be impossible. As far as I was concerned I was acting course co-ordinator 100 per cent of the time." [page 29 of transcript]
and to the handling of specialised courses, one witness under questioning proposed:
"Did you find that during the time that you were course co-ordinator that it was possible to differentiate between the periods of time that you spent as a course co-ordinator and the periods of time that you spent doing other academic duties? Were you able to have discrete periods of time for ? No - it was very difficult because I think particularly in relation to this course, because it was - the liaison we were required to actually undertake with Westpac mean't that we could be - I could be asked to talk with people. I needed to keep in contact with the manager down there quite regularly. Students could contact me at any time. It was very much a do it when it's required to be done type approach. So it was very difficult to say: "Well, I'll have a parcel of time here during the day" when I might just be going to work on course co-ordination. Of course there were times when was basically working on it all the time because that would have been obviously when I was doing the evaluation and working out papers for the restructure." [page 37 of transcript].

I found however one witness while then (1992) Head of the Centre of Agricultural Commerce, recalled having written to the OAC Personnel Manager about consideration for the model of course co-ordination allowance adopted by the University of South Australia and further explanation, that it was still
"My position on this matter is I believe that course co-ordinators should receive some recompense for taking on course co-ordination role and my view is that they - they should receive an allowance which represents a percentage of the difference between their current salary and the salary of the bottom level of senior lecturer." [page 18 of transcript]
That particular witness, however was not aware of any similar model applied elsewhere in the industry other than South Australia, but remarked that *"I haven't looked either..."*.

I have some disquiet with the totality of a proposition, that an academic at Level B but who in addition performs (and only) a Level C Co-ordinators role, that by such occurrence, the person is then said to be carrying the requirements of a Level C with all conditions it would normally attract. It may seem for some OAC academics that the Co-ordinators part of the level, has onerous and loaded attachment, even placing aside the enthusiasm for the task(s) at hand and the latter probably being a reality.
I accept also for instance, that such task allocation, approach adopted and eventual results will largely depend on the individuals approach and application and/or co-operation of others. But I suggest the same could be said to apply with any individual and occupier of a position within any organisation. Therefore such should not be a complete or even singular gauge for the review.
The fact as I view it, is that any position under specific allocated duties, for example at Level C, should only by preference and comparison, attract a link or allocation of a total classification paid value for that level, i.e. when and if it is performed by way of a full duty statement. I do not see the position posed by the union that with Level

B academic, i.e. the administration and co-ordination components, are based around the subject they teach as opposed to the course. This has never been clearly expressed in the suggested terms.
Nor I put, is it so clear with the union's proposal which goes to Level C academic. That view's effect, has from any outlook, a position that campus academic staff when performing the duties associated with Course Co-ordination, should in turn be classified and fully paid at the level of a C academic.
I find myself to some extent, accepting the unions contention that US's concept of higher duties allowances could possibly pose difficulties from both an arbitrary and subjective judgement of time spent as a Course Co-ordinator, especially given the OAC structure and client requirements. I do however not see it as a totally impossible situation as suggested, to separate out academia other duties, such as research and administration. Similar separation is widely used, for everyday costing purposes in general industry, including human resources, information technology and legal areas.
I have accepted the argument that based on the terms of references (refer 1. The Application - above), a distinction needs to be drawn between the amount of work performed at the level and value of that work. At time, it would seem the use of Co-ordinators or the like (whatever the given title), is widespread throughout the at large University industry. Its current value to the organisation and into the foreseeable future, must therefore be at this stage unquestioned.

C. Orange Campus Aspects

A comprehensive position was advanced by a witness about the effect of student numbers upon a co-ordinators role by comparison to US and Orange campus's.

"there might be more students but the level of responsibility doesn't diminish. For instance if you are not responsible for eternal, internal students. In Sydney University they may be responsible for a high proportion of internal students, you would not see much variance on the co-ordinators role? I think too there is a difference may be, in the way that we conduct and deliver our courses between here and Sydney as well and I know that is one of the strengths of Orange Agricultural College is some of the different learning processes we can put in to place and certainly in the course that I have been involved in and some of the other units that I am involved in, introducing things like learning contracts for example. Even though I know that you can do it with larger numbers and working in action learning groups, the management learning groups we get results from those students that there might not necessarily be able to get if we just had say a lecture with 500 or1000 or 1500 students. The other thing that I think you should take into consideration is the students that enrol at Orange Agricultural College have some different needs to say some of the students that enrol in the main campus courses. Because we are part of the old CA system and we have an entrance into advance diploma courses, we tend to get students who may have lower TER or different learning needs or learning problems than say students who might go into courses at 60 plus, 70 plus, 80 plus, 90 plus TER. So there is some of those, even though we might have fewer students, those fewer students have some special needs that require more time." [page 24 of transcript].

To illustrate what was seen as potentially some further exampling of uniqueness to the Orange campus, a position was put which could be best described as a form of "specialisation". Although that position had subsequently developed and widened in scope:

"Can I just ask you in relation to the course that you are co-ordinating - the advanced diploma or agri business - could you explain how it was that you came to be involved in that course and how the course developed over the period that you were the co-ordinator? Certainly. I came to the college in 1990 from industry. The course was basically in planning phase at that stage. I didn't have a lot to do with it initially in 1990. In 1991 it started running. I took over the co-ordination in 1992 because I was involved with one of the units in the course as well and I co-ordinated it `til the end of 1994.....
It was actually also a course at that stage that was designed specifically for Westpac employees. So it was very much a sort of a boutique course in that sense. Only Westpac employees were actually - students within the course. That was the case for the first three years of operation. We then restructured the course and it became available to all other students. So we had Westpac plus other students. But initially it was just a boutique course for Westpac and we basically discussed with Westpac their needs and came up with a course which suited the things that they wanted.

Were you the co-ordinator at the time that it was restructured to be offered to all students? Yes, I worked on that. There was quite a major part of work towards the last year that I was actually involved." [page 37 of transcript].
Despite there being a link between both campuses, on the five level salary structure, I do believe that at OAC there are additional and different factors with performed, regulated academia work in comparison to the US campus. This is not meant to take away a situation of reverse application. But as it goes I find established, sufficient uniqueness between OAC/US
Co-ordinator roles when they are compared. This provides leverage that separation of activities exist, along with responsibilities sufficient enough to negate flow-on. Many OAC course structures alone, along with personnel to whom they are offered, display a majority of separation elements from the main US campus.
The union's advanced argument of student numbers and origins have a viable effect, to provide a basis which also partially goes to giving an established picture of differences at OAC. It also complements a whole range of other activities which further accentuates, that uniqueness. As I see it however, this does not justify, the unions position on the flexibility question.
I do not consider the Full Bench in their 23 July 1991 decision (refer 2A(iii) above), would at the time ever had specific knowledge of differences for the OAC campus, or had it drawn to there attention. Such I suggest was not the forum which would extend to such emphasis on classification standards. I therefore agree that in the circumstances, the US stance that the developed classification standards have elements of attached guidance and flexibility in actioning, has the balanced credence.

D Course/Subject co-ordination
Some witnesses attempted to also provide an indication of the differences between subject/unit versus Course Co-ordinators, exampling for instance at page 60 of transcript:

"As a course co-ordinator you're looking after all the cogs in the wheel and as a unit co-ordinator you're simply looking after one cog. And even there your responsibilities only go so far before you hand over to the course co-ordinator. So the responsibilities of the course co-ordinator are quite profound and more far reaching than for the unit co-ordinator. It's very hard to split when you're moving from one end to the other or whatever. As a course co-ordinator I suppose there is a sense of - you're still maintaining your other roles as well as being the course co-ordinator. But really in a reductionist sense I think makes a nonsense of the whole responsibility of being a course co-ordinator. As a course co-ordinator you have that total responsibility of many academics as well as many students as well as many units."

Further complications were inferred with setting bench mark comparison within and between courses. The following extract at page 80 of transcript, came from a witness located at the US campus.

"Well, Science is a faculty in which different students take different course streams so there can be a considerable variation in the numbers of students. If you're talking about first year courses then they tend to run into the hundreds. They'll diminish rather sharply in second year and in third year people will scatter into various specialties and so there'll be a huge range in some places of relatively small courses.
Yes, but I think the nomenclature in this case is quite different from one campus to the next. When you talk about a course, do you mean a degree or an award, which is it is currently called, or do you mean a sub-component of a degree? It is a sub-component of a degree so, for example, you might have - in our own case you would have say, someone as the co-ordinator of second year pharmaceutical chemistry which is a course for the degree. Would you know how many students there would be in the overall degree course of a Bachelor of Science; just an educated guess ....? Overall, I would think it would probably be of the order of 7 or 800 but, I wouldn't swear to that."
I have also formed a view that at OAC campus, the following statement probably is very much akin to a large proportion of full time Course Co-ordinators in their jobs.
"there are some course co-ordinators who do have high - high work loads and they along with every other staff member have their work load reviewed and where we agree we provide some assistance. I have one if not two, course co-ordinators who, when it comes to reviewing their work load, tell me not to worry about it. It's a mechanistic, quantitative thing that they don't pay much notice of and they know they'll get the job done and they're happy with that.
Do course co-ordinators perform their duties on a voluntary or a compulsory basis? Completely voluntary."
[pages 111 and 112 of transcript]

One other witness with a substantive position of senior lecturer and fulfilling the role of Head of Undergraduate Studies in Academic Staff, explained that while at present involved with teaching, an example of 1998's work, was no teaching involvement for the first semester, but in semester two, the work undertaken was scheduled to include Unit Co-ordinator for one unit of a final year of a three year offered degree, for distance education post graduates. The same witness saw as a fair statement or position, that OAC courses when referenced to co-ordinating, were more likely to be complex due to their multi-disciplinary nature, but nevertheless with a recognition of offsets in some areas for course participants (comparison with US).

On a true work value basis, I have found no justification for full income recognition to the tasks undertaken by OAC co-ordination. However to be fair the input from both sides never completely asked that of the Commission as a pure exercise. There is however I detect, a strong situation for co-ordinators to be probably "used" and/or taken for granted, therefore needing a different method of handling than applied elsewhere within the US organisation.

E. Promotions

The promotion factor was referred to at varying intervals during proceedings, but from input, I am satisfied that not one standing alone factor, is relied on for promotion. For example, with level B to C there would basically seem to be three areas of main concentration or reliance when reviewing candidates for promotion. These three are research, teaching and administration. The fact then that an applicant may have had past exposure to subject/unit or even relief course co-ordination (administration), may not necessarily achieve for that candidate a relevant promotion. Likewise when assessing those at higher levels, for example a Dean or Departmental Head, these are established management roles.

Of further interest was how US's promotion criteria was looked at in conjunction with the organisation and Position Classification Standards.

"So, is it your understanding then that the position classification standards form a part of the University's promotion policy? I would regard the positions ... as guidelines not as indicative rather but as guidelines as to what should happen. ..... because of the variety and diversity across the University it would be very hard to be very specific because different subjects, different departments organise in different ways."

It is my view however, when it comes to the summation of the criteria in areas of promotion, one of the more pertinent slants provided was:

".....in order to be promoted you must be outstanding in two areas, one of which must be teaching or research, so that unless you're outstanding in either teaching or research - I can think from my experience of no case where a promotion would be possible because core business of a university is teaching and research. The administrative functions in fact support teaching and research."

Sufficient argument was placed before me to reject for final consideration, a large percentage of the union's approach on the links to promotion activities.

F. Terminology/organisation

The fact that there were differences between the nomenclature used on the campuses of US and OAC was obvious. For example one witness put.

"Could you just give a brief run down on nomenclature that is currently used at the university with respect to degrees and courses of study? It has become quite confusing I think for all of us in the room at this point in time because the case is about the Orange Agricultural College. I understand the method you use there is different to the main campus. So, if you could just run through the different levels of course components and what they are called, I would appreciate that? Thank you. The nomenclature was changed last year and it is between the two different promotion documents. A degree is now an award. A subject is now probably called unit of study. Subject would apply to the whole thing. The actual course a student does is a unit of study now." [page 89 of transcript].

It also was evident that the numbers of students together with the range of compulsory/optional subjects and courses available at say the larger campus, brings more examples of administrative structures to meet needs. For instance the introduction of "year" co-ordinates along with promotion standards.

There were also some additional functions carried by US Co-ordinators, but shown as perhaps not being so carried out or even required at OAC. It would appear there can also be a view that on both campuses, "Departments organise themselves in different ways."

G Costings

The Principal of OAC when giving evidence, mainly did so from the aspect of the OAC budget incorporated with the US master budget. The Principal also spoke of knowledge of the claims history going back to when OAC was linked to UNE. He also confirmed what other witnesses had said, on the basis for promotion to Course Co-ordinators, it is dominantly based on past teaching and research criteria.

When giving verbal evidence, there also was some concentration placed on point 6 of the Principals written statement that:

"If the college was forced to meet any untoward or unbudgeted cost increases the college would be in a position of have to reduce academic staff numbers."

From this statement and others who gave related input, I have experienced some difficulty. My difficulty arises potentially from, the possibility of contingency plans seemingly being overlooked. In my view this should not have been the case for a matter which has been on the books for so long (especially last year), along with other aspects (including what the US has put here in kind, as their fall back). While accepting the almost dramatic changes and degree of discomfort, with which all Universities are currently experiencing with their financial structures, it still seems inappropriate for the university to have not made some form of contingency plan for an on foot claim. This view is also heightened by what has been taking place elsewhere, with higher duties/responsibilities within the overall University organisation.

G Position, duty and Workload Standards

From evidence I have also been convinced, that by practice, Position Classification Standards have applied with varying degrees of flexibility towards their implementation, probably no less than that attributed by one witness:

"There are significant differences across the university itself in the way these standards are interpreted and implemented and a lot ..... is a result of the historical differences between disciplines but also between the colleges that became part of the university. The Conservatorium of Music, for example, is very different in the way it interprets and implements these standards to say the Faculty of Medicine. But those differences are both historical and disciplined based."" [page 127 of transcript]

and at page 13 of transcript on the same aspect:

"The expectations of staff members I think will vary depending on their discipline and their length of service with the university. There would be many members of staff ..... for whom they would have no meaning as far as the allocation of duties is concerned. For more recent members of staff they may well be aware of them and take them into account. The way that work is allocated is very much dependent on the department and the faculty concerned and it is up to that department whether in fact it bases its allocation of workload on the standards or not."

But here and it would seem US's situation is:

"We're not talking about moving all the duties around, we're talking about an overlap for one particular administrative duty between two levels, level B and level C. We're not talking about shifting subject co-ordination to level E and that is course co-ordination." [page 141 of transcript].

"The process of allocating duties has never been linked specifically to this document, no. The process of allocating duties is usually a far more - dare I say the term - collegiate methodology. The primary use for this document has been through the recruitment process, the implementation of the new salary structure and now for the promotion procedures." [page 133 of transcript].

Arising out of this flexibility situation I cannot help but believe, based on the manner in which evidence was given, that the position on higher duties versus responsibility loading etc., can only be viewed as having divergences and at the same time procrastination elements.

As a proposition a further aspect arose on the loading prospect. This came through a witness:

"Could I ask you, if the university were to adopt a policy of paying a responsibility loading to course co-ordinators which saw them go to the step one of level C as the minimum payment, would that be, in your view,

consistent with the way that subject co-ordinators are treated in that they have to go to step 6? It would be - it would consistent.
Would it be consistent with the way the heads of department loading works in that they have to go to the first step of level D? Yes, that would be consistent.
And it would be consistent with the way the Dean's loading is treated and they have to go to level E? Yes.
So, a responsibility loading taking course co-ordinators to the first step of level C would be quite consistent with the way responsibility loadings apply to those other positions? If the university decided to do that, yes, that would be a consistent way of treating responsibility loadings or higher duties, yes." [page 142 of transcript].

H Claim Positions

(i) Applicant
(a) Preferred Position
The role of Programme/Course Co-ordinator should be classified at Level 3(C) academic (a classification at US given the homeclature of Senior Lecturer), with effect from the time individuals commence such duties.
(b) Fall Back Position
A responsibility loading paid for time performing course co-ordination duties. The loading calculated at the difference between the individuals substantive salary with minimum recognition accorded to the first step of Level C and for all time required to perform such duties.
(c) Retrospectivity
(ii) Respondent
To apply.
(ii) Respondent
(a) Preferred Position
Opposed to reclassification and alternatively a responsibility allowance meaning in effect no additional payment for academic staff below Level C who undertake co-ordination duties.
(b) Fall Back Position
While opposed to a blanket higher duties allowance taking staff to the next salary structure level, staff below Level C who undertake co-ordinator duties, may receive a higher duty loading equal to the difference between their Level B salary and a Level C salary divided by the proportion and directly attributable to, the time spent of total duties which go to make up their co-ordination duties.
(c) Retrospectivity
Opposed to retrospectivity.

(i) Summary

From all of the above i.e. background practice, parties position and other input which for overall sake has not been included, I have formed the view that there is a need to rectify a perceived anomalous situation. At the same time from evidence, I have

For the benefit of all concerned I believe however this problem can no longer be allowed to continue in the manner it has i.e. to remain almost in a state of perpetual on/off limbo. In stating this and as already put above, I am strongly of the view that a sufficient amount of differences have been established between the OAC and US campuses to overcome any flow-on (one to the other) from judged outcomes. In this matter, any application should not, nor will have, application from OAC to US. In any case the union has stated such to be their position on flow on, and have given assurances and undertaking to that effect. Anything decided for implementation on/at OAC campus has no connection in this case with the situation at US campus, it stands alone. I have found no like avenues of similarity, which need to apply at both from the questions posed by the application.

DECISION

6. **DECISION/RETROSPECTIVITY**
A. Decision
For those employees (academics) at Orange Agricultural College campus (OAC) only, who perform Course Co-ordinators duties of a nature normally carried out as one of the duties found for a permanent classified Level C holder and.

* Who perform this duty side by side but in addition to their current classification duties at Level B,
Will for each occasion so allocated, be paid an allowance in addition to normal classification (Level B) rate of pay.
* The allowance to be termed a "Co-ordinator Duty Loading" (CDL).
About the CDL
* CDL is only to be allotted for the duration of time, for which the additional task(s) of Course Co-ordinator is so allocated and undertaken.
* CDL will have no application to any other classification duties normally carried and found at Level C. Those remaining duties in Level C will stand alone and separate from Course-Co-ordinator duties.
* CDL allowance will only apply to OAC campus and no other campus falling within the University of Sydney business operations.
* the CDL allowance will have no all purpose application.
The method of calculation for the CDL at OAC will be:
STEP 1 Ascertaining the current base salary for classification Level C.
STEP 2 Determine current base salary of the effected employee (academic) who currently is within classification Level B and who is directed/allocated to undertake Course Co-ordinator duties at OAC.
STEP 3 Determine the difference between Steps 1 and 2, the result of which will be the precursor amount for the finally determined CDL.
STEP 4 The difference amount figure arrived at in Step 3 immediately above, will become the final basis for a subsequent divisor comprising the proportionate time which can be directly attributed to duties to be spent as a Co-ordinator.
STEP 5 Any divisor arrived at in Step 4 - above, which shows a figure beyond the seventy percentile (70%) should be considered to be a reapplied divisor of one hundred percentile (100%), in consideration for the differences of Co-ordinator duties and responsibilities, applying within the OAC campus, and not found elsewhere within US's organisational campus structure.
B. Retrospectivity
I now turn to the other remaining substantial party difference, that of retrospectivity. Here, even if they had been able to agree to the first issue, I believe retrospectivity would still have remained an argument between them. At the time of hearing that was still the situation and the Commission has been requested by both, to include this in decision processes.
With considerable thought to all those matters presented and involved, including the various work value stances, I have reached a conclusion that retrospectivity should not be initiated in this case. For instance, I consider that if any reviews outcome had found absolute right, morally or any other such reasoning on its side, then retrospectivity justification would potentially have had more persuasion. However, I have not been so persuaded.

It would also seem that this matter has on many occasions been given a low priority burner, by both parties. Indeed it may have possibly remained so, but for the more recent and well covered development, of changes and their consequential effect, to every facet of university operation in Australia. Reasons or explanation for these changes are not in need of elaboration here, but OAC and US are obviously not isolated. Nor is this so for the students, the subject/course structures, the requirements imposed on teaching/research activities, or other areas of general academic university administration per se.
To my mind cost factor considerations would or should not have had such purported potential effect, if what I term "risk budgeting" implementation had taken place. On evidence it would seem that situation may not have been met by the university (refer above). In all reasoning, any failure for that situation, should not be totally sheeted home to employees, i.e. to the exclusion of any form of settlement, putting aside retrospectivity. However for some personnel over the years, there seems to have been an almost attached wish for this claim to go away.
Additionally I liken this claim to involving issues, which very much go to an appropriate division or right form of time. To expand on this one could ask, when is or when will be the right time for any change, for example to annual leave, sick leave, RDO's or shift allowances provision(s) etc? I suggest that actioning will accord with the dictates of entitlement, community pressure and/or time. As I see it, such would be no different for this case. Should then retropectivity apply? I consider this not to be the case, especially in terms of modern industrial relations practices.
I would also point out here, that I have taken an account of whether a lump sum payment in lieu might be appropriate, for those claimants. Apart from the perceived inequities that would introduce, I still hold the discretionary view, that retrospectivity is not warranted in this matter.
Based on the overall situation with which this matter has been advanced, I see that no matter how much those

effected personnel may feel personally and for which I have some sympathy, the situation for any retrospectivity in my opinion and given the circumstances, cannot be justified.

C. Implementation

For the same reasoning, which I found above with retrospectivity and CDL, inherent with all of such implementation, must be a smooth transition for the changes recommended to apply. For this reason the CDL should apply from the commencement of the current OAC semester of 1998 at which this decision is dated. It is recognised that some retrospectivity, contrary to 6(B) above may need to apply, but I reject any link to this activity and the main claim.

Again, in the interest of a smooth transition, the parties jointly should convene a meeting to plan implementation and a personnel communications programme, as to how the CDL scheme will operate. Those discussions should also include how OAC intends to approach the handling of the proportionate division spent on total duties as a co-ordinator. Referral during this process to the Commission on any differing elements arising between the parties is encouraged, but it is considered that the parties are in the best position to undertake this latter exercise. The Commission however, should be kept informed by the parties (in writing) every month on these aspects, as developments take place.

I may have set out, with some detail the information provided by the parties, together with examples of my reasoning towards conclusions. This is due to the fact I believe the parties deserve such consideration, given the time the problem has had carriage and their mutually acceptable position to private arbitration.

BY THE COMMISSION:

COMMISSIONER

Decision Summary

		Conditions of employment - classification - allowances - private arbitration - various employees, education services - discussion on issues commenced in 1992 - both parties seek private arbitration - whether persons performing function of course co-ordinator at Orange Agricultural Campus (OAC) should be re-classified as Level C academic or paid a responsibility loading or a higher duties allowance or receive no additional payment - whether retrospectivity should apply - respondent opposed re-classification and/or payment of responsibility loading, submitting that there should be no additional payment, or employees should receive higher duties allowance - restrospectivity opposed on budgetary grounds - held - employees at OAC at Level B who perform course co-ordinator duties of a nature normally carried out by a person at a permanent Level C classification shall be paid a "Co-ordinator Duty Loading" (CDL) for each occasion performing duties - method of calculating CDL defined - not persuaded retrospectivity justified - CDL to apply from commencement of current OAC semester - parties to convene to discuss implementation and how to approach proportionate division of time spent on course co-ordinator duties - Commission to be kept informed by parties of developments.
National Tertiary Education Union and University of Sydney		
C No. 34712 of 1997	Print Q5395	
Jones C	Sydney	25 August 1998

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Attachment 3

A0479 Dec 957/97 H Print P3971

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act, 1996

s.99 Notification of dispute

NATIONAL TERTIARY EDUCATION INDUSTRY UNION

and

AUSTRALIAN MARITIME COLLEGE

(C No. 34029 of 1996)

COMMISSIONER LEARY SYDNEY, 12 AUGUST 1997

DECISION

This is a notification of dispute by the National Tertiary Education Industry Union (the Union) and relates to a claim by the Union that the Australian Maritime College (AMC) has changed the conditions of employment of its member Mr Fred Stein.

The Union seeks that the Commission find that Mr Stein be confirmed at the sixth increment of Academic Level C classification and that payment be made retrospectively for the period for which he was paid as Academic Level B and that if redundancy is proposed that it be paid at the Level C rate.

Sworn evidence was presented by the Applicant, Mr Stein, Mr D Ranmuthugala, Dr C Buxton and Dr J Hewson.

The sworn evidence addressed the academic qualifications, experience and requirements for appointment to a Level C position, the history of Mr Stein's employment and appointments of a similar nature which have attracted a higher duties allowance. The evidence in respect to Mr Stein's employment history was comprehensive and detailed and revealed a number of differences of opinion between the parties.

The Academic Staff (Australian Maritime College) Conditions of Employment Interim Award, 1988, (the Award) provides at Clause 8 Higher Duties Allowance:

"(a) Higher duty allowance will be paid to staff who are appointed by the Principal to undertake the responsibilities of a position of a higher classification, subject to the following rules.

(b) The higher duty allowance may be paid for acting in a position as Senior Lecturer or above. Appointment to act as Senior Lecturer shall be made only in exceptional circumstances."

The Award provides at Clause 20 Appointments to Fixed Term Positions:

"(a) Within the Australian Maritime College there will be at least 2 categories of full-time academic staff:

(i) Staff in permanent positions

(ii) Staff employed in fixed-term positions.

(b) A fixed-term position is a position which ceases to exist after a specified term."

and

"(e) Fixed term positions will have an initial duration of up to 1,2 or 3 years. The length will be determined to suit college needs.

(f) At the discretion of the College, any fixed term position may have the duration renewed, for a further period of up to 1,2 or 3 years.

Provided that, unless there are exceptional circumstances, no fixed term position shall be renewed more than once; and that the total duration of any fixed term position shall not exceed 6 years."

and

"(h) A staff member who is appointed to a fixed term position shall have no expectation of employment continuing past the end of the fixed term."

Mr Stein testified that he had been employed at the AMC since April, 1987. He said he commenced his employment as a lecturer on a

one year fixed term with the AMC in 1987; in 1988 he applied for and was offered employment as a lecturer Level II on a "continuing" basis as the Course Leader for the Certificate of Marine Operations at the AMC campus at Beauty Point in Tasmania. He claims that it was made clear to him that the ability to fulfil the role of course leader was one of the "primary selection criteria." He further testified that he informed AMC that he viewed the position as appropriate to a Senior Lecturer but did not seek appointment at that level.

Mr Stein was appointed a permanent staff member at Lecturer Level II classification, and was advised accordingly by letter dated 26 September, 1989; he was promoted to Lecturer Level I by notice dated 10 October, 1989. Following his successful application for the position of Course Leader, Certificate of Marine Operations, he was advised by letter dated 20 December, 1989 that he would receive an "additional responsibility allowance" for a period of two years in recognition of him acting as Course Leader. The conditions of employment for that position were clarified by letter dated 22 December, 1989. Mr Stein applied for and was appointed to the position of Senior Lecturer II, he was advised by letter dated 23 January, 1991, that, for a two year appointment, he would be paid the rate applicable to that of Senior Lecturer II (Level C) but that his substantive position remained at Lecturer I (Level B), whilst the letter is not specific it does record that his conditions will remain the same and that the differential between the rates for Level B and Level C recognise a previous period of higher duties therefore placing him of the second increment. He was informed by letter dated 26 October, 1992, that the position he "occupied" was translated to that of a Level C by application of the Academic Award Restructuring Agreement, that advice did not refer to his substantive appointment but to the position he "occupied". Mr Stein refers to that notice in his statement and says he was pleased that he had been translated in accordance with his own understanding although he was concerned about the reference to the position he "occupied" and said he considered this was "part of continuing attempts to divorce me as a person from the duties which I had been employed to undertake." It seems however that Mr Stein did not pursue the invitation to refer his alleged concern to an Anomalies Review Committee. By letter dated 20 April, 1993, he was again informed that his substantive position was that of Level B, Mr Stein claims to have been confused by the letter [Exhibit V2, para 55] and its contents which is not an offer of appointment but a letter of clarification [Exhibit A7, attachment H] forwarded to all staff. In 1994 Mr Stein successfully applied for the position of Course Co-ordinator and that appointment was announced at a meeting on 4 February, 1994. Mr Stein considered the notification was "strange" but made no verbal protest [Exhibit V2, para 73]. He claims not to have received any written offer of employment and decided that the "uncertainty had gone on too long" and referred the matter to the Union [Exhibit V2, para 74 & 75].

The above short history of Mr Stein's employment does not reveal any reference to him being offered or appointed to a permanent Level C position, he has been successful in his applications for a position which has attracted a rate of pay based on that of a Level C and has been paid the difference between the Level C and Level B rates by an additional responsibility or higher duties allowance. The payment has been paid consistently during his period of employment although it would seem that AMC have been somewhat careless in the administration of the additional payment. His appointments have been "term" related but that seems to be more of a lack of ability on the part of AMC to properly apply the appropriate terminology in the Award. Prima facie Mr Stein was aware of his employment conditions even though he has held the view that he should have been recognised as being in a permanent Level C position there is no evidence that supports his claim. There is no evidence of any offer or acceptance of a permanent Level C position and Mr Stein has accepted, it would appear with little or no challenge, the number of appointments offered following his applications. He seems to base his claim on his own perceptions of his position with little reference to the formal documentation, and the comments of a number of individuals no longer employed by AMC. It is noted that none of those individuals were called to provide evidence in support of Mr Stein's claim. The issues raised by Mr Stein following his return from his overseas exchange have no relevance to the finding in this matter as the period of the exchange was the subject of a "without prejudice" agreement between the AMC, Mr Stein and the Union which allowed Mr Stein to maintain the Level C payment for the duration of that exchange.

The Union claims that Mr Stein has performed the work of a Level C academic and should have been so classified. AMC claims that Mr Stein was never performing the duties in a substantive position and that he was well aware of the AMC position in respect to the disagreement about his classification. It is claimed by the AMC that the higher duties allowance paid to Mr Stein did not entitle him to an ongoing position with payment at Level C. AMC concedes that its paperwork in respect to Mr Stein's position was less than satisfactory but that Mr Stein was aware of the temporary nature of the responsibility or higher duties allowance.

Mr Stein further testified that at the time of his two year appointment in February, 1991, he understood that his position as Course Co-ordinator Certificate of Marine Operations (New Entrants) was considered by AMC as an appointment as Senior Lecturer II (Level C) [Exhibit V2, para 39]. Nevertheless the position was offered, presumably as previously, with a responsibility or higher duties allowance to be paid over and above the substantive position of Level B [letter dated January 23, 1991]. In a number of places in his witness statement, and for reasons that are not clear, Mr Stein seems to infer that the AMC was attempting to ignore or avoid any recognition or confirmation of the change in his employment status to that of a continuing employee at Level C [Exhibit V2, paras 46, 47, 51 & 60]. Much of that statement addresses the understandings of Mr Stein which are not supported by any tangible evidence, other than by hearsay in his recording of comments allegedly made by a number of individuals, and as already noted, none of whom were called to provide evidence in support of Mr Stein's application. In respect to his claimed appointment to a continuing position at Level C there is no evidence of such appointment being offered or accepted other than Mr Stein's understanding that such would happen and that he looked forward with "some hope" to the regularisation of his appointment [Exhibit V2, paras 39 & 40]. Whilst Mr Stein was advised that the position he "occupied" was that of a Level C such notification is not a notice of appointment and does not offer any position but addresses the outcome of translation to the new classification structure following implementation of the restructuring agreement. There was no evidence presented to suggest that the AMC had at any time offered Mr Stein a substantive appointment at Level C, the evidence and submissions record that it was Mr Stein's understanding and his view that somehow his employment status had changed without any offer or appointment being made by the AMC. Mr Stein agreed with the proposition that the payment of a responsibility or higher duties allowance was in accord with the award provision. In fact the employment conditions for Mr Stein

appear to have been by payment of a responsibility or higher duties allowance and that the payment reflected that of a Level C classification but the substantive position has continued to be at Level B. Although the AMC has handled the notice and applications of Mr Stein's various appointments in a very careless way most of his claims are little more that assumption and a view on his part that he should be recognised in the Level C position in a continuing position but he is unable to present any tangible evidence that such was the view and intent of the AMC.

I have considered the evidence and submissions in this matter and reject the claim by the Union on behalf of Mr Stein for the following reasons:

* The position occupied by Mr Stein has attracted remuneration at the Level C rate and has been paid to that level by way of a responsibility or higher duties allowance with a specified period. This is supported by various letters of appointment presented in proceedings.

* The position offered in January, 1991, was recorded as being for a two year period with a substantive position at Level B with a higher duties payment to equate the salary to that of Level C. Mr Stein records in his statement that he "understood" AMC to consider the appointment to be that of a Senior Lecturer (Level C) [Exhibit V2, para 39].

* The payment of a responsibility or higher duties allowance is provided by the award and is acknowledged by Mr Stein.

* Mr Stein comments in his statement that he regarded some of the actions of AMC as an attempt to avoid acknowledging the duties he was performing and presumably his right to recognition at a Level C. He offfers no reason for holding these views.

* There was no doubt that Mr Stein's classification was a matter in dispute and this is supported by the "without prejudice" arrangement entered into by all parties prior to his overseas exchange.

* The period for which Mr Stein was appointed in January, 1991, nominally expired in January, 1993, that position was a Level B position with payment of a responsibility or higher duties allowance, accordingly at the expiration of that period his employment continued unchanged with the payment of the responsibility or higher duties allowance for responsibilities undertaken as Course Leader.

* Mr Stein raised his concerns about his position and AMC responded by advising him that he was a substantive Level B position with payment of a responsibility or higher duties allowance to the Level C salary.

* There has been no evidence presented in these proceedings that would support Mr Stein's proposition that he is a continuing employee at Level C. No letter of offer or appointment has been cited and the claim is based on assumption and what appears to be his understanding of what he considered should have occurred, not necessarily what in fact did occur.

* There is no doubt AMC should have handled the process in a more professional manner and provided precise and proper information; nevertheless, whilst critical of the careless approach by AMC, the fact remains that Mr Stein is unable to provide any support for his claim. It is to be hoped however that AMC take note of the problems that can be caused by such a cavalier approach to recording employee conditions.

* AMC has offered and Mr Stein has accepted a series of positions

> which provided appointment at Level B with the payment of a responsibility or higher duties allowance to equate the remuneration to that of Level C. Those offers are reflected in letters of 20 December, 1989, 22 December, 1989, 23 January, 1991 and 20 April, 1993, and whilst perhaps poorly constructed, the terms of those letters form the employment arrangements accepted by Mr Stein. Those offers provided a fixed time period. The award provides for appointment with payment of a higher duties allowance subject to certain provisos; the offer was not challenged when initially offered, nor when subsequent offers were made, as being unacceptable or in breach of the award. Sworn evidence revealed that the type of offers made to Mr Stein were not unusual and had applied to other staff.

* The Award provides payment of higher duties allowance, subject to certain provisos, and also provides employment by fixed term also subject to certain provisos. Mr Stein, in his capacity of a permanent Level B position, was offered, and accepted, positions with payment of a higher duties allowance for a specified period. Whilst the Commission is not able to interpret its own awards it is my observation that the award does not allow an individual to be both a permanent employee and a fixed term employee. The award prescribes that fixed term contracts have application to full-time staff and to apply it in the manner which the Union seems to imply would not, in my view, be possible.

* AMC claims that the position which Mr Stein occupied is not a Level C position but that the additional payment made to him was in recognition of him performing course leader responsibilities. That statement seems to be at odds with some of the documentation and evidence presented in these proceedings and the reality of the payment made to Mr Stein. It is not necessary nor is it realistic for the Commission to determine the appropriate classification for the position on the information provided. It is necessary however for AMC to qualify the classification it does consider appropriate for future incumbents and to allow the award provisions to be applied if necessary.

* The notice by AMC that the position Mr Stein occupied was a Level C position was not a reclassification but notice of translation

following implementation of the restructuring agreement.

* The Union submits that Mr Stein has a right to consider that he held a continuing appointment at Level C for a number of reasons, none of those reasons however refer to an actual offer or promotion to

Level C.

* The claim by the Union is supported to some degree by the fact that Mr Stein's payslips and other personnel documents record his remuneration at Level C and do not specify a responsibility or higher duties allowance. Such position does add to the confusion perhaps but does not support a claim for appointment to a continuing position at Level C, it does however indicate poor administration by AMC.

* Mr Stein argued that the Award provides only two types of employment [Exhibit V2, para 47], the Award prescribes that *"there will be at least 2 categories."*

* The order sought by the Union seeks payment for Mr Stein for the period he has "occupied" the Level C position, it is my understanding from the evidence and submissions that Mr Stein has in fact received that level of payment including for the period of his overseas exchange.

I reject the claim by the Union and so decide.

BY THE COMMISSION:

COMMISSIONER

Decision Summary

		Industrial dispute - conditions of employment - classification - lecturer - educational services - claim by union that respondent has changed the conditions of employment of one of its members - seeks finding that employee be confirmed at Level C - series of contracts for Level B position with payment of a responsibility or higher duties allowance at Level C - found there was not a letter of offer or appointment to higher level position - application seeks payment for period applicant has "occupied" higher level position - applicant has received that payment - claim rejected.		
National Tertiary Education Industry Union and Australian Maritime College				
C No 34029 of 1996				Print P3971
Leary C		Sydney		12 August 1997

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Attachment 4

PR924190

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1996
s.170LW application for settlement of dispute

National Tertiary Education Industry Union

and

University of Adelaide Australia
(C2002/3065)

Various employees — Educational services

SENIOR DEPUTY PRESIDENT O'CALLAGHAN — ADELAIDE, 30 OCTOBER 2002

2002 promotion round.

DECISION

[1] In June 2002 the National Tertiary Education Industry Union ('the NTEIU') and the University of Adelaide Australia ('the University') sought the assistance of the Commission pursuant to section 170LW of the *Workplace Relations Act 1996* ('the Act') in relation to a number of disputed issues addressed by *The University of Adelaide Enterprise Certified Agreement 2000-2003* ('the Agreement').

[2] These issues were the subject of conferences before me and continuing discussions between the parties in June and July 2002. All but one of the disputed issues was subsequently resolved.

[3] In September 2002 the parties confirmed that as they had not been able to reach agreement on the effect and the operation of clause 76 of the Agreement, it was jointly proposed that the Commission arbitrate on the dispute over the operation and effect of this provision on the basis of section 170LW and the Dispute Settlement Procedures in the Agreement. This matter was heard before me on 15 October 2002. Representing the NTEIU was Ms K Harrington and for the University of Adelaide Australia was Mr S Daysh.

The Issue in Dispute.

[4] Clause 76 of the Agreement sets out the provisions relative to promotion.

[5] The Agreement provides for five relevant classification levels; A to E. In March 2002 the University advised the NTEIU of its intention that there would not be an academic promotions round in 2002, other than up to the level B positions.

[6] The parties have disagreed on the issue of whether the Agreement should be read such that the University is obligated to conduct a promotions round for 2002.

The NTEIU position.

[7] The NTEIU argues that clause 76 obligates the University to conduct a promotions round in 2002. The NTEIU position is that:

- clause 76 was negotiated in its current form so as to overcome issues which had arisen in previous years when promotions rounds had not been conducted;

- the procedures relating to the promotions arrangements referenced in clause 76.5 are articulated in a Policy, Guidelines and Web Based Toolbox. All of these arrangements were agreed between the NTEIU and the University, not long before the Agreement was reached. Further, these procedures confirmed an agreed commitment that there would be an annual promotions round that would provide for salary increases for those persons promoted to take effect from the beginning of the following year;

- clause 76.5 of the Agreement references the Single Bargaining Unit which generally consists of the unions party to the Agreement, but in the context of this dispute, should be taken as the NTEIU as the union with the primary interest relative to academic promotions; and

- the University did not reach agreement with the NTEIU.

[8] The NTEIU sought that a promotions round be commenced as a matter of urgency. It acknowledged that such a promotions round would be unlikely to be completed before March 2003, but committed to facilitating the expeditious operation of such a promotions call, which it argued, should allow for wage increases to be applicable to promoted employees from 1 January 2003.

The University Position.

[9] The University argued that clause 76 of the Agreement did not impose an obligation on the University to conduct an annual promotions round. The University argued that the policy agreed between the University and the NTEIU did not require such an annual round and that the reference to an annual promotions round in the guidelines for the implementation of the policy on the University's web site, were not binding on the University, as they represented advice that could be changed at the prerogative of the University without the necessity for mandated consultation with the NTEIU.

[10] The University advised that the decision not to offer an academic promotions round in 2002 was the result of financial exigencies confronting the University and the University's desire to avoid further redundancies.

[11] The University argued that it would be impractical for a promotions round to be commenced this late into the year and that the effect of two promotions rounds in close proximity would create huge problems for staff.

Clause 76 of the Agreement.

[12] This clause states:

> *"The following principles will underlie promotion:*
>
> *76.1 The parties agree that there should be internal promotion rounds to Level B, C, D and E and their equivalent.*
>
> *76.2 The parties agree that promotion shall be on the basis of merit. The minimum requirement for promotion should be that the candidate meets the skill base specified for the academic level concerned. In addition, candidates will be required to demonstrate merit in a competitive process.*
>
> *76.3 When assessing candidates for promotion, the promotions committee shall have regard, inter alia, to the following:*
>
> *(i) formal qualifications or progress towards such qualifications;*
> *(ii) achievements in research and/or scholarship and/or professional consultancy activities;*
> *(iii) experience and achievement in teaching and/or curriculum development;*
> *(iv) contribution to institutional planning and/or governance;*
> *(v) service to the relevant profession and/or academic discipline and/or relevant contributions to the wider community.*
>
> *An individual will not be required to demonstrate achievement in each and every one of the above criteria, but will be assessed on his/her overall merit relative to the Position Classification-Standard.*
>
> *Special considerations will continue to apply for research-only positions.*
>
> *76.4 The University shall make available publicly or on request the criteria which it applies to determine suitability for promotion to each level. The University shall make available information on the relative importance of each of its criteria at each promotion level.*
>
> *76.5 The existing procedures for promotion will not be varied unless agreed to by the SBU."*

[13] The parties are in agreement as to the operation of each of the provisions of this clause, except for clause 76.5.

[14] This subclause was added to the current version of the Agreement at the time of the negotiation of this Agreement.

[15] I do not know precisely when negotiations in relation to the Agreement were concluded. However, as the Agreement provides for wage increases with effect from 13 January 2001, I have assumed that the Agreement was negotiated in the latter part of 2000.

[16] On 22 December 2000, the University confirmed to the NTEIU formal written versions of the Academic Promotions Policy and Guidelines and the script for the Web Based Toolkit.

[17] Clause 76.5 refers to "procedures". It does not refer simply to a policy. The Macquarrie dictionary definition of "procedures" refers to the act or manner of proceeding in any action or process and to a particular course of action.

[18] On this basis I can only conclude that had the parties collectively intended to limit the commitment in clause 76.5 to "policies", the wording of the clause would have reflected this.

[19] In its current form, I consider that the clause must be read as covering the suite of arrangements agreed between the University and the NTEIU in December 2000 and described in the University's correspondence as the "...Academic Promotions Policy, and Guidelines""... and the amended contents of the Promotion Toolkit."

[20] The document headed "Guidelines for Academic Promotions" at clause 3.1.1 states: *"Applications for promotions should be considered and determined annually, and the promotion schedule structured to enable the announcement of promotions and payment of the salary increase by the first pay in January the following year."*

[21] It follows then, that I consider that the Agreement should be taken as committing the University to the conduct of an annual academic promotions round. Accordingly, I consider that an accurate interpretation of the Agreement requires that applications for promotion should be considered and determined annually and the promotions schedule should be structured to enable the announcement of promotions and payments of commensurate salary increases by the first pay in January in the following year, unless a contrary arrangement is agreed with the Single Bargaining Unit.

[22] I appreciate the cost implications of this obligation, but I do not consider that Agreement obligations can be avoided simply because of costs - particularly when the opportunity exists to reach agreement between the University and the NTEIU pursuant to clause 76.5.

[23] I am concerned, however, at the practical effect of commencing a promotions round in November 2002 with the expectation that this would not be concluded until - at the earliest, March 2003. I can foresee confusion over how appeals should be taken into account and likely confusion over the foundation or basis for applications for promotion applicable to the 2003 promotions round. On the past record of both parties, I consider there is a strong likelihood of disputes over these issues.

[24] Accordingly, I propose to the parties that I will convene a further conference to suggest that the parties might consider an arrangement that might be agreed whereby the promotional rounds for 2002 and 2003 could be merged with some recognition of the 2003 and 2004 payment obligations.

[25] If such an agreement could be reached, I consider that it would provide benefits for both the University and staff.

[26] If, however, agreement is not achievable by 15 November 2002, I consider that the only appropriate course of action will be for the University to belatedly commence a promotional round for 2002.

BY THE COMMISSION:

SENIOR DEPUTY PRESIDENT

Appearances:

K Harrington for the National Tertiary Education Industry Union.

S Daysh for the University of Adelaide Australia.

Hearing Details:

2002.
Adelaide:
October 15.

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