IN FAIR WORK COMMISSION

MATTER NO: AM2015/6

***Fair Work Act 2009* 4 Yearly Review of Modern Awards**

National Tertiary Education Industry Union

Outline of Submission in Reply, 8 March 2017

1 Scope of Submission

1.1 This submission is further to the submission filed on 3 March 2017 which dealt with Research Institute matters.

1.2 In this submission, the National Tertiary Education Industry Union ("**NTEU"**) replies the proposed variations sought by the employers in relation to the *Higher Education – Academic Staff – Award 2010* ("the Academic Award") and the *Higher Education – General Staff – Award 2010* ("the General Staff Award"), being:

a) deletion of all or part of the industry specific redundancy scheme (clause 17) in the Academic Award;

b) deletion of the provisions for severance payments on the non-renewal of certain "fixed-term" contract employees;

c) introduction of a new category for the use of "fixed-term" contract employment.

1.3 NTEU also relies upon our earlier submissions in these proceedings.

2 Deletion of part of the Industry Specific Redundancy Scheme (clause 17) in the Academic Award – Response to the Go8 Submission

2.1 This part of the Union's submission is made in response to the Group of Eight Universities' ("Go8") submission at paragraphs 11 – 12 of their submissions of 3 February 2017 and at 19 – 42 of Attachment 1 thereto.

What is the nature of the sub-clause?

2.2 The Group of Eight have applied for the deletion of subclause 17.6(b) of the Academic Award. They incorrectly characterise that subclause by saying that it "provides for an entitlement to a notice payment …" (Go8 Submission, para 19). In fact, the subclause provides for an entitlement to notice, not an entitlement to *payment*. This is plain on its words.

2.3 The notice provision at 17.6(b) can be contrasted with the provision at 17.5 (c) which gives the employee an entitlement to take payment in lieu of notice. No comparable entitlement exists in relation to the notice provided for in 17.6(b).

2.4 Clause 17 of the *Higher Education - Academic Staff - Award 2010* is entitled "Industry Specific Redundancy provisions".

2.5 S.141 of the *Fair Work Act 2009* (the Act) allows for the inclusion of an industry-specific redundancy scheme.

2.6 S.12 of the Act defines "industry-specific redundancy scheme" as follows:

> ***"Industry-specific redundancy scheme*** means redundancy or termination payment arrangements in a modern award that are described in the award as an industry-specific redundancy scheme."

2.7 Subclauses 17.1 to 17.5 of the *Higher Education - Academic Staff - Award 2010* describe the circumstances which may give rise to redundancy, and then provide the redundancy or termination payment arrangements which result from such a redundancy when the employee volunteers to accept redundancy.

2.8 Subclause 17.6 deals with what happens if the employee does not volunteer for redundancy, but is nevertheless terminated for reason of redundancy. In that circumstance, the Award provides the employee with, at (b), the benefit of an extended period of notice, in a range of between 6 months and 12 months depending on the age of the employee, on top of, at (a), any notice provided for in the NES or their contract of employment, and, at (c), a severance payment calculated in accordance with the NES.

The sub-clause is not relevantly discriminatory

2.9 The Go8 employers object to 17.6 (b) because they argue it is discriminatory and therefore not permitted by virtue of s.153 of the Act which provides:

> *Discriminatory terms must not be included*

(1) A modern award **must not include terms that discriminate against an employee because of, or for reasons including, the employee's race**, colour, sex, sexual orientation, **age,** physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

(Emphasis added.)

2.10 It is clear that cl 17.6(b) operates according to its terms by reference to the age of the relevant employee. While the length of the entitlement provided by cl 17.6 is determined by reference to the employee's age, a proper construction of the Act reveals that cl 17.6 is not discriminatory for the purposes of s 153 because it is an affirmative action measure designed to compensate for the otherwise discriminatory impact of redundancy on academic staff over the age of 40. There are two reasons this interpretation should be preferred.

2.11 First, the employers' construction offends the rule that absurd or repugnant interpretations should be avoided where possible[1]. The employers' construction treats differential treatment as discrimination, for the purpose of s 153 of the *Fair Work Act*. That is, a term treats people of a different type differently and it must not be included, or it does not and it can. This interpretation would lead to the absurd result of terms being excluded from an award because they seek to balance pre-existing prejudices, or make an allowance that is rightly made for a particular group that share one of the named attributes.

2.12 By way of example, on the employers' construction, a term that provided for a special allowance of leave so that people of a specific ethnic, cultural or religious group could attend to duties that are inherently linked to their membership of that group would discriminate against all other employees and could not be included in the award. Such a construction would not minimise but entrench pre-existing prejudices in the workplace and should not be adopted because it would result in a patently absurd result[2].

2.13 Secondly, the text of s 153 and the context of the *Fair Work Act* indicate that the employers' construction should be rejected. The better interpretation, supported by the factors mentioned below, is that s 153 of the Act precludes terms that are discriminatory insofar as they result in a detriment to the subject of the term.[3]

[1] *Australian Boot Trade Employees' Federation v Whybrow & Co* (1910) 11CLR 311 at 341-342 per Higgins J.
[2] *Footscray City College v Ruzicka* (2007) 16 VR 48 at [16].
[3] *A School v Human Rights and Equal Opportunity Commission* [1998] FCA 498

2.14 Section 153 uses the term 'discriminates against', the ordinary meaning of which focuses attention on some detriment. As described above, the identification of some detriment is key to characterising an activity as discriminatory within the anti-discrimination framework in Australia. That approach is embodied in the language of s 153 of the Act. Further, it is uncontroversial that:

a. legislation must be interpreted by examining the context of the relevant provision in order to 'give effect to harmonious goals' in the statute;

b. where conflict arises between statutory provisions, the relevant provisions are to be read so as to best 'give effect to the purpose and language of the provisions while maintaining the unity of all statutory provisions' [4] ; and

a. words in an Act ought to be used consistently.' [5]

2.15 In construing the term 'discriminatory' for the purpose of s 153 of the Act, s 351 of the Act provides internal support for the proposition that affirmative action measures are not caught by the prohibition.

2.16 The prohibition on adverse action because of an employee's protected attribute, as defined in s 351(1), is limited by the operation of ss 351(2) and (3) which provide that discriminatory action that is lawful under any of the various Commonwealth or state anti-discrimination statutes, for example the *Age Discrimination Act 2004* (Cth) (the AD Act), is not discriminatory for the purpose of s 351. That is, the scope of unlawful discriminatory action for the purpose of s 351 is defined by the legislation listed in s 351(3). One such limitation exists at s 33 of the AD Act, which provides:

> 33 Positive discrimination
>
> This Part does not make it unlawful for a person to discriminate against another person, on the ground of the other person's age, by an act that is consistent with the purposes of this Act, if:
>
> …
>
> (c) the act is intended to reduce a disadvantage experienced by people of a particular age.
>
> Example: Older people are often more disadvantaged by retrenchment than are other people. This paragraph would therefore cover the provision of additional notice entitlements for older workers, because such entitlements are intended to reduce a disadvantage experienced by older people.

[4] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69] – [70] per McHugh, Gummow, Kirby and Hayne JJ.
[5] *Craig Williamson Pty Ltd v Barrowcliff* [1915] VLR 450 at 452.

2.17 Discrimination for the purpose of s 351 of the Act does not include actions that do not result in a detriment to the relevant employee. The *Fair Work Act* in this way sits consistently alongside the various anti-discrimination statutes.

2.18 Section 153 of the *Fair Work Act* should be read to compliment that approach so as to give the provisions a harmonious operation. Together the provisions remove detrimental discrimination when the instrument that defines employment terms is being created and when the parties to that agreement take action within the employment relationship. The alternate reading does not promote that harmonious operation.

2.19 Similarly, the term 'discriminates against' should be given a consistent reading throughout the Act as a matter of principal. Such a reading precludes any conflict arising between the direct or indirect operation of the provisions, and ultimately the clear scheme in the AD Act designed to eliminate detrimental age discrimination, and accords with legal principal.

2.20 It would be against the proper reading of the *Fair Work Act* to give age discrimination a different meaning to the definition given in the *Age Discrimination Act*, especially where it is clear that positive discrimination – that is action that enhances the protections of older workers in relation to matters on which they are more vulnerable – was expressly identified by the Parliament as a type of legitimate discrimination.

2.21 This approach to interpretation of the *Fair Work Act* is supported by the fact that at s.117(3)(b) the NES provides that a notice period may vary on the basis of the employee's age, providing for an additional one week of notice if an employee is over 45 years of age.

2.22 NTEU submits that a clause in a modern award which provides "additional notice requirements for older workers" is permissible because it is precisely the sort of positive discrimination envisaged in and permitted by s.33(c) of the *Age Discrimination Act*, and in the example thereto.

2.23 NTEU submits that the Commonwealth anti-discrimination legislation should be given primary relevance for the purposed of considering a harmonious interpretation of anti-discrimination provisions in the *Fair Work Act*. Nevertheless, since the employers' have referred to State and Territory anti-discrimination legislation, it is worth noting that such legislation also contains similar provisions allowing for positive discrimination to address a disadvantage:

a) Australian Capital Territory – *Discrimination Act 1991*, s.27

b) New South Wales – *Anti-Discrimination Act 1977*, s.49ZYR

c) Northern Territory – *Anti-Discrimination Act 1996*, s.57

d) Queensland – *Anti-Discrimination Act 1991*, s.105

e) South Australia – *Equal Opportunity Act 1984*, s.85F

f) Tasmania – *Anti-Discrimination Act 1998*, ss.25 and 26

g) Victoria – *Equal Opportunity Act 2010*, s.12

h) Western Australia – *Equal Opportunity Act 1984*, s.66ZP.

2.24 Therefore, the correct construction of s.153 of the *Fair Work Act* is that it prohibits the inclusion of terms that are discriminatory in the manner identified as such by (in relation to age discrimination) the *Age Discrimination Act 2004*, and therefore that there is no prohibition on the inclusion in a modern award of a provision which meets the test of positive discrimination under that Act. The provision in 17.6(d) meets that test since it has the purpose and effect of reducing a disadvantage experienced by older people – the greater difficulty in finding new employment after termination.

Alternate Submission

2.25 If the tribunal nevertheless finds that cl.17.6(b) offends s.153, then the next question is, What should be done to remedy that situation?

2.26 The Go8 employers propose that the 17.6(b) be deleted in its entirety.

2.27 This would have the effect of reducing the notice required in the case of involuntary redundancy from the NES entitlement plus 6 – 12 months, to a flat entitlement of 6 months (which arises under cl.15.2(b), but which would absorb the NES entitlement mentioned at 17.6(a)).

2.28 It is obvious why the employers would prefer this outcome, but not obvious why it is the appropriate approach.

2.29 S.153 (1) of the *Fair Work Act* provides that a Modern Award must not include terms that discriminate against an employee because of, inter alia, their age. In the case of clause 17.6(b), the discriminatory effect applies to persons aged below 45 years of age, who are discriminated **against** when compared to persons aged 45 years and over. It is therefore the provisions which apply to persons aged below 45 years of age which could be said to offend s.153(1).

2.30 If the Commission is of the view that 17.6(b) as currently drafted is discriminatory, then it should take steps to remove any term which discriminates ***against*** any employee on the grounds of age (ref. s.153(a)). This would be achieved by amending the current words:

17.6 Employees not accepting redundancy

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

(a) *the greater of the period of notice prescribed by the NES or the contract of employment of the employee; plus*

(b) *notice according to the following scale:*

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

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

to the following:

17.6 Employees not accepting redundancy

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

(a) *the greater of the period of notice prescribed by the NES or the contract of employment of the employee; plus*

(b) *12 months' notice.*

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

2.31 This is permissible, as a provision supplementary to the NES on notice of termination (s. 117). It is not discriminatory. It reflects the existing provision in the industry, where the median age of academic staff in ongoing employment is well over 45 years and where the evidence indicates that a significant majority of persons who are made involuntarily redundant are aged over 45. It removes any discrimination ***against*** persons aged under 45.

2.32 The term 'discrimination' and the concept of 'age discrimination' within the context of the *Fair Work Act* needs to be given a meaning consistent with the ordinary rules of statutory interpretation. The discussion in *Australian Building And Construction Commissioner v McConnell Dowell Constructors (Aust) PTY LTD* (ACN 002 929 017) - (2012) 289 ALR 506 at [44] and [64] – [74] per Flick J (noting that the language in s 153 of the *Fair Work Act 2009* is 'discriminates against', identical to that in the *Age Discrimination Act 2004*).

2.33 The authorities relied upon by AHEIA are examples of discrimination that would not be consistent with the Age Discrimination Act affirmative action measures. In each case, the entitlements of older workers are capped in a manner which has no element of positive discrimination or affirmative action.

2.34 It is evident that the employers collect annual data across the industry and by institution which would readily enable them to provide evidence about the age profile of the academic staff eligible for notice of termination under clause 17.6(b) of the Award. Their failure to produce any such evidence in support of their claim is telling. Such data as there is, leads to the conclusion that the vast majority of the continuing employees who might be made involuntarily redundant are aged 45 or over. Therefore any argument that the remedy proposed by the Union would *in practice* result in any increase in costs for the employer is not supported by the evidence.

2.35 Attachment L to Exhibit H is The University of Queensland's *Annual Workforce Profile Report*, which analyses UQ staffing data and benchmarks it against G08 Universities and against all Australian Universities using data from the AHEIA's Universities HR Benchmarking Program 2015. Pages 18-23 of Attachment L to Exhibit H has an analysis of the age profile of academic staff at the University of Queensland, and refers to some national benchmark data for comparison. While the data includes fixed term as well as continuing staff, that document reports:

- The median age of all staff at the university in 2015 was steady at 42 years.

- The median age of academic staff at the university is higher than that for general staff.
- More than half the teaching and research academic staff at the university in 2015 were aged over 50. (While the proportion of research-focussed academic staff in this age bracket was significantly less, the table and graph at page 10 of the same document shows that the vast majority – 96.9% - of research focussed staff were fixed term, and would not be entitled to the benefit of clause 17 of the Award in any case.)
- Table 13 on page 19 shows that in 2015, 66% of teaching and research academic staff and 68.4% of teaching focussed academic staff at the university were 45 years or older.

2.36 The comparison of the University of Queensland with the national benchmarking data on page 23 shows that the median age for all continuing and fixed term academics at the Group of Eight Universities is 42, and at all Australian universities is 45 (Table 18). 42.9% of all UQ academics in 2014 were aged 45 or over (Table 17). The notes above the table explain that this figure is affected by the high proportion of UQ academic staff employed as (fixed term) research focussed staff. By comparison, that table indicates that 46.4% of fixed term and continuing academic staff at the research-intensive Group of Eight universities, and 53.2% of fixed term and continuing academic staff across all Australian universities were aged 45 years or over.

2.37 Table 31 at page 33 of that same attachment indicates that between 2010 and 2014, on average between 0 and 0.2% of terminations of fixed term and continuing academic staff at the University of Queensland were for involuntary employer-initiated reasons. Table 35 at page 34 compares this data for 2014 with the benchmark data for the Group of Eight and all Australian universities:

TABLE 35: BENCHMARKING - TERMINATION TYPES (CONTINUING AND FIXED-TERM STAFF) (2014)37

	UQ	**Go8**	**Aus**
Voluntary Employee Initiated	9.9%	8.2%	7.7%
Cessation of fixed-term contract	8.6%	7.2%	6.3%
Involuntary University Initiated	1.0%	0.5%	0.7%
Voluntary University Initiated	0.0%	0.7%	1.1%
All Termination Types	***19.5%***	***15.4%***	***15.2%***

The terms used in this table are explained at page 50 of the attachment as follows:

- **Voluntary University Initiated Termination Rate:** Percentage of Continuing and Fixed-term staff that ceased working for the University as a result of organisational change or early retirement during the year (includes voluntary redundancies).
- **The Involuntary University Initiated Termination Rate:** Percentage of Continuing and Fixed-term staff whose employment terminated at the initiative of the employer including by dismissal and forced retrenchment.

2.38 Attachment M to Exhibit H is a copy of the Universities HR Benchmarking Program 2013 report of HR Performance Indicators for Edith Cowan University compared with Australian Universities for the period 2008-2012. While the data is older than that reported in Attachment L, and Edith Cowan is a very different university to UQ, it corroborates the evidence found in the later report.

2.39 For example, at pg 8 of Attachment M, the following data on staff turnover is consistent with that reported at paragraph 3 above:

Turnover

	Edith Cowan University					**AUS Average**				
	2008	**2009**	**2010**	**2011**	**2012**	**2008**	**2009**	**2010**	**2011**	**2012**
Fixed Term Contract Expiration	9.89%	8.17%	8.26 %	7.49 %	3.11 %	6.25 %	6.62 %	6.44 %	6.29 %	6.41%
Involuntary University Initiated Turnover	0.24%	0.00%	0.22 %	0.71 %	0.54 %	0.49 %	0.67 %	0.64 %	0.59 %	0.66 %
Total Turnover	24.67 %	17.07 %	20.84%	21.32 %	13.03 %	17.98 %	16.68 %	17.52 %	16.29 %	15.89 %
Voluntary Employee Initiated Turnover	13.75 %	7.16%	8.70 %	11.10 %	8.15 %	10.47 %	8.14 %	9.22 %	8.79 %	7.95 %
Voluntary University Initiated Turnover	0.78%	1.73%	3.60 %	2.02 %	1.23 %	0.93 %	1.50 %	1.31 %	0.72 %	0.96 %
Voluntary Employee Initiated Turnover< 12 months			0.50 %	2.62 %	2.09 %	1.97 %	1.45 %	2.43 %	2.02 %	2.34 %

2.40 At page 9, the median age for all ECU employees in 2012 was reported as 42 years, while the table specific to academic staff, at page 70, reports the median age for

academics as 49.73, and the median age for academic staff who left the university's employment in the reporting period (including all reasons for separation) was 47.19.

3 Deletion of all of the Industry Specific Redundancy Scheme (clause 17) in the Academic Award – Response to the AHEIA Submission

3.1 This part of NTEU's submission is made in response to the Australian Higher Education Industrial Association ("AHEIA") submissions in relation to the whole of clause 17.

3.2 The AHEIA urge that clause 17 be deleted in its entirety on the basis that its application is limited to those employers who were bound by the *Universities and Post Compulsory Academic Conditions Award 1999 [AP801516]* at 12 September 2008. They assert this imposes an unfair burden on those 39 (now 37) institutions in comparison to the three employers bound by the Modern Award who were not so bound in 2008. This is not an argument of statutory construction, but one of merit.

3.3 All three of Bond University, the University of Notre Dame and the Batchelor Institute of Indigenous Education existed in 2008. All three existed at the time the Modern Award was made and the industry specific redundancy scheme was included in it.

3.4 No relevant facts have changed since that time in relation to the scope of the clause nor its "regulatory burden" on the employers bound. Therefore there is no basis for its deletion.

3.5 Consideration should be given to the findings of the Full Bench in the Award Review Judicial Issues decision[6], which found, at [23]:

> ***"[23]*** *The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI's submission that some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation."* (emphasis added)

3.6 Removal of the industry specific redundancy scheme for academic staff would result in a significant change to the Award. No probative evidence has been led in these proceedings to support the assertion that Clause 17 imposes any significant

[6] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues decision* [2014] FWCFB 1788

regulatory or cost burden on those employers bound, or that any unfairness to the employers results from the operation of clause 17.

3.7 The AHEIA claim for the deletion of clause 17 should be rejected.

4 Deletion of the provisions for severance payments on the non-renewal of certain "fixed-term" contract employees

4.1 Since the advent of the *Higher Education Contract of Employment Award 1998* the award safety net for nearly all employees in this industry has included a provision that certain limited classes of employees, whose employment is liable to continue from contract to contract, are entitled to a severance payment in circumstances where the employer decides not to continue their employment after the expiry of a fixed-term contract.

4.2 The employers assert that the Commission is required to remove this provision because it purportedly excludes a provision of the National Employment Standards ("NES") and is contrary to s 55(1) of the Act which provides:

> *National Employment Standards must not be excluded*
>
> (1) A modern award or enterprise agreement must not **exclude** the National Employment Standards or any provision of the National Employment Standards.

4.3 The relevant NES provision is s 123 of the Act which provides:

> (1) This Division does not apply to any of the following employees:
>
> (a) an employee employed for a specified period of time, for a specified task, or for the duration of a specified season;
>
> …

4.4 For the following reasons, the employers' constructions should be rejected.

4.5 The employers' interpretation misunderstands the purpose of the NES and, more importantly, misunderstands the purpose of s 55(1) which is to safeguard the conditions provided by the NES, rather than lock types of employees to minimum standards.

4.6 The NES provides the minimum standard of conditions that employees are entitled to enjoy. Beyond the NES are the unique conditions provided by both awards and enterprise agreements. The latter instruments can expand on the NES conditions by, for example, providing a more generous notice period for permanent employees. The

notes to s 55(4) of the Act make clear that the NES provides the base minimum conditions of employment from which no derogation is permitted, but with the potential for those conditions to be improved upon by the creation of an award or enterprise agreement.

4.7 In relation to redundancy pay for fixed term contract employees, s 123(1)(a) provides that the relevant NES standard does not apply. Put another way, the NES does not provide any entitlement to redundancy payment. If an award or agreement provides for an entitlement to redundancy pay for fixed term contract employees, then that is an entitlement that builds on what is provided by the NES. It would be correctly described as 'supplementary' for the purpose of s 55 of the *Fair Work Act*. Had the legislature intended that s 123 operate as a complete bar to a fixed term employee having an entitlement to redundancy pay, the section would have been framed in that manner. It is not framed as a bar to redundancy, rather it simply provides that no NES entitlement exists.

4.8 The use of the term 'exclude' in s 55(1) in conjunction with the guidance in s 55(4) and 55(6) provides textual support for rejecting the employers' construction. The prohibition in s 55 is on terms that 'exclude' the NES (or NES provisions). Quite clearly, where an award provides for more generous conditions than the NES, for the life of the award the minimum condition set by the NES has little or no work to do in respect of award covered employees. However, the standard could not be said to have been excluded simply because it won't be utilised. Similarly, where the NES provides a minimum standard of no entitlement, an improvement on that standard in an award does not exclude the NES provision in any way. The standard provided by the NES remains, and remains unused for the duration of the award.

4.9 Additionally, there is authority for the proposition that the Commission is empowered to create an award that provides a scheme for redundancy payment, as described above, that supplements, or sits alongside, an industry specific redundancy scheme. Item 558 of the *Explanatory Memorandum to the Fair Work Bill*, states:

> *558. In addition to industry specific-schemes dealt with by clause 141, a modern award may also deal* ***with redundancy*** *by including terms that supplement the NES (see paragraph 55(4)(b)).*
>
> (Emphasis added)

4.10 Another difficulty in the employers' contention becomes apparent when it is observed that the construction would equally affect the substance of an enterprise agreement

because s 55(1) of the *Fair Work Act* affects both types of instrument. It would not be possible, on their reading, for an agreement (or award) to include either redundancy pay or a notice period for a casual employee because s 123 of the *Fair Work Act* provides that the NES division that contains those entitlements does not apply to casual employees: see s 123(1)(c) *Fair Work Act*. An interpretation that results in such an outcome is absurd and should rejected.

4.11 In any case, and in the alternative, NTEU submits it would be open to the Commission to find that the redundancy payments provided for in Sub-Clause 12.4 of the *Higher Education Industry Academic Staff Award 2010* should have been included in the industry specific redundancy scheme already included in the Academic Award*, and that* and Sub-Clause 11.4 of the *Higher Education Industry General Staff Award 2010* should have been labelled as an industry specific redundancy scheme when the General Staff Award was made. These errors can be rectified by the Commission pursuant to s 160 of the *Fair Work Act*.

4.12 However, the NTEU does not consider that this is necessary. The Commission has the power to supplement the NES in relation to the matters listed in Section 55(5).

4.13 The decision of the HECE Full Bench was made at a time when Section 88A of the *Workplace Relations Act 1996* required, in s.88A(a)-(c), that:

> *88A Objects of Part*
> *88A The objects of this Part are to ensure that:*
> *(a) wages and conditions of employment are protected by a system of enforceable awards established and maintained by the Commission; and*
> *(b) awards act as a safety net of fair minimum wages and conditions of employment; and*
> *(c) awards are simplified and suited to the efficient performance of work according to the needs of particular workplaces or enterprises; and …*

4.14 In relation Division VI of that Act (under which Awards were made), Section 88B also required that the exercise of the Commission's power in relation to the settlement of disputes, it must further those objects.

4.15 The employers have presented no evidence that the reasoning of the Full Bench in the HECE Award Case was faulty or the issues of merit have materially changed. The NTEU has said in earlier submissions that the breaking up of ongoing employment into individual contracts of a fixed term is manifestly unfair. For this NTEU was attacked in closing submissions for not providing any evidence. The employers seem not to understand what "manifestly" means, but in any case the HECE Case Full Bench found

it was necessary to limit the circumstances where fixed term contracts were used, and to provide redundancy payments where fixed term contracts were being used to avoid the obligations which would otherwise be due to continuing employees.

4.16 The supplementation of the NES is not limited to the amount of redundancy pay which can be paid to employees already entitled to it under the NES. That is far too narrow a view of the ordinary meaning of *supplementation*. The provisions attacked by the employers supplement the NES in relation to the subject area "redundancy pay".

4.17 The clear legislative intent of the NES is not to deprive employees of entitlements, but to set minimum standards. The exclusion of a particular class of employees from some part of those standards does not preclude an award from providing benefits in relation to a subject matter included in the NES, by way of supplementation.

5 The proposed introduction of a new category for the use of "fixed-term" contract employment.

5.1 This part of the Union's submission-in-reply is made in response to paragraphs 3-9 of the 3 February 2017 submissions of the Australian Higher Education Industrial Association ("AHEIA") (supported at paragraph 21 of their 3 February 2017 submissions by the Group of Eight) and in response to the conclusions and opinions expressed in the witness evidence of Diana Chegwidden.

5.2 The *Academic Award* and the *General Staff Award* both have a Type of Employment Clause (respectively Clause 11.3 and Clause 10.3) which, in identical terms, specify the circumstances in which fixed-term contracts may be used. The AHEIA proposes to add an additional circumstance in which fixed-term contract employment is permitted, as follows:

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

5.3 In *NTEIU v University of Wollongong*[7] Branson J was required to consider the meaning of the terms of the *University of Wollongong (Academic Staff) Enterprise Agreement, 2000-2003*, which in clause 19.6 in substance replicated the modern award restrictions. The court said in that case (paras 28-29):

[7] [2002] FCA 31 (29 January 2002)

"[28] The proper construction of the subclause is to be derived from a consideration of the meaning of the words of the subclause read in the context of the Agreement, and having regard to the nature and purpose of certified agreements under the WR Act. The critical question is what is the meaning reasonably to be attributed to the words of the subclause in all of the circumstances.

[29] In my view, a consideration of the terms of cl 19.6 as a whole reveals an intention that "fixed-term employment" is to be the exception, rather than the rule, for academic staff of the University of Wollongong."

5.4 The purpose of the existing Clause, taken as whole, is to specify as exactly as ordinary language can allow, the specific circumstances in which fixed-term contract employment is permitted. The provisions included in the modern award, insofar as they have found their way into enterprise agreements, have not led to significant disputation about interpretation, and have been reasonably clear.

5.5 This cannot be said of the proposed additional sub-clause (g). To say the least, it is broad and vague, as well as being unfair. The inclusion of such a sub-clause would fundamentally defeat the purpose of the clause as a whole. Broken into its logical component parts, the proposed clause allows for the use of fixed term contract employment in six distinct circumstances, as follows:

A. *Where uncertainty exists as to future workforce requirements arising from a decision to undertake major organisational change;*
B. *Where uncertainty exists as to future workforce requirements arising from a formal review of a work area;*
C. *Where work activity is being introduced;*
D. *Where work activity is being discontinued;*
E. *To cater for a sudden and unanticipated increase in student enrolments; or*
F. *To cater for a sudden and unanticipated decrease in student enrolments.*

5.6 The term *"where"* is extremely broad or at best unclear, in all of A, B, C and D. On the most probably correct reading, in A and B *"where"* simply means *"if"*. There is no reference to a position being affected or an employee. This means that, for example, if the employer announces a review of each work area (i.e. the *entire university)* under B, and simply announces that as a consequence it will review the continued requirement for every job, then for however long the "review" takes place, any and every position can be filled on a fixed-term basis. Given such reviews are, as a matter

of course, undertaken with secret or obscure terms of reference, it is difficult to see how an employee, let alone a job applicant, could know whether or not her or his job is legitimately captured, or to challenge a decision to declare his or her job "uncertain". Moreover, under A and B, there does not need to be any uncertainty about the need for the employee's particular job, merely a requirement for uncertainty about "future workforce requirements". The way the proposed provision is drafted is by reference to the employer's circumstances in general, not the circumstances of a particular job or employee.

5.7 If these problems were not enough, the words *"uncertainty exists"* hang in linguistic space, leaving the reader/interpreter to wonder whether such *uncertainty* is objective or merely has to exist in the mind of the employer. The level of *uncertainty* apparently does not matter, provided it exceeds death and taxes. Presumably, if an employee teaching Criminal Law considered her job 95% "certain" (and was right about this), and as a consequence of the employer announcing a 12 month "formal review" of the Law Faculty, she now correctly considered her job to be only 90% "certain" it is clear that now "uncertainty exists" as a direct result of the formal review. This it seems would be sufficient to replace her job with a fixed-term contract position should it fall vacant. Moreover, the fixed-termer so appointed would have no claim on the ongoing work at the end of her fixed-term contract, even if it turned out that the job was unaffected by the formal review.

5.8 The *"future"* referred to as part of the "future workforce requirements" in A and B could be at any time in the future. If a University chose to undertake a formal review of a faculty (a work area), as a result of which there was uncertainty as to the need for teaching in one of the subject areas delivered by that faculty in the distant future, then the proposed clause would enable the university to fill all new positions in that faculty using fixed-term employment, even if there was certainty about workforce requirements for the next two decades.

5.9 In relation to C and D, the word *"where"* is not quite so vague, and probably refers to a more specific concept of area or incidence. However, it is entirely unclear whether that "where" refers to the job, the immediate work area, a department or discipline or academic faculty or school, or perhaps to an occupational type. Even if this were not such a serious problem of interpretation, in C and D there remains the problem of what is meant by *"work activity" being* introduced or discontinued. On a plain common-sense reading, the circumstance will exist in almost every year in almost every work area – work activity is always being introduced and/or discontinued, certainly in higher

education. The words *"work activity"* in this context (by contrast to its use in Clauses 11. 3 (a) of the academic award and the equivalent general staff award provision) are quite ambiguous. An example reveals the likely effect of C and D:

> *A group of 5 cleaners cleans 25 laboratories. Their job includes the replacement of blown light globes and the incineration of animal experimental specimens. Over the next year, the employer proposes to add 5 new laboratories to their work schedule, but to gradually phase out the requirement to incinerate specimens, as a new chemically-based machine is to be installed to do this in the laboratories. Two vacancies occur in this team.*

It cannot be seriously doubted that work activity is being both *introduced* (C) and *discontinued* (D) and that therefore these two vacancies may now be filled on fixed-term contracts. It is difficult to work out how this circumstance, or thousands of other potential circumstances exactly the same, could justify permitting the use of fixed-term employment where it would not otherwise be permitted. Under the employer's proposal, there need be no connection between the C or D circumstance and any objective factor necessitating, or even relevant to, the use of fixed-term employment.

5.10 No proper explanation or evidence is given as to why it is necessary to introduce E or F. NTEU is at a loss to understand the basis of this part of the claim.

5.11 The Commission should, in relation to these employer claims, draw no conclusions from the terms of enterprise agreements. At [5] of their submission of 3 February 2017, the AHEIA suggests that the provisions agreed to by the NTEU in the listed Agreements evidence that there is no problem with vagueness nor uncertainty in the provision proposed by the AHEIA in these proceedings. Attachment A is a collection of extracts from the listed Agreements (provided that for points C and D of their table where AHEIA merely assert "most agreements", we have provided a selection of typical clauses). An examination of the actual clauses negotiated demonstrates that in each case there is both greater precision as to circumstances, and greater detail as to fairness for affected employees, than is proposed by the AHEIA. In some cases the AHEIA misrepresents the clause (for example, the clauses at Curtin University, Edith Cowan University, Murdoch University and the University of Queensland – which AHEIA submit are EBA provisions in relation to sudden and unanticipated decrease in enrolments – actually relate to *anticipated* and *planned* reductions in student numbers, not *unanticipated* or *sudden* reductions at all. In fact, the WA clauses arose from a one-off circumstance where WA changed the minimum school entry age in 2002 leading to a one-off reduction in school leaver numbers of 32% in 2014. Universities in that state planned for an expected downturn in enrolments from several years out. That this is so is reflected in the clause name at ECU: "Half Cohort". It is disingenuous for

the AHEIA to rely on this one-off circumstance, itself a legitimate subject for bargaining, to attempt to justify a global change to the award safety net.) In very few cases indeed have more than one of the criteria proposed by AHEIA been agreed to in a single agreement, and all are qualified by varying degrees of protection against misuse. Even the University of Wollongong clause, which on its face appears to be the broadest in scope, must be read in the context of clause 16.6.8 of that Agreement, which gives staff appointed under 18.6.6.121 a right to apply for conversion to ongoing work. In summary, the conclusion urged by AHEIA cannot be drawn from the clauses they point to, even were it appropriate to simply translate provisions negotiated in the context of enterprise bargaining into the award stream.

5.12 In our submissions of 3 June 2016, NTEU drew attention to the proposal it put forward when the terms of these Awards were being considered by the AIRC in 2008. In those proceedings, NTEU suggested that the following additional categories be added, which were of more limited scope and included appropriate safeguards:

> ***x.3.9 New organisational area***
>
> *A fixed-term contract may be offered in the case of employment in a new organisational area about which there is genuine uncertainty as to whether it will continue, for up to two years from the establishment of any such area. A further fixed-term contract of a maximum of 12 months may be offered subsequent to the initial contract.*
>
> *For the purpose of this paragraph a new organisational area shall mean a group of not less than three positions either;*
>
> - *established in relation to a new discipline or sub-discipline of academic work not previously offered; or*
> - *an academic function or new activity organised either in a new geographic location distant from existing campuses where that function is offered or organised distinctly from existing schools or centres or organisational units and not created from the merger or division of or movement of work from an existing unit(s).*
>
> *A fixed-term contract offered in the circumstances described in the dot point above will be subject to the following conditions:*
>
> ***x.3.9.1** the letter of offer of employment includes an understanding that should the position or substantially the same position occupied by the employee continue beyond the maximum contract period (three years) the employee shall, subject only to satisfactory performance, be offered continuing employment in that position (or in another agreed position) at the conclusion of the contract period;*

x.3.9.2 *should a position not be offered under the above dot point, upon request by the employee, the University will, for three months prior to the expiry of the contract, make reasonable attempts to identify other employment opportunities within the University.*

x.3.10 Disestablished organisational area

Where an organisational work area consisting of at least 3 employees has been the subject of a decision to discontinue that work within 36 months, fixed-term contract employment may be offered to work in that area provided that the letter of offer of employment includes an undertaking that:

x.3.10.1 *subject to satisfactory performance, should the decision to discontinue the work area be reversed, or should for any other reason the employee's position or substantially the same position continue beyond a 36 month period, the employee shall be offered that work on a continuing basis.*

x.3.10.2 *should a position not be offered under the dot point above, upon request by the employee, the employer will, for three months prior to the expiry of the contract, make reasonable attempts to identify other employment opportunities within the University.*

5.13 NTEU does not seek the insertion of such provisions now, but if the Commission were minded to consider the matter of "uncertainty" further, the proposal put forward by the Union in 2008 is at least a serious attempt to engage with the issue.

5.14 Further, NTEU submits that the circumstance of a "disestablished organisational area" is already encompassed within the existing award provision: "***Specific task or project*** *means a definable work activity which has a starting time and which is expected to be completed within an anticipated timeframe.*"

5.15 In relation to the "new organisational areas" aspect of the AHEIA's claim, unlike the NTEU's proposal in 2008, there is no requirement for it to relate to an area of work which has not previously existed. It could, for example, apply in circumstances where a university simply decided to divide an existing faculty into two, with no new activities introduced. Each of the two new faculties would be a "new" organisational area.

5.16 By contrast, the employer claim would so widen the scope of the circumstances in which fixed-term employment can be used as to make the whole of the clause regulating the use of fixed-term employment largely nugatory. Rather than limiting such employment to those circumstances where there is an objective logic in the character of the circumstances giving rise to the employment for the use of fixed-term appointments, the employer proposal would provide university managements with a

mechanism whereby they could artificially create an excuse to avoid ongoing employment whenever and wherever they wished.

5.17 The track record of university employers prior to the making of the Higher Education Contract of Employment ("HECE") Award demonstrated their lack of restraint in the use of fixed-term employment. Their conduct since the making of the HECE Award demonstrates that they have not developed greater restraint, but rather will consistently prefer the use of fixed-term employment at every opportunity and to the fullest extent available to them. Introduction of a provision such as the proposed subclause would not result in a few additional instances of fixed-term employment. Rather it would open the floodgates.

5.18 Several examples were in evidence in these proceedings which would have enabled university employers to use fixed term appointments without any limitation, were the AHEIA proposal to be approved. For example:

(a) **James Cook University**

The uncontested evidence of Mr McAlpine (Exhibit H, paragraph 7) was:

> *"Many universities conduct major organisational change processes frequently, and less often on a whole-of-institution basis. These reviews, to the best of my knowledge based on my experience can take from around one month (usually in a smaller area) to several months, and a review taking over one year from announcement to implementation is not uncommon."*

Attachments O, P, Q and R of Exhibit H are documents relating to a formal review process at James Cook University in relation to all or nearly all of the work areas in that university, as a result of which, *"in one form or another, most of JCU was under formal review for most of 2013 and 2014."* (Exhibit H, paragraph 8)

A state of ongoing formal review of most of the institution, even without any specific decisions being made as a result, would have enabled, under the proposed clause g, any position at the university to be filled on a fixed term basis at any time while the review was afoot.

(b) **Australian Catholic University**

The evidence of Ms Chegwidden was that ACU conducted a major organisational change process and formal review in 2013 and 2014 – the

Futures Project – which included reorganising the faculty structure, the creation of new research institutes across the university, and a review of general staff "shared services". (PN9432 – PN9444). Again, this circumstance would have enabled ACU, if the proposed clause g were in operation, to make every appointment during 2013 and 2014 fixed term.

Ms Chegwidden also agreed with the proposition that "in a university, work activity is being introduced or discontinued in just about every department of the university all the time." (PN9431)

(c) **The University of Melbourne**

At paragraphs 40 and 41of Exhibit N and at PN2534 – PN2541 Mr Adams reports two major restructure processes at the University of Melbourne: the Responsible Division Management restructure approximately nine years ago, and the Business Improvement Plan in 2014. His evidence was that in the first case, technical staff were "corralled" and the second did not apply to academic staff.

If the proposed clause g were in operation, in the first review, Mr Adams' work area, although corralled from the impact of the restructure, would not have been immune from the offering of fixed term contracts (nor in the second case would academic staff have been immune) because the proposed clause considers uncertainty as to "future workforce requirements", looking to the workforce as whole, and not uncertainty as to the requirement for any particular role.

(d) **Queensland University of Technology**

The evidence of Professor Coaldrake was that QUT has, for a long time, had a policy of conducting rolling reviews of organisational areas. He agreed with the proposition that the review process can lead to uncertainty about future workforce requirements (PN5604 – PN5615).

If the proposed clause g were in operation, QUT would be able to rely upon the fact of its policy commitment to a permanent state of rolling reviews to make all its appointments on a fixed term basis.

(e) **Victoria University**

Professor Hamel-Green gave evidence that VU has "been through restructures (for) practically four or five years".

If the proposed clause g were in operation, VU would be able to rely upon the fact of this long period of restructures to make all its appointments on a fixed term basis.

(f) **Evidence of Professor Vann**

From PN5305, Professor Vann emphasised the variability of student numbers and the difficulty of universities in planning for enrolment numbers. He agreed that student numbers tend to go up and down all the time. At PN5311-2, he agrees that organisational change is common in Australian universities, saying "various kinds of change are being pursued in Australian universities as they adapt to changing circumstances."

He argued that not every change in student numbers or organisational change would trigger clause g, but was not familiar enough with the detail of the proposed clause to be sure of this. In fact, a plain reading of the clause indicates that Professor Vann's more qualified view of what might give rise to a need for employment flexibility is not supported by the words, which are very broad in their application.

It is clear from the evidence that the proposed clause g would be extremely wide in its scope, and would have the effect of making the existing scheme of regulation of the use of fixed term employment effectively nugatory, contrary to the purpose of the clause as identified by Justice Branson and evident from the HECE Full Bench decision (P4083).

5.19 The workforce data presented in these proceedings, including Attachment C to Exhibit G, Attachments L and M to Exhibit H, and the survey data of Professor Strachan (Exhibit Z), demonstrate that Australian universities already enjoy significant levels of workforce flexibility. For example, Table 2.8 of the Commonwealth staffing data at Attachment C to Exhibit G (pp 414-415) shows that in 2015, 38.6% of non-casual staff were employed on fixed term contracts. No evidence was presented of the need for further flexibility, and certainly not for the effective removal of all or almost all restrictions on the use of fixed term employment as sought in the AHEIA proposal.

6 Conclusion

6.1 The three variations proposed by the Group of Eight Universities and the Australian Higher Education Industrial Association should be rejected.

Attachment A – *EBA clauses mentioned in AHEIA Submissions*

A. Where uncertainty exists as to future workforce requirements arising from a decision to undertake major organisational change

CHARLES DARWIN UNIVERSITY AND UNION ENTERPRISE AGREEMENT 2013

Innovation or reorganisation

25.7.11 Where the University or some proportion of the University is undergoing or is about to undergo major organisational change including discontinuation of a work area, or where a new course, new system, market research or organisational unit is being developed and implemented a fixed-term contract can be used for staff either in the work area, or employed in support of the change. The contract may have a term of up to two (2) years. In the case of discontinuation of a work area, if the decision to discontinue the work area is reversed, or should for any other reason the employee's position or substantially the same position continue beyond the 2-year period, the employee shall be offered that work on a continuing basis. In the case of a new course, new system, market research or organisational unit, if the position or substantially the same position occupied by the employee continues beyond the expiry of the contract, the staff member shall, subject only to satisfactory performance, be offered continuing employment in that position. The University will report on all contracts issues under this clause 25.7.11 to the JUUCG.

Edith Cowan University Academic and Professional Staff Union Collective Agreement 2013

6.6.3.g. ***Innovation or Reorganisation***

Where the University or some portion of the University is undergoing or is about to undergo major organisational change or where a new course is being developed and implemented, a fixed-term contract can be used.

Period of Contract

A contract can have a term of up to two (2) years.

THE UNIVERSITY OF WESTERN AUSTRALIA ACADEMIC STAFF AGREEMENT 2014

6.9 Innovation or Reorganisation

Where the University or some portion of the University is undergoing or is about to undergo major organisational change, including the development and implementation of a new course or sudden and unanticipated increase in student enrolments a fixed-term contract can be used, with prior agreement between the parties.

B. Where uncertainty exists as to future workforce requirements arising from a formal review of a work area

MURDOCH UNIVERSITY ENTERPRISE AGREEMENT 2014

16.5 **(h) Disestablished organisational area**
(identical clause re general staff at 59.5 (h)

An organisational area that is performing one or more functions or teaching one or more courses which will cease within a reasonably certain time, or where a formal review is under way which may result in this outcome.

(i) Where part or all of an organisational unit is to be disestablished, staff may be employed on a fixed-term contract of up to three (3) years.

If at the end of three (3) years, the work is considered to be on-going, and the employee meets the criteria in paragraph 16.5(1), he/she will be offered continuing employment.

(ii) In circumstances where a formal review is under way, staff may be employed on a 12 month fixed-term contract. Where the formal review has not been completed prior to the expiry of the 12 month period, the employee will be given further employment on a fixed-term basis for a further 12 months.

If at the end of the formal review the organisational area is not to be disestablished and the work is considered to be on-going, the employee will be offered continuing employment subject to the criteria listed in paragraph 16.5(l). If at the end of the formal review the organisational area is to be disestablished then the employee may be employed on a further fixed-term contract of up to three years. If at the end of 3 years, the work is considered to be on-going, the employee shall be offered continuing employment subject to the criteria listed in paragraph 16.5(1).

A list of contracts issued in this category, including information as to the area of appointment, will be provided to the Academic Staff Consultative Group on an annual basis.

16.5(l) Conversion Criteria

An employee will have their employment converted from fixed-term to on-going where the following criteria are satisfied:

(i) The employee has been appointed to the particular position as the outcome of a merit selection process for at least one fixed-term appointment;

(ii) The employee has been in the role for a minimum of two (2) years;

(iii) The employee is not subject of an unsatisfactory work performance process; and

(iv) Any other item put forward by the employee's supervisor that warrants consideration.

C. Where work activity is being introduced

MURDOCH UNIVERSITY ENTERPRISE AGREEMENT 2014

(g) New organisational area

In the case of employment in a new organisational area about which there is genuine uncertainty as to whether it will continue, for three (3) years from the establishment of any such area.

If it becomes certain that the organisational area will continue, and the employee meets the criteria in 16.5(l), he/she will be offered continuing employment.

AUSTRALIAN CATHOLIC UNIVERSITY STAFF ENTERPRISE AGREEMENT 2013 – 2017

6.7.2.3 (vii) **New Organisational Unit**

A fixed-term contract may be offered in the case of employment in a new organisational area about which there is uncertainty as to whether it will continue or to perform specific commencement activities, for up to two (2) years from the establishment of any such area. Where there continues to be an uncertainty as to whether the organisational area will continue, a further fixed-term contract of a maximum of twelve (12) months may be offered to the incumbent subsequent to the initial contract.

Central Queensland University Enterprise Agreement 2012

12.2 **ix) New organisational area**

(a) A fixed-term contract may be offered in the case of employment in a new organisational area about which there is genuine uncertainty as to whether it will continue, for up to two years from the establishment of any such area. A further fixed-term contract of a maximum of 12 months may be offered subsequent to the initial contract.

For the purpose of this paragraph a new organisational area shall mean a group of not less than three positions either; established in relation to a new discipline or sub-discipline of academic, administrative or commercial work not previously offered; or another new academic, administrative or commercial function organised either in a new geographic location outside of the existing campuses where that function is offered or organised distinctly from existing organisational areas and not created from the merger or division of or movement of work from an existing unit(s).

Any new configuration of work previously undertaken shall not constitute a new organisational area.

(b) A fixed-term contract offered in the circumstances described in sub-clause 12.2.5 (viii) (a) above will be subject to the following conditions:

- The letter of offer of employment includes an understanding that should the position or substantially the same position occupied by the appointee continue beyond the maximum contract period (three years) the appointee shall be offered continuing employment in that position (or in another agreed position) at the conclusion of the contract period as long as the original appointment was via merit

based selection under the University's recruitment and selection procedures and performance has been satisfactory.

- Should a position not be offered under the above dot point, upon request by the employee, the University will, for three months prior to the expiry of the contract, make reasonable attempts to identify other employment opportunities within the University.

CHARLES STURT UNIVERSITY ENTERPRISE AGREEMENT 2013—2016

21.6 (viii) **New organisational area**

A fixed-term contract may be offered in the case of employment in a new organisational area or discipline about which there is genuine uncertainty as to whether it will continue, for up to two (2) years from the establishment of any such area. Where there continues to be a genuine uncertainty as to whether the organisational area or discipline will continue, a further fixed-term contract of a maximum of twelve (12) months may be offered to the incumbent employee subsequent to the initial contract.

DEAKIN UNIVERSITY ENTERPRISE AGREEMENT 2013

16 **h) New Organisational Unit**

Fixed-term employment of up to three years may be offered in a newly established organisational work unit.

If at the end of the allowable period of fixed-term employment under this category, the requirement for the work which has been performed continues, the University shall employ the staff member on a continuing basis without the need for the position to be advertised, but only where an ongoing vacancy exists, the staff member meets the requirements of the position, the staff member was selected after the previous fixed-term position was openly advertised and the staff member has performed satisfactorily in that position.

MONASH UNIVERSITY ENTERPRISE AGREEMENT (ACADEMIC AND PROFESSIONAL STAFF) 2014

16.4.7 **New Organisational Area**

A fixed-term contract may be offered in the case of employment in a new organisational area, for up to two years prior to or from the establishment of any such area. A further fixed-term contract of a maximum of 12 months may be offered subsequent to the initial contract.

For the purpose of this clause 16.4.7 a new organisational area shall mean either:

- a group of three or more positions established in relation to a new area of academic work; or

- a new staff member position organised in a new geographical location outside existing campuses; or

- a new staff position organised distinctly from existing schools or centres and not created from the merger or division of or movement of work from an existing unit(s).

A fixed-term contract offered in the circumstances described in this clause 16.4.7 will be subject to the following conditions:

(a) the letter of offer of employment includes an understanding that should the position or substantially the same position occupied by the staff member continue beyond the maximum contract period (three years) the staff member shall, subject only to satisfactory performance, be offered continuing employment in that position (or in another agreed position) at the conclusion of the contract period;

(b) where a fixed-term staff member employed in this circumstance is not offered further employment, he/she will receive on cessation of employment five weeks' severance pay for employment up to two years, and seven weeks' severance pay for employment between two and three years. This clause 16.4.7 will replace any entitlement to severance pay elsewhere in this Agreement.

UNIVERSITY OF MELBOURNE ENTERPRISE AGREEMENT 2013

19.4 New Organisational Area

"New Organisational Area" means an identifiable work unit performing a function or functions or teaching a program or programs that have not been performed or taught previously and the prospective need or demand for which is uncertain or unascertainable at the time of establishment of the unit.

Notwithstanding the above, "new organisational area" will also include a unit or group as described above but where the new unit or group is to perform work which has been performed at the University before and where that work is now to be performed at a location not less than 50km from any campus where it is presently being performed.
Fixed-term employment under this category may be used for up to three years from the date of commencement of a new organisational area, and fixed-term positions offered under this category may not be extended or renewed, may only be offered once and will be for a period of no more than 3 years and not less than one year.

THE AUSTRALIAN NATIONAL UNIVERSITY ENTERPRISE AGREEMENT 2013-2016

14.2(c) new organisational arrangement where a professional staff member is employed for up to 12 months until the practicality of permanently filling the position is known dependent on the continuing operation of the area.

D. Where work activity is being discontinued

AUSTRALIAN CATHOLIC UNIVERSITY STAFF ENTERPRISE AGREEMENT 2013 – 2017

6.7.2.3 (viii) Disbanded Organisational Unit

Where an organisational work unit has been the subject of a decision by the University to discontinue that work within three (3) years, fixed-term contract employment may be offered to work in that work unit.

Central Queensland University Enterprise Agreement 2012

12.2(i) Disestablished organisational area

Where an organisational work area consisting of at least three employees (or with the Agreement of the Union, fewer employees) has been the subject of a decision by the University to discontinue that work within 36 months (including a discontinued course/program) fixed-term contract employment may be offered to work in that area provided that:

- should the decision to discontinue the work area be reversed, or should for any other reason the employee's position or substantially the same position continue beyond a 36 month period, the employee shall be offered that work on a continuing basis as long as the original appointment was via merit based selection under the University's recruitment and selection procedures and performance has been satisfactory.

- Should a position not be offered under the dot point above, upon request by the appointee, the University will, for three months prior to the expiry of the contract, make reasonable attempts to identify other employment opportunities within the University.

CHARLES STURT UNIVERSITY ENTERPRISE AGREEMENT 2013—2016

21.6(ix) Disestablished organisational area

Where an organisational work area, work function or teaching program has been the subject of a decision by the University to discontinue that work within three (3) years, fixed-term contract employment may be offered to work in that area or discipline.

DEAKIN UNIVERSITY ENTERPRISE AGREEMENT 2013

16(i) Disestablished Organisational Unit

A fixed term contract may be offered to a staff member where a decision has been made by the University to discontinue work in that area within 24 months. The use of such contracts will not exceed 24 months, provided that:

I. the letter of offer of employment includes an undertaking that subject to satisfactory performance, should the decision to discontinue the work area be reversed, or should for any other reason the staff member's position or substantially the same

position continue beyond a 24 month period, the staff member will be offered that work on a continuing basis.

II. should a position not be available under the previous bullet point, upon request by the staff member, the University will, for three months prior to the expiry of the contract, make reasonable attempts to identify other employment opportunities within the University.

MONASH UNIVERSITY ENTERPRISE AGREEMENT (ACADEMIC AND PROFESSIONAL STAFF) 2014

16.4.8 Disestablished Organisational Area

Where an organisational work area or part of an organisational work area consisting of 3 or more staff members has been the subject of a decision by the University to discontinue that work within 36 months a fixed-term contract of employment may be offered to work in that area provided that:

(a) the letter of offer of employment includes an undertaking that subject to satisfactory performance, should the decision to discontinue the work area be reversed, or should for any other reason that staff member's position or substantially the same position continue beyond a 36-month period, the staff member shall be offered that work on a continuing basis; and

(b) should a position not be offered under clause 16.4.8(a) upon request by the staff member, the University will, for three months prior to the expiry of the contract, make reasonable attempts to identify other employment opportunities within the University.

UNIVERSITY OF MELBOURNE ENTERPRISE AGREEMENT 2013

19.6 Disestablished Area

"Disestablished Area" means an identifiable work unit performing a function or functions or teaching a program or programs the provision of which will cease within a reasonably certain time.

Where a final decision has been made to disestablish part or all of an organisational unit, staff may be employed on a fixed-term contract of length equivalent to the length of the phase-out of the unit.

Should the work continue at the end of the proposed phase-out time, the incumbent will be offered the further work.

THE AUSTRALIAN NATIONAL UNIVERSITY ENTERPRISE AGREEMENT 2013-2016

14.2(d) Where an organisational work area has been the subject of a decision to be disestablished or reduced in size, and fixed term staff are needed to phase out the area. Should the decision be reversed or the positions be for in excess of five (5) years, staff in these positions will be offered conversion to a continuing appointment, except where an extension beyond five (5) years is for a defined, short term period and at which point the funding for the position will cease

E. To cater for a sudden and unanticipated increase in student enrolments

SOUTHERN CROSS UNIVERSITY ENTERPRISE AGREEMENT 2016

44 Fixed-term employment may be offered in the case of employment in a new organisational area, about which there is genuine uncertainty of continuing operation for up to three years prior to or from the establishment of any such area.

45 For the purpose of this subclause a new organisational area will mean positions established:

a) in relation to a new organisational area, discipline or sub-discipline area of academic work not previously offered; or

b) as a result of a demonstrated sudden and unanticipated increase in student enrolments; or

c) as a result of an academic function organised in either a new geographical location, distant from existing campuses where that function is offered or organised distinctly from existing schools or centres, and not created from the merger or division of or movement of work from the existing unit(s).

46 At the expiry of the fixed-term employment period and subject to the necessity of ongoing work, continued funding and satisfactory performance of the employee since appointment, the University may offer conversion to continuing employment as determined by the relevant delegated officer in accordance with clause 61 and University policy.

UNIVERSITY OF CANBERRA ENTERPRISE AGREEMENT 2015 – 2018

12.1(i) *Convertible fixed-term:* This may occur where there is a new initiative and where continuing operation is uncertain. For the purposes of this sub-clause, a new initiative relates to a new area of work not previously undertaken, and not created from the merger or division of, or movement of, work from existing work areas.

Convertible fixed-term employment may only be offered where:

(i) a demonstrated sudden and unanticipated increase in student enrolments requires additional staffing in a specific area to meet the student demand; or

(ii) there is a new organisational area/discipline; A contract may be offered prior to or from the establishment of any such discipline or area, during a period in respect of that establishment not exceeding two (2) years; or

(iii) otherwise agreed between the University and the relevant Union(s).

A convertible fixed-term appointment will normally be for a period not exceeding three (3) years. An area of work ceases to be a new area of work after three (3) years of operation and a fixed-term position may be converted in accordance with this sub-clause at that time. Conversion from fixed-term to continuing employment

will be determined by the University, based on the availability of continuing work and the Employee's performance since appointment

THE UNIVERSITY OF WESTERN AUSTRALIA ACADEMIC STAFF AGREEMENT 2014

6.9 Where the University or some portion of the University is undergoing or is about to undergo major organisational change, including the development and implementation of a new course or sudden and unanticipated increase in student enrolments a fixed term contract can be used, with prior agreement between the parties.

UNIVERSITY OF WESTERN SYDNEY ACADEMIC STAFF AGREEMENT 2014

14.13(a) where there is a discipline or sub-discipline area of academic work not previously offered;

(b) where there is a demonstrated sudden and unanticipated increase in student enrolments;

or

(c) where there is an academic function or unit organised in either a new geographical location or organised distinctly from existing Schools or centres, which has not been created from the merger or division of, or movement of work from an existing academic unit(s) to another academic unit(s).

14.14 At the expiry of the fixed-term employment period and subject to the necessity of ongoing work and satisfactory performance of the Employee since appointment, the University may offer conversion to ongoing employment in accordance with subclause 14.17.

(note: no equivalent clause in WSU General Staff Agreement)

F. To cater for a sudden and unanticipated decrease in student enrolments

Curtin University Academic, Professional and General Staff Enterprise Agreement 2012 – 2016

Substantial decrease in enrolments

15.2.13 Where there is a reasonable expectation based on data available at the time that there is a significant risk of a decrease in enrolments that is likely to require a reduction in future staff numbers, and there is a need, in the period leading up to the decrease in enrolments, to cover work of a type that could reasonably be expected to be affected by the decrease in enrolments, Fixed Term Appointments may be used for up to 3 years.

15.2.14 There needs to be a link between the number of contracts issued and the area(s) of forecast enrolment decrease. If at the end of 3 years, the work is considered to be ongoing, the Staff Member will be offered a Continuing Appointment unless the Staff Member:

a) is unable to demonstrate satisfactory performance in the position; or

b) is the subject of a disciplinary process.

Edith Cowan University Academic and Professional Staff Union Collective Agreement 2013

6.6.3.m. Half Cohort

Where there is a reasonable expectation based on data available at the time that there is a significant risk of a decrease in enrolments due to the half cohort that is likely to require a reduction in future staff numbers, and there is a need, in the period leading up to the decrease in enrolments, to cover work of a type that could reasonably be expected to be affected by the decrease in enrolments, Fixed-term Appointments may be used for up to three (3) years. Appointments to this category of fixed term employment can only be made between the date of certification of this Agreement and 30 June 2016. If at the end of any contract the work is deemed to be ongoing, consideration will be given to the employee being converted to continuing employment.

MURDOCH UNIVERSITY ENTERPRISE AGREEMENT 2014

16.5(j) Substantial decrease in enrolments

Where there is a reasonable expectation based on data available at the time that there is a significant risk of a decrease in enrolments that is likely to require a reduction in future staff numbers, and there is a need, in the period leading up to the decrease in enrolments, to cover work of a type that could reasonably be expected to be affected by the decrease in enrolments, fixed-term contract employment may be used for up to three (3) years. There needs to be a link between the number of contracts issued and the area(s) of forecast enrolment decrease. If at the end of three (3) years, the work is considered to be on-going, the employee will be offered continuing employment subject to the criteria listed in

paragraph 16.5(l). If the University is able to reasonably justify that risk still exists at the end of the contract, a further contract of up to two (2) years may be issued. A list of contracts issued in this category, including information as to the area of appointment, will be provided to the Academic Staff Consultative Group on an annual basis.

(Identical clause for general staff at 59.5(j))

UNIVERSITY OF ADELAIDE ENTERPRISE AGREEMENT 2014-2017

2.3.1.10 Organisational change;

a) Fixed-term employment may be offered to staff members in an identifiable work unit that:

i. is a new unit performing one (1) or more functions or teaching one (1) or more programs, that have not been performed or taught previously and the prospective need or demand for which is uncertain or unascertainable at the time of establishment of the unit;

ii. is performing one (1) or more functions or teaching one (1) or more programs at a new location that is not less than 5Okm from any campus where those functions or programs have previously been taught or performed and where the prospective need or demand for those functions or programs is uncertain or unascertainable at the time of commencing them at the new location;

iii. experiences a sudden and unanticipated increase or decrease in enrolments; or

iv. is performing one (1) or more functions or teaching one (1) or more programs the provision of which will cease within a reasonably certain time, and a final decision has been made to disestablish part or all of the unit.

b) Fixed-term employment under categories 2.3.1.10 (a) (i) – (iii) may be used for up to three (3) years from the date of the relevant functions or programs commencing, or the unanticipated increase or decrease in enrolments. Fixed-term positions offered under these categories may not be extended or renewed, may only be offered once and will be for a period of no more than three (3) years and not less than one (1) year.

c) Fixed-term employment under category 2.3.1.10 (a) (iv) may be offered for a duration equivalent to the length of the phase-out of the unit or relevant part of the unit. Should the work continue at the end of the proposed phase-out time, the incumbent will be offered the further work as set out in clause 2.3.2.2.

THE UNIVERSITY OF QUEENSLAND ENTERPRISE AGREEMENT 2014-2017

20 (j) **Decrease in Enrolments**

Consistent with the University's commitment to the appropriate use of casual employment, fixed-term appointments may be used for up to two (2) years where:

(a) there is a demonstrable likelihood based on available data of a significant decrease in enrolments; and

(b) this is likely to require a reduction in future staff numbers; and

(c) there is a need, in the period leading up to the decrease in enrolments, to cover work of a type that could reasonably be expected to be affected by the decrease in enrolments.

It is a requirement for the use of such fixed-term appointments that there is a correlation between the number of fixed-term appointments made and the numbers and area(s) of forecast decrease in enrolments.

If at the end of the fixed-term appointment, the work is considered to be continuing, the relevant staff member(s) will be offered a continuing appointment where the staff member(s) was appointed through a merit-based selection, has demonstrated continued satisfactory performance and where no continuing staff members in substantively similar positions within the organisational area are proposed to be made redundant.

UNIVERSITY OF WOLLONGONG (ACADEMIC STAFF) ENTERPRISE AGREEMENT, 2015

18.6.6.11. For work in an area of activity where there is uncertainty about the ongoing operational needs for the work to be performed for a contract period of up to 3 years due to:

a) An unanticipated influx or decrease in enrolments in an established program, course or subject; or

b) The work relating to a new organisational area, program, course or subject where the future pattern of enrolments is unclear; or

c) The academic area being under review.