IN THE FAIR WORK COMMISSION

Fair Work Act 2009

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

AM2014 Higher Education (Academic Staff) Award 2010 [MA000006]
AM2014 Higher Education (General Staff) Award 2010 [MA000007]

AHEIA Closing Submissions in Reply

These submissions are made by the Australian Higher Education Industrial Association (**AHEIA**) in accordance with the amended Directions issued by Johns C. on 3 February 2017 in relation to the Higher Education (Academic Staff) Award 2010 (**''the Academic Staff Award''**) (AM2014/229) and the Higher Education (General Staff) Award 2010 (**''the General Staff Award''**) (AM2014/230). They are in response to the Final Submissions of the National Tertiary Education Industry Union (**NTEU**) dated 3 February 2017.

I – RESPONSE TO NTEU CLAIM

Overview

1. The Australian Higher Education Industrial Association (AHEIA) makes the following closing submissions in reply in this case. In doing so, it also relies on all its previous submissions, particularly those of 6 June 2016, and on all relevant evidence.
2. AHEIA agrees with the NTEU that the Annual Leave decision, [2016] FWCFB 6838 paragraphs [18] to [24] and paragraphs [155] and [156] set out the approach which should govern the exercise of the Commission's powers in this review.

3. In this matter, the employers have been faced with an extraordinary amount of material presented by the National Tertiary Education Industry Union (NTEU). This is the case with written submissions, witness statements and oral testimony. In many cases, other materials are appended to witness statements (and some of those themselves have attachments),

much of which is of dubious value as evidence. The NTEU says, in its closing submissions, "These submissions are lengthy, which is regrettable"[1]. AHEIA concurs with this and takes a similar view of the NTEU evidentiary case.

4. The NTEU has attempted to excuse this "carpet-bombing" approach to this case by saying that it "… has taken the approach of presenting such material as was in our possession which could inform the Commission of facts relevant to the issues under consideration"[2]. Many of those materials have not been relevant to the matters before the Commission. Some witness statements have been redacted, but much else presented by the NTEU has been of little value given the task the Commission is called upon to undertake.

5. The NTEU then suggests that the employers have done the wrong thing by "refraining from volunteering relevant material that was within their knowledge.[3] AHEIA rejects this assertion, and has presented an extensive case in response to that of the NTEU and has sought to bring the attention of the Commission to all matters relevant to this case.

6. The NTEU also suggests that **"**the need for change is self-evident**"[4],** and suggests that:

> "In these circumstances, the onus should lie with the employer parties to demonstrate why the deficiency does not need to be remedied or why the solution proposed by NTEU is not appropriate."[5]

7. That is a nonsense in the face of variations sought by the NTEU which represent the introduction into modern awards of requirements that are novel and untested (in any industry) and which would be very complex in operation. In these circumstances, the onus of proving that its proposed changes are both necessary, workable and in accord with the relevant legislation lies with the NTEU. This is in accord with the view of the Full Bench in the 4 yearly Review of Modern Awards: Preliminary Jurisdictional Issues decision, which the NTEU itself quotes in its Closing Submissions:

> "… where a significant change is proposed it must be supported by a submission which addresses

[1] NTEU Closing Submissions, 3 February 2016, page 2, paragraph 2
[2] NTEU Closing Submissions, 3 February 2016, page 6, paragraph 14
[3] NTEU Closing Submissions, 3 February 2016, page 6, paragraph 14
[4] NTEU Closing Submissions, 3 February 2016, page 5, paragraph 8
[5] NTEU Closing Submissions, 3 February 2016, page 5, paragraph 8

the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation."[6]

8. When considering the modern awards objective in relation to its proposals for change to the modern awards, the NTEU has taken the approach of assuming that they will inevitably operate alongside enterprise agreements that look much like those currently operating in the higher education industry. For example, at paragraph A108 of its Closing Submissions it argues that the cost to employers of granting its claim on Academic Hours of Work would be minimal because they are covered by enterprise agreements which currently provide salaries that are 30-60% higher than the award rates.

9. Whatever the strength of this argument at the present time, the Commission cannot assume that this situation will always remain the case. Respondency to the *Higher Education (Academic Staff) Award 2010* and the *Higher Education (General Staff) Award 2010* is not prescribed by a list of employers, but rather by a definition of the industry they cover. It is possible, even probable, that other educational institutions will come into being in the future that meet this definition and to which, and to whose employees, these modern awards will apply. Such institutions may or may not also have enterprise agreements.

10. It is also possible under the current legislation that existing universities might in future be covered by enterprise agreements that are very different to those applying now or that they might cease to be covered by them at all. The legislation provides for termination of an enterprise agreement either by agreement or after its nominal expiry date. There is currently an application for termination of a university enterprise agreement under s.225 before the Commission[7].

11. Modern awards therefore need to be able to operate by themselves, rather than only in the context of enterprise agreements, and the Commission should consider this in applying the requirements of the legislation in this case.

12. Relevantly, among the details of the modern awards objective set out in s.134(1) of the *Fair Work Act 2009* is "(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system …". The award provisions proposed by the NTEU in

[6] [2014] FWCFB 1788, para 23
[7] AG2016/7598

relation to Academic Hours of Work, Payment for casual academics, General Staff working hours and overtime are anything but simple and easy to understand. They are extraordinarily convoluted and unclear in their meaning and would likely give rise to considerable disputation.

13. Two of the NTEU's award proposals are based not on additional payments for work done or expenses incurred but, instead, on an arrangement where all employees in a class would be made a payment on the assumption that they are all doing so. For instance:

    - the NTEU Academic Hours of Work proposal would lead to all academics assessed as having a workload that would take a hypothetical academic more than 40 hours per week being made an overtime payment, including an individual academic who might only work 30 hours per week.
    - the Policy and Disciplinary Currency payment regime proposed by the NTEU would provide payments to all casual academics whether or not they familiarise themselves with university policies or keep up to date in their discipline.

14. AHEIA is of the view that such arrangements are fundamentally flawed from the start and should find no place in a modern award system.

15. In relation to academic staff, the NTEU has sought to introduce into the Academic Staff Award, for the first time, an enforceable limit on working hours and an associated scheme for additional payments and, also for the first time, the possibility of advancement through the academic grades by reclassification rather than promotion.

16. There are two principles that are paramount in relation to academic staff in universities in Australia and overseas. They are the autonomy and freedom of academics generally to determine how they spend a high proportion of their, particularly in relation to research, and secondly, merit-based peer-review academic promotion processes.

17. AHEIA submits, and the evidence shows, that the granting of these NTEU claims would threaten these principles and could create a backlash amongst universities and academic staff leading to further disputation and possibly to considerable damage to the reputation of Australia's universities internationally.

A. AM2014/229, Item 14, Academic Hours of Work Clause

18. AHEIA is strongly opposed to the inclusion of a provision of the type being proposed by the NTEU in the *Higher Education (Academic Staff) Award 2010*. None of the changes to the draft clause made by the NTEU during the course of proceedings have allayed our concerns that the scheme would be alien to academic work, disruptive and a major cause of disputation.

19. Much of the NTEU evidence was directed to demonstrating that academics commonly worked hours above 38 per week and the reasons for this. While AHEIA does not seek to deny that this is sometimes the case, it believes that the NTEU is overstating the situation for its own purposes.

20. Evidence was presented which shows that competent academics can do their job within what might be considered "standard" working hours:

> "Now, you also say that's set out in the academic workload allocation. When you say that, are you saying then that there - is it fair to say that you're saying that the volume of work that they're given should be able to be done in that time?---Yes, I guess that's what I'm saying. I'm not sure whether I wrote it - I was looking at it in quite the detail - I was trying to convey a sense that people work 46 weeks a year, around about, and if they work hard five days a week on average over that time they should be able to do their jobs and there'd be something wrong if they couldn't."[8]
>
> . . . .
>
> "It is possible to achieve the minimum expectations in regard to teaching allocation, research/scholarship and contributions to the University and community, as set out in the Discipline Profile for my Department (Attachment 4) within the requirements set out in Clause 4.3.29 of the EAClause, that is 1575 working hours per year (45 weeks at 35 nominal hours per week) for a full-time staff member. This includes the work that will enable the academic to be promoted from one academic level to the next."[9]

[8] Evidence of Professor Coaldrake, 31 August 2016, PN5631
[9] Witness Statement of Professor Herberstein, paragraph 16

21. Other evidence shows that longer hours worked by academics can be a result of lack of experience or organization or a reluctance by them to discontinue subjects or activities to which they have become attached. This latter is a byproduct of the independence they enjoy:

> "If it is the case that academic work is 'blowing out', it is my experience that this is in part due to a reluctance by academics to accept that the way they are teaching needs to change in response to changes in the environment such as increased student numbers. Often if academics are struggling it is because they have not been prepared to consider and adapt the way they teach."[10]

22. Inexperience too can apparently be a reason why longer hours are worked:

> "You refer to yourself and some other new staff presenting material for the first time. Would you agree that part of the reason you and these staff were working long hours was that you were new to the role at that time of a teaching and research academic?---Yes, sure."[11]

23. However, AHEIA accepts that some academics work long hours some of the time. This is offset by the fact that they are professionals who have great flexibility and, for half the year, have no assigned teaching duties. This is, in our view, "reasonable" in terms of section 62 of the *Fair Work Act 2010* given all the incidents of the employment of academic staff. This view is supported by the absence of any applications (let alone any successful applications) under s.62 of the *Fair Work Act 2009* by academics arguing that their required hours of work are unreasonable, or by any academic refusing work on these grounds.

24. The NTEU application, as amended, seeks to introduce a 38 hour per week restriction on the "maximum ordinary hours of work" into the Academic Staff Award, to be averaged over "each calendar year or such other period as is agreed in writing between the employer and the employee (not exceeding two years)", for purposes of calculating overtime payments.

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[10] Witness Statement of Professor Herberstein, paragraph 21
[11] Evidence of Dr Schroeder, 28 July 2016, PN2264

25. The definition of "required work" now proposed by the NTEU seeks to distinguish between it and any other work an academic employee may do, and reads as follows:

> "***b. Required work*** shall mean:
> i. The specific duties and work allocated to an employee; and
> ii. To the extent these are not covered by i), any work necessary to meet performance standards expected of the employee."

26. The proposed NTEU clause provides for two different ways of working out overtime pay. The first [clause 22.4] provides for the employer to set and arrange for the recording of the actual hours worked by each academic. Under this provision, payment of any hours above an average of 38 per week would be at ordinary time for the first 5 hours and at 150% of ordinary time thereafter, capped at what would be applicable to a Level C, Step 6.

27. The evidence shows that the only practical way to record work done by academics would be by asking them to do this themselves. Under cross-examination, Mr McAlpine acknowledged that this would be the way it would have to work:

> "The employer or the employee.? -- The employee would record them."[12]

28. This would be unacceptable to the academic employees themselves:

> "Academic staff are not required (nor would they be willing) to complete timesheets or otherwise record their hours of work or attendance for work."[13]

29. There is no recording of time worked by academics anywhere in the English speaking higher education system. This is attested to by the evidence of Professor Hughes-Warrington and Professor Freshwater:

> "No. There are no timesheets kept at ANU?---No, there are no timesheets."[14]

> "Would it be fair to say that in your experience in the United Kingdom, as in Australia, the

[12] Evidence of Ken McAlpine, 27 July 2016, PN1799
[13] Witness statement of Professor Biggs, paragraph 17.
[14] Evidence of Professor Hughes-Warrington, 30 August 2016, PN4925

duration of working time is not measured for academics?---That's correct."[15]

30. The NTEU itself does not seem to believe that this is a viable option and acknowledges that both universities and academics would reject it:

> "You'd accept that they'd be fiercely resistant to being required to monitor and record their time? – I think it would depend what the purpose of that was, but as a – there would be certain purposes for which they would be happy to records[sic] their time, but the idea that they were required to record their time – the time spent working on some sort of ongoing, regular monitored basis would be something that they, like we, the union, would consider to be absurd."
>
> And therefore probably fiercely resisted? -- Yes." [16]

31. It is therefore difficult to see why it is being proposed in the first place. Under questioning from the Bench, the NTEU was unable to give a clear answer to this question:

> "DEPUTY PRESIDENT KOVACIC: Can I just perhaps ask a question: how do you see that fitting in with the modern awards objective?---Well, we think that it's providing flexibility as to which model the employer sees as most productive.
>
> But I suppose the question I have is that in circumstances where your evidence a moment ago was that you don't envisage that anybody is employed in the circumstances that you've outlined. In those circumstances, why would it be necessary to be included in a modern award?---I suppose because we hope eventually that some of the work that's being done by - some of the work that's being done by sessional employees could actually be bundled together and turned into a proper, ongoing job. So there could be positions for markers or other things or field workers; research assistants, where in fact the employer does decide to do that. Now, I don't think that that - when I say I wouldn't expect, I wouldn't rule that out as a possibility but I would expect that if this clause came in overwhelmingly, I should say - probably not never - but overwhelmingly employers would continue to use the sort of existing norms of the industry to employ people. But if - I mean, we're not insisting upon it. We saw it as meeting the modern awards objective in a sense that we were giving the employer the choice about whether they wanted to use essentially model A or model B.

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[15] Evidence of Professor Freshwater, 2 September 2016, PN6811
[16] Evidence of Ken McAlpine, 27 July 2016, PN1225

To the extent that you've raised the possibility that it might be used, why wouldn't you pursue that through bargaining?---Well, because we don't - I suppose as a general proposition we don't support the idea of academics recording their hours. I mean, that's our position. What we were doing with 22(iv) was saying that if an employer wants to be able to do this and thinks that's the best way of organising the work, we wouldn't have thought that the award should completely rule that out. I think that's probably a fair way of putting it. I mean, I have no - I don't think the union has any particular attachment to 22(iv). We thought that in terms of flexible work practices there was no in-principle reason under the modern award objective why the employer shouldn't be able to choose one or the other.

So in terms of the flexible work practices, what's driving this particular issue? What is driving - I mean, I just struggle in circumstances where your evidence is that you don't envisage any university employing anyone on this basis - I just really struggle to see what the motivation is for including the clause?---Well, I suppose it was to - I suppose it was to head off the argument that you have to use this model rather than employing academics like you employ other people, which is on an hour-for-hour basis. So it was really about saying we don't see any reason why the award safety net shouldn't provide that option for the employer."[17]

Casual academics

32. The NTEU also proposes that casual academic employees be paid overtime at 150% of their ordinary rate for any hours worked in excess of 76 in any fortnight [22.9], though this issue has not been specifically addressed by the NTEU in evidence. In its Closing Submissions the NTEU says merely:

> "This in our submission provides a fairly comparable "overtime" arrangement for casual employees . Engagement of a casual for more than 76 hours in a fortnight is rare, but if and when it occurs, it should attract an overtime loading."

33. This does not appear to be sufficient evidence or other reason to grant this part of the claim.

[17] Evidence of Ken McAlpine, 27 July 2016, PN1470-PN1473

34. The alternative method of working out overtime pay [clause 22.5] involves ascertaining "the number of hours per week within which employees at the relevant academic level and discipline or group of disciplines could with confidence be expected to perform that work, as allocated to the employee, in a competent and professional level, as averaged accros the period of account". This is to be determined prospectively in respect of the relevant period of account" (emphasis added).

35. The payment scheme for hours in excess of an average of 38 per week in this case is effectively at single time (1/38 of salary) for between 40 and 43 hours per week and at a rate described as 5/38 of salary plus 3.947% for further hours worked.

36. The proposal by the NTEU, even in its modified form, represents a significant change in the Academic Staff Award. Nothing like it has been in any academic award, or indeed in any award in any industry. The NTEU acknowledged that it did not seek this scheme, or anything like it, at the making of the Academic Staff Award[18] or during the 2 year review of modern awards.

37. The NTEU has not sought anything like this in enterprise bargaining. In his evidence Mr McAlpine disclosed:

> "No. That's never been sought"[19].

38. Mr McAlpine's evidence also included the following exchange:

> "When was the first time, in an industrial context, whether it was bargaining or in this award stream, have you raised the prospect of overtime being a relevant or necessary part of award regulation or industrial regulation? – This year."[20]

39. As a result, it is unclear how this provision would work in practice. The clause is unique and untested and this, in itself, is a reason for the Commission not to grant the NTEU claim:

[18] Evidence of Ken McAlpine, 27 July 2016, PN997-PN1003
[19] Evidence of Ken McAlpine, 27 July 2016, PN1057
[20] Evidence of Ken McAlpine, 27 July 2016, PN1309

"You accept that we don't have any experience of how the clause would operate in practice?---Yes.

It's an untested clause?---Yes; some of the concepts in it are - exist in the world in agreements but as a package, absolutely.

You accept that it is different from existing industrial regulation that we just went through in - - - ?---Yes."[21]

40. The clause that is currently proposed is the last of a number of variant provisions proposed by the NTEU, which itself seems to have had difficulty in conceptualizing how it wants to approach this issue:

"Do you accept that the version that you filed originally in March was quite different to this? You recall that?---It was - I don't think it was different in its operation. It was different in its expression. We decided that it was the first draft was a bit clumsy and we tried to make it more plain English and I think we generally narrowed the scope of the claim. I think that's a fair description but you might want to correct me on that.

You accept that the first version didn't have any concept of additional payments?---As in first - the one put in in March last year? If you - yes, I think the very first one that we lodged didn't have a concept of additional payments. It just imposed a cap, I think that's correct."[22]

41. The NTEU acknowledges that its proposed clause 22 would increase the regulatory burden on universities, but suggest that this would be only if there were no operating enterprise bargaining agreement:

"If we are considering a future circumstance where there is no EBA and employees are being paid at or much closer to the award minima, there is without doubt a regulatory burden."[23]

[21] Evidence of Ken McAlpine, 27 July 2016, PN1430-PN1432
[22] Evidence of Ken McAlpine, 27 July 2016, PN1436-1437
[23] NTEU Closing Submissions, 3 February 2016, page 65, paragraph A108

42. The NTEU also appears to acknowledge the difficulty of making comparisons between the Award and enterprise agreements in relation to the application of the BOOT without universities establishing new administrative systems. See, for instance, the following exchange with Mr McAlpine on transcript:

> "Thank you. In terms of the BOOT - better off overall test - you are obviously an experienced industrial officer - you would accept that if the NTEU's position was adopted in the award, unless it was also adopted in the enterprise agreement in subsequent negotiations, the issue about how you would assess the BOOT in compliance could be very complex?---The extent of the complexity would depend upon the type of clause that was included in the enterprise agreement.
>
> Yes?---It need not be complex.
>
> If we maintain the current clauses that are in the enterprise agreement, do you accept that there would be complexity?---If we maintained those current clauses unamended, yes.
>
> Do you accept that it would effectively require to look at an employee, work out whether they are going to be better off, or a class of employees, to work out whether they are going to be better off overall under the enterprise agreement versus the award, you would actually have to make some prospective assessment about their activities that are likely to occur during the coverage of the enterprise agreement so that you can attach a dollar figure to it, to ascertain whether, if they applied the paradigm under the award, they would be better off or not?---Yes, remembering what you're assessing - I think I am right in saying this - what you are assessing is the terms of the agreement. One isn't assessing what is happening on the ground, one is assessing the terms of the agreement with the terms of the award and what that means for employees.
>
> Yes?---In a particular factual matrix, I grant you that, but - - -
>
> The recent Coles decision, for example, where it looked specifically at night shift issues and so forth, coincidentally run - I won't go there. With respect, and I appreciate it is ultimately a question for the Commission to assess the BOOT, but on the authorities as they stand at the moment, it is necessary to actually look at not just the terms of the agreement but the effect of the application of those terms to the real employees in their real circumstances?---Yes, that's true.
>
> You would accept that relative to what the universities have at the moment, to enable them to do

that, they would have to adopt a range of systems and processes even to assess the BOOT?---Well, they would to the extent that they didn't think that they could safely argue that the extent to which the agreement rates were higher than the award comprehended all those issues.

Your answer to the complexities to the BOOT is to say, "Well, you are already paid 30, 40, 50 per cent above the award rate and so you really don't need to worry about this provision"?---No, I wouldn't go that far, I wouldn't go that far. What I would be saying is that that is a relevant consideration in the extent to which some sort of forensic approach would need to be taken by the employer what the terms of the agreement were to be and what the Commission would have to consider. There will be many agreements that come before the Commission where penalty rates and other things have been replaced with all-up rates and it is a question of overall judgment and impression, to quote from a Full Bench decision, you know, whether you think the BOOT test has been met."[24]

43. If the scheme as described in the NTEU clause were required to operate, either because there was no operative enterprise agreement or because the NTEU proposed Award clause was "rolled over" into an enterprise agreement, a university would have to establish systems:

- for determining the "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 of 38 hours per week".
- for determining the "number of hours per week within which employees at the relevant academic level and discipline or group of disciplines could with confidence be expected to perform the required work, as allocated to the employee … (emphasis added)
- for comparing Award and agreement rates of pay
- for paying periodically overtime loadings to academics
- for determining whether there should be a reduction or an increase in overtime loading
- for dealing with disputes over any aspect of this provision

[24] Evidence of Ken McAlpine, 27 July 2016, PN1828-PN1835

44. Even if a university sought to rely on the following provision at clause 22.7 of the NTEU proposal, it would need some system to determine what would "otherwise be payable" under the Award:

> "No procedural requirement of Subclause 22.5 or this sub-clause need be complied with by any employer if the actual salary paid to the employee at all relevant times exceeds the sum of the minimum salary applicable under this Award and any overtime loading with would otherwise be payable".[25]

45. Concerns about what would be involved in setting up such administrative systems were a cause of concern to universities:

> "Yes, and you were asked some questions by my friend about the NTEU claim and you gave some evidence about that. When you've - in answering questions about the NTEU claim, what have you understood you have been responding to?---I was particularly concerned with number 22.6, which had an implication that the University would have to ascertain the hours of work involved in research, which I believe would be extremely difficult to administer. The ascertaining would involve significant administrative overheads and burdens that would be counter, I think. The self directed research imperative that underpins an innovative economy through the higher education research and innovation.
>
> And at the University of Sydney do you currently undertake such an ascertaining exercise?---Absolutely not."[26]

46. The scheme proposed by the NTEU would lead to disagreements over many of its aspects, giving rise to increased disputation. Disputes could include:

- Disagreements over the length of the "period of account" in the case of each individual (22.1a)
- Disagreements about what is "required work" as defined and what is not (22.1b and 22.5a)

> "Mr McAlpine, a result could arise where there is a difference of view about the required

[25] NTEU proposed clause 22, as amended
[26] Evidence of Professor Garton, 30 August 2016, PN4793-PN4794

work , couldn't it ? – Oh, yes, yes, that's true".[27]

- Disputes about what work could be expected to be done within 38 hours per week (22.1c.)
- Disputes about the number of hours employees at the relevant level and discipline could be expected to competently and professionally perform the required work as allocated to each individual (22.5a)

"In practice this will require someone or even a panel of people to assess how long a "competent and professional" person would take to perform the broad range of work activities they are intending to undertake. This also gives rise to all sorts of problems and difficulties and has the potential to lead to disputation. If different people were required to allocate or estimate hours that the particular tasks would take a "competent person", it is highly likely that there will be significant differences in opinion."[28]

- Whether there is a "fair and rigorous system" for ascertaining those hours (22.6)
- Whether or not an overtime loading is to be averaged over the period of account (22.7)
- When an overtime loading is to be paid (22.7)
- Every time there is a move to reduce, withdraw or increase an overtime loading (22.7)

47. This is consistent with the views expressed by Professor Vann, Vice-Chancellor of Charles Sturt University:

"Now, the NTEU claim, in relation to academic hours, suggests an averaging approach for a competent academic by discipline and by level of appointment, you understand that to be the case?---Yes.

What do you say about that approach, compared with allocating workload, having regard to the capabilities and competencies of each individual academic?---I think it looks to me to be highly problematic and likely to end up with a lot of disputes. I just really see that the proposal opens the door to a lot of disputation and particularly once you start trying to think about potential bans of overtime for extra hours. I think it would be really very highly problematic and it just, to me, is not a good fit at all with the culture of academic work and the expectations of academic

[27] Evidence of Ken McAlpine, 27 July 2016, PN1763
[28] Witness Statement of Professor Simon Biggs, paragraph 35

practice, as an autonomous professional."[29]

48. The following "case study" illustrates the sort of issues that would be likely to arise in practice under the NTEU proposal:

Fictional Case Study

The workload for Lecturer A is assigned at the beginning of the year through a collegial process overseen by Professor B. It consists of:

- Teaching 40% - 12 hours face to face teaching in 2 subjects – 20th century French literature and Modern English literature / a mix of lectures and tutorials in both Semester 1 and Semester 2. Both subjects are within the academic interests and skills of the lecturer
- Research 40% – with an output expectation of 3 articles published in journals at least A standard. The subject matter of the research is left to Lecturer A, but it will be consistent with his research interests which are focused on French existentialist writers : Sartre, Camus, Malraux, de Beauvoir, etc. He is a particular expert on Albert Camus having written his PhD thesis on Camus' writings and influence.
- Administration 20% – responsibility for subject coordination of one of 20th century French literature involving supervision of 3 casual academics in this subject

Professor B ascertains that this workload can be done if Lecturer B works an average of 39 hours per week. Accordingly, she assesses that no overtime is payable to him.

Lecturer A disagrees. He thinks that he can only write the 2 (not 3) research articles, which he has already planned, to acceptable standard in the time as he has a heavy teaching load, wants to attend two conferences in Europe and the USA on Camus during non-teaching time, and is the academic staff representative on the University Council which involves him in quite a bit of work. Even with only two articles, he thinks this will take him about 46 hours per week, which would involve him being paid overtime.

Professor B has no money left for academic overtime, but wants the credit the school will get for 3 articles, so she suggests to him that he might not go to one of the conferences and might cut back on some of his work for the University Council.

Lecturer A is horrified by these suggestions. He has been looking forward to both conferences and sees them as essential to a major book he is planning to publish in 2 or 3 years. He suggests that Professor B is trying to interfere in his academic freedom to pursue his research interests. As for the University Council work, this is much more important than Professor B understands, and it is essential that it continue. Instead, Lecturer A suggests that he drop his teaching duties in Modern English literature.

Professor B has no-one else to teach in this subject and it is (surprisingly) very popular. She suggests that she is not stopping Lecturer A from going to both conferences, or from being on the University Council, but that she does not require him to do so, and therefore that work should not be counted toward overtime.

[29] Evidence of Professor Vann, 31 August 2016, PN5585-PN5586

Lecturer A again disagrees. How can Professor B suggest that the university does not require work for its Council – the governing body of the university? Lecturer A suggests he might take this matter up personally with the Chancellor. As for the conferences, given his proposed focus on teaching the Camus subject, of course it is required.

Lecturer A suggests that Professor B making the assessment of 39 hours per week does not constitute a "fair and rigorous system for ascertaining those hours" and that it ought to be decided by a panel of his peers. Reluctantly, Professor B agrees and after extensive consideration the panel of peers decides that Lecturer A's workload, including attending both overseas conferences, University Council work and teaching in both subjects, but only publishing 2 articles, would take 48 hours per week, so a higher of overtime payment would be required.

Reluctantly, Professor B goes along with this arrangement, budgeting to pay the overtime loading at 48 hours per week at the end of the year. She does not hear again from Lecturer A on this topic until just before the year is up, at which point Lecturer A seeks a meeting. Lecturer A advises that he has finished all the allocated work, but has been overwhelmed by the workload involved. He has spent an average of 55 hours per week on this required work and has kept records to show it. He now wants to be paid the overtime loading at 55 hours per week.

49. The NTEU proposal requires the determination of an ordinary-hours workload for each academic employee based on "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, as determined prospectively in respect of the relevant period of account."[30]

50. The NTEU spent much time in cross examination of university witnesses trying to get them to agree that existing enterprise agreement workload schemes already requires some form of estimation of this type. In AHEIA's view, the evidence adduced shows that this does not go anywhere near the complexity of the estimations that would be required under the NTEU proposal.

51. The evidence presented in this case shows that it is particularly difficult to measure or estimate the amount of time it would take to undertake research tasks:

> "But your more general point, which is that they could – I'm not trying to put words in your mouth, but that different academics could take different paths and take different amounts of time

[30] 22.1c of revised NTEU proposed clause

to reach the same research output is certainly true."[31]

. . . .

"So it follows from that, doesn't it, that two competent academics may take different time to do the same activity?---In any given activity that might be true.
When we start talking about research activity and producing two publications, there's significant scope for divergence of views about how long that might be?---Yes, that's true."[32]

. . . .

"What would that look like?---It depends on the academic. It depends on what the work is. It could be - it's easiest when it's teaching loads. So if there is an overload of teaching then that's relatively easy to measure. There's still variation - - -
Outside of teaching it's very difficult to measure?---It is."[33]

. . . .

"It is therefore impossible to be able to reasonably allocate and/or determine in hours how long research activities and projects should take."[34]

. . . .

"You were asked questions about allocating particular time, in workload models, to teaching and other activities. When you think about research activities and research outputs, is there specific time allocated for those sorts of outputs in the say that time is allocated for face-to-face teaching?---Well, research is a lot more unpredictable so you can't - as was being said before, you can have an expectation that a normally productive research academic would publish, let's say, two or three papers a year, depending on the discipline, but it's not a one-to-one cause and effect. You can't say, "I'm going to spend 20 hours and I know I'll have a research at the end of it, or 200 hours and I know I'll have a research paper at the end of it." Because sometimes you can churn out quite a number of papers, based on two years' worth of work and sometimes you could do a years' worth of work and not have much to show for it. So it's quite lumpy, which is why you usually have to look at multi-year averages and also you have to investigate, in more detail, what the individual circumstances are without excusing people entirely from producing anything,

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[31] Evidence of Ken McAlpine, 27 July 2016, PN1173
[32] Evidence of Dr Kenny, 1 September 2016, PN5774-PN5775
[33] Evidence of Cathy Rytmeister, 31 August 2016, PN5091-PN5092
[34] Witness Statement of Professor Simon Biggs, paragraph 29

of course."[35]

. . . .

"The reality is without the funding and without the students, and I think we have to recognise that when you get to level D/level E staff, so associate professor/professor you almost transition to a research manager environment rather than a direct hands on researcher. I think if you're going to achieve anything in the research area you still have to have significant success in those two other domains to achieve the research outputs. Trying to quantify and time what it would take is difficult I think. That really depends on what the other variables and what the inputs are and I think those would have be some quantification around those as to so how managing those variables would allow you to meet any particular outcome that would be required from the university. I think what I'm saying is it's not an easy question to answer."[36]

. . . .

"Yes, and you were asked some questions by my friend about the NTEU claim and you gave some evidence about that. When you've - in answering questions about the NTEU claim, what have you understood you have been responding to?---I was particularly concerned with number 22.6, which had an implication that the University would have to ascertain the hours of work involved in research, which I believe would be extremely difficult to administer. The ascertaining would involve significant administrative overheads and burdens that would be counter, I think. The self directed research imperative that underpins an innovative economy through the higher education research and innovation."[37]

52. It is also extraordinarily difficult, if not impossible, to distinguish between work that is "required" of an academic and other work that they do.

"And if you want to go off on a frolic of your own it's not going to get counted?---It's not going to get counted, that's right.

Or, indeed, if you're not on a frolic of your own, a significant proportion of academics are pursuing their particular lines of research and will do that, whether the employer requires them or not?---Well, yes, some of them will, some of them won't. They'll make a choice, yes. But

[35] Evidence of Professor Vann, 31 August 2016, PN5584
[36] Evidence of Philip Andrews, 29 July 2016, PN3166
[37] Evidence of Stephen Garton, 30 August 2016, PN4793

certainly some of them will."[38]

53. As a result, this scheme could lead a much greater monitoring of the work of academics, which would be unacceptable to them:

> "Now, what systems or mechanisms would the Australian National University put in place in order to comply with clause 22.5?---Your Honours, I think we would need to move towards billable hours.
>
> Why do you say that?---If a staff member were wanting to claim overtime, we would have to determine whether the effort in the envelope were professionally and competently done. In order to determine what was professional and competent, we would have to look in some detail to find out what it was staff were doing."[39]

54. The NTEU acknowledges the importance of autonomy of academics but, in stark contradiction, its proposal has the clear potential to lead to greater regulation of academic work by universities:

> "The last thing the union and its members would wish to see is the loss of remaining autonomy or the sense of vocation which allows those whose life and family responsibilities permit them to work very long hours on their passion."[40]

55. AHEIA does not believe that, overall, the hours being work by academics in Australian universities are such as to require the introduction of a scheme of the type being proposed by the NTEU. The NTEU presented a large amount of material attempting to make as much of this issue as it could, but much of it was flawed in some way or other.

56. The NTEU sought to rely on 3 pieces of survey evidence in support of this claim. Each of these pieces of evidence was shown to be flawed and unreliable.

57. In relation to the survey conducted by Dr Kenny, it was conceded by him that:

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[38] Evidence of Ken McAlpine, 27 July 2016, PN1280-ON1281
[39] Evidence of Professor Hughes Warrington, 30 August 2016, PN4995-PN4996
[40] NTEU Closing Submissions 3 February 2017, page 8, A6

- The survey was not random[41]
- The survey was conducted by the NTEU and not commissioned independently[42]
- NTEU members were targeted, and most responses were from NTEU members[43]
- Respondents were self-selected, in that they were union members who had been agreed to be followed up[44]
- The survey is merely "indicative" and does not apply to the whole academic profession in Australia[45]
- The survey would not be able to be published unless its limitations, qualifications and potential biases were acknowledged[46]

58. In relation to the "State of the Uni" survey, it was conceded by Mr Evans that:

- He had no qualifications or expertise in survey design[47]
- The survey was conducted by the NTEU and was not commissioned independently[48]
- NTEU members are over-represented amongst respondents[49]
- It is not claimed to be a representative set of data across the sector[50]

59. Professor Hepworth agreed that the survey:

- Is not "perfect"[51]
- Contains some negatively worded questions[52]
- By using "bands" of hours, gives a less precise estimate of an average[53]

60. The evidence of Professor Strachan is very unreliable. Although presented as an expert witness, her evidence fell far short of what is expected of such a witness. Professor Strachan agreed that in her unredacted statement she attested to material prepared by, but

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[41] Evidence of Dr Kenny, 1 September 2016, PN5966
[42] Evidence of Dr Kenny, 1 September 2016, PN5967
[43] Evidence of Dr Kenny, 1 September 2016, PN5971
[44] Evidence of Dr Kenny, 1 September 2016, PN5977-5980
[45] Evidence of Dr Kenny, 1 September 2016, PN5980
[46] Evidence of Dr Kenny, 1 September 2016, PN5983
[47] Evidence of Michael Evans, PN9603-PN9604
[48] Evidence of Michael Evans, PN9612
[49] Evidence of Michael Evans, PN9962
[50] Evidence of Michael Evans, PN9966
[51] Evidence of Professor Hepworth, PN9075
[52] Evidence of Professor Hepworth, PN9051
[53] Evidence of Professor Hepworth, PN9020

not attributed to the NTEU, and conceded the NTEU was a partner in her research:

> PN4319
> "Your statement in front of you has been redacted. Do you accept that the NTEU put some content to you in the initial report that you filed in these proceedings?---Yes. There was an initial literature review which they showed me, yes.
> PN4320
> You included that in your previous expert report?---Yes, that was included, yes. I agree with that, yes."[54]

61. The evidence shows that "workloads clauses" have been common in university enterprise agreements and have been agreed to by the NTEU.[55] Typically they follow the form described by Professor Biggs:

> "(a) a set of guiding principles to ensure that workloads are allocated fairly and distributed equitably amongst staff in the particular school, institute or centre;
> (b) that workload models within particular schools, institutes or centres be implemented in consultation with academic staff;
> (c) that the workload models give reasonable consideration to the individual circumstances of academic staff members including, but not limited to, their time fraction, personal and family responsibilities and early career status; and
> (d) that staff may raise any concerns they have about their workload in the first instance through the Staff Grievance and Resolution Procedure."[56]

62. Because of this, a modern award clause in the terms being sought by the NTEU would not operate as a proper safety net for the way in which academic workload is regulated in universities.

63. In fact, the NTEU proposal sits very oddly with the way in which some agreement workload allocation provisions actually work. If an academic is allocated a workload that includes a research component of 40% of a workload defined as being no more than 1725 hours over a 12 month period, then any research work done in excess of this is obviously not being

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[54] Evidence of Professor Strachan, 30 August 2016, PN4319-PN4320
[55] Evidence of Ken McAlpine, 27 July 2016, PN1056
[56] Witness Statement of Professor Simon Biggs, paragraph 20

required by the employer. It would be unreasonable for an employee to expect overtime payment under these circumstances, catching the employer by surprise. The grievance in these circumstances is not really about how many hours she is working but with the performance requirements associated with her workload allocation. This should be raised by the academic at the time the workload is allocated and resolved at that stage.

64. The NTEU argument is premised in part on a claim that without something like this, the modern award does not act as a proper safety net.

65. The legislative safety net consists of both the modern award and the NES. Academics are in no different situation to other professional staff – including teachers with no overtime provision in their awards – and any professional not subject to a modern award at all. That is, they have the protection of the NES generally and of s62 of the *Fair Work Act 2010*.

66. Section 62 in particular provides recourse in the event of unreasonable working hours that are requested or required. There are many autonomous professional workers in Australia for whom this (and the NES) generally are the only protections in relation to working hours. If Academic employees, many of whom are highly paid autonomous professionals, are the same situation (apart from detailed workload regulation in their enterprise agreements), that is not necessarily unreasonable.

67. The NTEU proposal would significantly increase employment costs under the modern award. The following calculations are based on the current salaries in the Academic Award and shows the costs of overtime payments both at the base of the lecturer level (Level B) and at the sixth step for Level C, which is the cap specified at clause 22.5d. of the NTEU clause:

	Level B Step 1	Level C Step 6	
	$62,549	$82,509	
hpw	**overtime payment**		**% of salary**
38	$0	$0	
39	$0	$0	
40	$3,292	$4,343	5.26%

41	$4,938	$6,514	7.89%
42	$6,584	$8,685	10.53%
43	$8,230	$10,856	13.16%
44	$10,699	$14,113	17.10%
45	$13,168	$17,370	21.05%
46	$15,637	$20,626	25.00%
47	$18,105	$23,883	28.95%
48	$20,574	$27,140	32.89%
49	$23,043	$30,396	36.84%
50	$25,512	$33,653	40.79%
51	$27,981	$36,909	44.73%
52	$30,449	$40,166	48.68%
53	$32,918	$43,423	52.63%
54	$35,387	$46,679	56.57%
55	$37,856	$49,936	60.52%

68. The regulatory burden the NTEU provision would impose on universities, as pointed out above, be significant.

69. Finally, the NTEU proposal is the antithesis of “simple” and “easy to understand” as required of a stable and sustainable modern award system.

70. AHEIA submits that the NTEU proposal in relation to Academic hours of work should be rejected completely.

B. AM2014/229, Item 13, Payment for Casual Academics

71. The NTEU has proposed the introduction into the *Higher Education Industry (Academic Staff) Award* 2010, of an entitlement for casual academic employees of two new payments. Both would be payable to academics engaged on a casual basis to deliver a series of 6 or more related lectures or tutorials in an academic unit of study, payable only once for any length of employment with a single employer, unless the breaks between engagements is greater than 12 months.

Payment for Policy Familiarisation

72. This payment is defined as being payable for "the employee's work in becoming informed of relevant workplace policies, procedures and academic obligations applicable to the employee's duties".

73. It would be a single one-off payment of 10 hours pay at the "Other required academic activity rate" specified in clause 18.2 of the Award and would be reduced by any payment made by the employer for formal induction.

Payment for discipline and pedagogical currency

74. This payment is defined as being for "the employee's work in maintaining currency in the employee's discipline and relevant pedagogy, and remaining informed of workplace policies, procedures and academic obligations" [emphasis added]. Hence, there is an overlap with the other payment.

75. It would be a payment of one hour's pay at the "Other required academic activity rate" specified in clause 18.2 of the Award for each four hours' delivery of lectures or tutorials performed in that year to a maximum of 40 hours' pay in any calendar year. It would be reduced by any hours paid to the employee for attending staff development, academic or professional conferences, or like activities.

76. Despite NTEU arguments based on the wording of Codes of Conduct, university policies and computer splash screens, the practical reality is that not all casual academics are

required to familiarise themselves with all university policies. This is borne out by the following evidence:

"Now you've given evidence that that induction program provides links to university policies but that academic staff, casual academic staff are not required to read those policies as the important elements are contained within the induction program?---That's correct."[57]

. . . .

"So that induction program does go into some considerable detail about some policy areas but it doesn't deal with all of the policy obligations of sessional staff, does it?---It would cover, I believe, enough of them to be able to perform their duties adequately."[58]

. . . .

"MS GALE: Thank you, your Honour. I am testing the proposition that Ms Thomas has put that the induction program covers the policies relevant to sessionals and I suppose I can simply say it certainly doesn't cover all of them, does it Ms Thomas?---Between the organisational induction and faculty inductions.

No, sorry. I'm asking you - I'm asking you about the online induction program. It certainly doesn't cover all of the policies relevant to sessional academics does it?---It covers organisational policies that are relevant to them. There may be other - - -

But it doesn't cover all of them does it?---There could well be ones that the faculties do in their induction which also cover relevant policies for them. So overall, our induction policies do cover those."[59]

. . . .

"MR PILL: If your Honour pleases. Now in terms of policies at the University of Tasmania, you'd accept that even continuing academic staff are not required to read all of the University of Tasmania policies?---Are not fully cognisant with the policies, did you say?

Are not required to read all of the University of Tasmania policies?---No, no, that's right. I think most wouldn't probably.

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[57] Evidence of Sue Thomas, 29 August 2016, PN3921
[58] Evidence of Sue Thomas, 29 August 2016, PN3988
[59] Evidence of Sue Thomas, 29 August 2016, PN3996-PN3998

So your answer is most would not?---I'd imagine most wouldn't necessarily be aware of it.

You yourself haven't read all of the policies?---I've read the ones that I think are pertinent to me, the pot plant policy doesn't necessarily interest me for example."[60]

. . . .

"Yes. Now, I'm not going to take you to the code in detail, but I am going to suggest to you that the Code of Conduct and the other documents referenced in that require staff to at least be aware of the existence of a whole range of University policies and procedures. Is that fair?---Yes, but not necessarily all sessionals or sessionals."[61]

. . . .

"Okay. I would have to look at those policies, however, to decide which ones were relevant to me?---No, the University outlines for both casual, continuing and contract staff which of the most important policies to look at and which ones they are obligated to know about."[62]

. . . .

"What expectation is there for casual academic or casual professional staff at the university to read the policies and procedures in this list?---Well, they would only need to read a policy where some relevant subject matter arose in the conduct of their work would be my feeling. There is - I should - perhaps it might be helpful to explain it. New staff go through an online induction process which provides summaries of certain key policies regarding equal opportunity, occupational health and safety. I believe there might be also ethical conduct and one or two other things. But in terms of actually reading the source documents, that would only be expected to be undertaken where there was some reason for them to do so."[63]

. . . .

"I take it from your answer that you accept that you don't have to read every one of these policies and, indeed, you didn't read every one of these policies during your six years at the University of Melbourne?---No.

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[60] Evidence of John Kenny, 1 September 2016, PN6162-PN6165
[61] Evidence of Professor Garton, 30 August 2016, PN4783
[62] Evidence of Professor Hughes-Warrington, 30 August 1016, PN4961
[63] Evidence of Andrew Picouleau, 2 September 2016, PN6781

So, you accept that?---I accept that, yes."[64]

. . . .

"What we're referring to is, in paragraph 6 there are 21 related documents. What you're being asked about is, did you go and look at the 21 related documents referred to in paragraph 6?---Right, no. No, I haven't looked at all of the 21 documents."[65]

. . . .

"And you'll see, "This activity is to be completed by a supervisor or appropriate delegate", and "Important policies and procedures". And there's reference to a limited number of policies and procedures including the one that you've attached, which is the UNSW code of conduct?---Yes.

And then some other, what might be called, core policies, OH&S, emergency procedures, equity (indistinct), a process for making complaints, conflict of interest and intellectual property policies?---Yes.

And do you accept that on its face the information that's referred to in that checklist, including those what I've identified as important policies and procedures, were provided to you by the supervisor?---Yes."[66]

77. Evidence also shows that that casual academics can seek guidance and assistance on policy matters from more senior staff:

"Now a number of these policies wouldn't be accessed by a sessional academic until particular circumstance arises would they? For example, there is a policy about how to deal with plagiarism, how to deal with a student who is engaged in plagiarism. An academic might not access that policy until an instance of plagiarism arises. Is that the case?---That's correct, and in that case they may refer it to a course coordinator or such like person who would deal with it instead of a casual academic."[67]

. . . .

[64] Evidence of Camille Nurka, 2 November 2016, PN8699-PN8700
[65] Evidence of Camille Nurka, 2 November 2016, PN8746
[66] Evidence of Camille Nurka, 2 November 2016, PN8786-PN8788
[67] Evidence of Sue Thomas, 29 August 2016, PN4045

"Now, you were asked about or you gave the evidence in response to a question. There's professional staff and supervisors. Are there other supports at the University available to sessional academic staff if matters arise that are dealt with under policies?---They have access to all of the unit of study coordinators, heads of school, professional staff, faculty managers, all of the online resources we have for accessing and understanding policies and finding out whether policy is relevant to their situation or not.

So if I'm a sessional staff member and I was confronted with an issue of student academic misconduct at the University of Sydney, how would that be dealt with by me as the sessional academic staff member?---Under normal circumstances, I would expect the sessional academic to consult the unit of study coordinator, who would normally be a fixed-term or continuing academic staff member and they would then take the matter in hand and deal with it through the normal policies and procedures framework."[68]

. . . .

"Now it's also the case that if a matter that was covered by a policy arose, there's a variety of supports that are available to you as a staff member, to potentially deal with the issue. You don't necessarily have to go and find the policy and read the policy. So to give you an example, an issue - a health and safety issue might arise, there are health and safety advisers in the university?---Yes, there are some available within the university, yes."[69]

. . . .

"Paragraph 43, you refer to the need for sessional staff to be aware of the range of student supports services. Who would they contact in the event of student misbehaviour or mental health problems?---They would contact the student counselling service and the student advocates depending on the nature of the circumstance. Sessional and other staff would also potentially discuss that with the head of the discipline area or head of school. Yes, certainly absolutely vital because it's a regular occurrence, yes."[70]

. . . .

"Does the university have other supports and resources available to staff to deal with issues covered in the policies?---Certainly. For example, in regard to any human resource policy issue,

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[68] Evidence of Professor Garton, 30 August 2016, PN4811-PN4812
[69] Evidence of John Kenny, 1 September 2016, PN6166
[70] Evidence of Professor Hamel-Green, 1 September 2016, PN6262

there are advisors assigned to all faculties and divisions, organisational units, who are able to advise staff members about the operation of HR policies.

What about issues concerning students?---They would be matters that would be dealt with within faculty student services units. That would be my expectation. And then there's all relevant central administration divisions that deal with student administration."[71]

78. There are common elements to policies from one university to the next, meaning that casuals who have previously been employed at another university may already be familiar with similar policies:

"DEPUTY PRESIDENT KOVACIC: But in terms of things such as responsible conduct, responsible conduct of staff, which you refer to at Melbourne uni, sort of the conduct expectations across institutions would be fairly similar though there might be some elements of difference which, at their core, they'd be very common?---Yes, yes.

MR PILL: And you'd accept, Dr Nurka, that's also true of policies such as discrimination, sexual harassment and even matters like privacy where there's common elements across the sector?---Yes."[72]

79. In relation to discipline currency, casual academics already undertake, and are paid for, preparatory work that assists them in maintaining an up to date knowledge of the discipline area in which they are teaching:

"And when you're preparing a lecture, delivering a lecture, it might be one that's predominantly been prepared by somebody else, or it might be one that's predominantly been prepared by you, but you would look at the relevant readings?---Yes.

And do you accept that in undertaking those activities it does contribute to your knowledge of the discipline?---Okay, so in developing a curriculum, so you're saying if I develop a curriculum myself, that that goes into me developing knowledge of my field?

In preparing for - - -?---Yes.

---

[71] Evidence of Andrew Picouleau, 2 September 2016, PN6781-PN6783
[72] Evidence of Camille Nurka, 2 November 2016, PN8722-PN8723

A tutorial or in preparing for a lecture, the activities that you undertake - - - ?---Yes.

Contribute to your knowledge of the discipline?---Yes."[73]

80. There is evidence that casual academics are not appointed unless they already have a strong discipline knowledge:

"Okay. So you would agree that by force of this code, irrespective of your opinion or mine, that casual academic staff are required to maintain, I think it's fair to say, discipline currency. Is that correct?---Yes, and we would expect managers to only appoint casual staff who are people that they have confidence that they understand their area of expertise.

And your evidence is that that preparation time covers this requirement?---When you look at the people who are employed as casuals and sessionals, more than adequate."[74]

. . . .

"Okay. So you would agree that by force of this code, irrespective of your opinion or mine, that casual academic staff are required to maintain, I think it's fair to say, discipline currency. Is that correct?---Yes, and we would expect managers to only appoint casual staff who are people that they have confidence that they understand their area of expertise."[75]

81. Many casual academics are PhD students who will already be familiar with the disclipline:

"How many of those would generally be PhD students?---Nearly all of them. There are usually plenty of applicants and we can pick and choose."[76]

. . . .

"And that you are effectively oversubscribed and you pick and choose. Do you accept that you would pick and choose based upon those candidates who have the requisite skills, experience and knowledge of the subject area in which you're looking to appoint?---That is the major criterion but not the only criterion that I use and that my immediate colleagues use. I know what they do

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[73] Evidence of Camille Nurka, 2 November 2016, PN8860-PN8864
74 Evidence of Professor Garton, 30 August 2016, PN????
75 Evidence of Professor Garton, 30 August 2016, PN4777
76 Evidence of Michael Ross Dix, 3 November 2016, PN9331

because they do it in consultation with me."[77]

82. Preparation hours are encompassed within the casual rates and this already represents payment for the academic's skill currency:

"And is it fair to say that under the existing enterprise agreement, at least, there is no requirement upon the university at the moment to make any payment to casual academic staff for doing that work?---There are implicit preparation hours involved in the casual and sessional payment, to allow them to prepare for those classes."[78]

83. There are other factors that assist in maintaining discipline currency:

"I suppose I'm asking, it's not just that they're expected to turn up at the beginning of semester with discipline currency, you would expect them to maintain their discipline currency during semester, wouldn't you?---Yes, and if they're working as professionals we'd expect that that's something that would happen in any case but I mean, discipline currency, depending on which discipline you're in, doesn't necessarily evaporate over a space of about 12 weeks."[79]

. . . .

"Certainly there may well be developments in a discipline which are specifically relevant to a particular lecture or tutorial, and informing yourself about those developments could be considered part of preparation for that lecture or tutorial, is that right, but that - - -?---Well, and more broadly. I mean, if I were planning a lecture series I would be hopefully not leaving it till delivering the individual lecture but you would be thinking about where there's concepts at play, so, you know, certainly if you really want to make your teaching interesting it's really good to be able to refer to something that's come up in the week but you would also plan, I would think, around things that had happened in the last 12 to 18 months as examples to draw on, so in my view, at least, discipline currency would be something that you would be freshening up as part of lecture preparation, as much as anything else."[80]

. . . .

"And do you accept that in undertaking those activities it does contribute to your knowledge of

[77] Evidence of Michael Ross Dix, 3 November 2016, PN9360
[78] Evidence of Professor Garton, 30 August 2016, PN4780
[79] Evidence of Professor Vann, 31 August 2016, PN5374
[80] Evidence of Professor Vann, 31 August 2016, PN5393

the discipline?---Okay, so in developing a curriculum, so you're saying if I develop a curriculum myself, that that goes into me developing knowledge of my field?
In preparing for - - -?---Yes.
A tutorial or in preparing for a lecture, the activities that you undertake - - - ?---Yes.
Contribute to your knowledge of the discipline?---Yes"[81]

84. The Academic Award as it stands, already provides for the possibility of payment for these types of work. There is nothing to stop a casual academic from requesting payment for time spent either familiarizing themselves with university policy or in maintaining discipline currency under the Other required academic activity rate already specified in the Academic Award, if that work is genuinely required by their employer.

85. This would give the employer an opportunity to decide whether they wanted to require this work before a liability arose. The flip side of this is, of course, that the employer might when considering the cost of additional payment decide that they don't wish this extra work to be done.

86. This more sensible approach would also avoid a situation where a person is being paid to familiarize themselves with university policies or maintain discipline currency without doing so, which would be one possible consequence if the NTEU clause was inserted in the Academic Award.

87. It is also noted that, under the existing Academic Award, universities are already subject to the following requirements:

"14.1 Upon engagement, the employer must provide to the employee an instrument of engagement which stipulates the type of employment and informs the employee of the terms of engagement at the time of the appointment in relation to:
…
c) for casual employees the duties required, the number of hours required, the rate of pay for each class of duties required and a statement that any additional duties required during the term will be paid for;"[82]

[81] Evidence of Camille Nurka, 2 November 2016, PN8861-PN8864
[82] *Higher Education Industry – Academic Staff – Award 2010*

88. AHEIA submits that there is no problem with the operation of the BOOT when the existing provisions relating to academic payment are taken into account that would warrant a change such as that being suggested by the NTEU.

89. The system being proposed by the NTEU would also add to the regulatory burden on universities by requiring the establishment of systems to monitor and pay these payments.

90. There would also be difficulty for universities in policing the protection against "double dipping" by employees who claim such payments from more than one university at a time. Universities would inevitably only have the word of the employee concerned unless they were to set up incredibly complex inter-university systems to police this.

91. In terms of added costs, it is difficult to be specific. Both David Ward and Andrew Picouleau gave evidence about estimated costs at their universities, but both were subject to cross-examination in which it was suggested that their estimates were "based on inflated assumptions about how many staff might be eligible for the payments, and to what extent they would be eligible"[83]

92. On the other hand, the NTEU concedes in its Closing Submissions that "at the absolute and merely theoretical maximum would increase employment costs in respect of casual staff by 8%"[84]

[83] NTEU Closing Submissions, 3 February 2016, page 93, paragraph B52
[84] NTEU Closing Submissions, 3 February 2016, page 98, paragraph B61g.

C. AM2014/229, Item 11, Academic Salaries, Promotion and MSALs

93. The NTEU proposal, if granted, would allow for academic staff who do not have access to academic promotions processes to seek reclassification to a higher academic level based on the Minimum Standards for Academic Levels (MSALs) in the Academic Staff Award.

94. The evidence shows that all current Australian universities have an academic promotions process based on peer assessment of individual merit, through university policy rather than through regulation by either award or enterprise agreement. It also shows that other universities in other countries also have such a system. This does not appear to be in contention.

95. Examination of the selection of university promotion policies appended as Attachment A of the witness statement of Ken McAlpine, discloses a number of categories of academic staff who are not eligible to apply for promotion. These exemptions vary from university to university, but include the following:

    - academics who have not met a service requirement (usually 1 or 2 years)
    - academics who have not completed probation
    - academics who were unsuccessful in a recent promotions round (1 year or 2 years)
    - Scholarly Teaching Fellows
    - Ongoing Sessional Fellows
    - academics without a satisfactory performance assessment
    - academics on Leave without Pay for more than 12 months
    - academics who have resigned or are in the last year of their appointment
    - academics on a fixed-term contract of less than a specified length
    - academics appointed on a research grant where the grant does not provide for the cost of promotion
    - short term Academic Visitors
    - academics subject to disciplinary action

96. The NTEU, at C32 and C33 of its closing submissions, provides a list of exclusions from promotions policies which, while not being identical to the list above, is quite similar.

97. In cross-examination, Mr McAlpine indicated that the NTEU was not interested in providing access to reclassification based on the MSALs to all of these categories.

98. For instance, Mr McAlpine indicated he was not proposing that access to reclassification be given to employees undertaking a qualifying period:

> "You've attached, as attachment A, a number of policies and you can reference those if you need to, but that's not an uncommon eligibility requirement?---No. That's right.
>
> There is a minimum period; first two years, first three years?---Yes.
>
> Is it intended that such an employee have access to reclassification under the award?---No. I think you can say that there is a bona fide promotion system applicable to the employee under which the employee can progress their classification under the award. So what I'm talking about, I think, is exclusions, which means that I could be excluded simply because I - although I've been employed for 10 years, I've always been employed on one-year contracts and therefore I might be excluded by a provision that says I have to be on a contract of more than two years. It's certainly not the intention that things like a qualifying period - so, for example, many universities say if you apply for a promotion and you're unsuccessful, you can't apply for a promotion for another two years."[85]

99. Mr McAlpine also indicated that the NTEU was not proposing that reclassification apply to academics who had been unsuccessful with an application for promotion:

> "Yes?---It's certainly not our intention to exclude - to say that those people can stick their hand up and say, "Oh, my promotion application was unsuccessful. Therefore, I want to be reclassified."'"[86]
>
> . . . .
>
> "- - - there are exclusions for employees who are the subject of formal performance management?---Yes.

[85] Evidence of Ken McAlpine, 27 July 2016, PN1888-PN1890
[86] Evidence of Ken McAlpine, 27 July 2016, PN1891

One would assume that they don't have access to reclassification under the clause or - - -?---That's certainly our intention. That is a temporary ineligibility."[87]

100. Mr McAlpine seemed to indicate that the NTEU's main concern was with persons employed on fixed-term contracts of employment whose duties may have changed significantly over the period of that contract, even though they had agreed to the level of the fixed-term appointment only recently.

"If I'm on that fixed term contract say for two years ---?---Yes.
If I'm not eligibility, do I have access under your---?---Yes, you might."[88]

. . . .

"Notwithstanding they actually agreed at the inception point that they would accept the classification for two years when they started?---Yes, that's right. That would be like any other employee in any other industry. They may have been employed as a process worker rather than a trades assistant. If, six months into the employment, they discover in fact the work they're being required to do is that of a trades assistant, then they entitled to say, "Well, hang on. Under the award I'm entitled to this rate of pay. My letter of appointment might have said process worker, but I'm actually working at this level of work", so it's about the enforceability of the safety net.

I suggest that is quite different. Having done those disputes - we won't go down there. Let's just focus on the academic, right?---Yes.

Who has come in knowing that they are at a particular classification?---Yes.

They are engaged in that classification?---Yes.

You are saying that even though it's a two-year fixed term contract, they could apply under this clause to be reclassified?---Yes. They could apply, yes."[89]

101. This would apparently be the case even though a research grant on which the employee was engaged did not contain funding that would cover the cost of the reclassification:

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[87] Evidence of Ken McAlpine, 27 July 2016, PN1893-PN1894
[88] Evidence of Ken McAlpine, 27 July 2016, PN1901-PN1902
[89] Evidence of Ken McAlpine, 27 July 2016, PN1912-PN1916

"You would say notwithstanding the funding and that's why they're paid that classification, if they're otherwise able to be reclassified, you forget the funding and suddenly find the funding from somewhere else?---That's right. An employee should be classified according to the work value level of the work that they're performing."[90]

102. When asked, Mr McAlpine described this "a small problem"[91].

103. Clause 14.1 of the Academic Award states as follows:

"14.1 Upon engagement, the employer must provide to the employee an instrument of engagement which stipulates the type of employment and informs the employee of the terms of engagement at the time of the appointment in relation to:

(a) for employees other than casual employees, the classification level and salary of the employee on commencement of the employment, and the hours or the fraction of full-time hours to be worked;
(b) for a fixed-term employee, the term of the employment, the length and terms of any period of probation, and the circumstance(s) by reference to which the use of fixed-term contract for the type of employment has been decided for that employment;
…
(e) other main conditions of employment including the identity of the employer, or the documentary, or other recorded sources from which such conditions derive, and the duties and reporting relationships to apply upon appointment that can be ascertained."[92]

104. In relation to this clause, Mr McAlpine acknowledged that there was an obligation on employers to ensure that fixed-term employees were engaged at the correct classification upon appointment:

"It describes the MSALs and then in the second paragraph there, "An academic appointed to a particular level" - so if I pause there, do you accept that under the existing award regulation, upon appointment or engagement it's necessary for the staff member to be appointed to the particular

[90] Evidence of Ken McAlpine, 27 July 2016, PN1926
[91] Evidence of Ken McAlpine, 27July 2016, PN1922
[92] *Higher Education Industry – Academic Staff – Award 2010*

level that accords with the MSALs?---Yes. I think that's more probable than not. I don't think it has ever been tested, but I think that is a reasonable interpretation.

Yes. If I simplify that, the clause requires appointment to the correct classification upon appointment, but it doesn't have a particular mechanism in the award to progress through the classifications?---Yes, that's right.

That first obligation applies upon each engagement or appointment. Do you accept that?---Yes."[93]

105. AHEIA submits that the NTEU proposal should be rejected. It is both unnecessary and inappropriate given the history of the Academic Award in this respect, the history of the industry and the nature of academic work.

106. The MSALs were inserted into the Academic Award by consent on the basis that they weren't an appropriate basis for the reclassification of academic staff.

107. AHEIA reiterates its submission of 6 June 2016 in which it said:

"97. The NTEU argues that the present Academic Staff Award cannot operate as a proper award safety net without some change. AHEIA notes that this matter was not raised either at the making of the award or during the 2 year review of modern awards. Nor has it produced any evidence that the Award is deficient in this regard.

98. The issue of the MSALs, their inclusion in the academic award at the time, and their relationship to promotion and reclassification was dealt with extensively by the Australian Industrial Relations Commission in 2001. Central to the decision to include the MSALs in the award at that time was the rider that "MSALs will not be used as a basis for claims for reclassification by an employee".

99. Deputy President Duncan, in his Decision of 15 February 2001, 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

[93] Evidence of Ken McAlpine, 27 July 2016, PN1952-1954

merit promotion. There is a risk that this tension might be resolved in favour of the reclassification process."

and that:

"Further, the NTEU says, it would not support claims based simply on the basis of performance of duties only. This would be remedied by higher duties allowances."

100. 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.

101. The words were inserted into a predecessor of the Academic Award by agreement by all parties including the NTEU.

102. AHEIA submits that the Commission ought to take into account the decisions of Duncan DP above."[94]

[94] AHEIA Submissions of 6 June 2016,

108. It is a nonsense to suggest that universities might abandon or freeze their promotions schemes, as the NTEU does in its submissions. Professor Coaldrake indicated how unthinkable this is in his evidence:

> "You've certainly said in your statement that if a university stopped offering promotion, right at the end of paragraph 22, you said:
> *If a university abandoned its promotion process it would lose talented staff to other institutions.*
> You would also agree that that wouldn't be fair either?---Ig[sic] would not be a good idea.
> Well, it wouldn't be fair to the academic staff, to abandon the promotion system, would it?---No, it wouldn't be fair. It's an incentive. It's a vocation, people want to rise up in their fields. If they don't have an opportunity in one place they'll go to another, or they might."[95]

109. The NTEU clause would, in its present form, go well beyond the class of persons or situations with which the NTEU is apparently concerned.

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.

111. The NTEU proposal could lead to increased costs to universities if they have to pick up the difference between external research funding and a higher salary as a result of a reclassification.

112. Professor Coaldrake gave evidence as follows:

> "I think it is best always to benchmark your performance against what's going on nationally, what's going on in your discipline nationally and internationally. …Our promotional panels always have external representatives on them, and that helps us, in terms of national and international norms and benchmarks."[96]

113. In the event that a dispute arose over the classification of an academic based on the MSALs, it might fall to the Fair Work Commission to put itself in the position of an international discipline expert, which it would not be able to do properly.

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[95] Evidence of Professor Coaldrake, PN5639-PN5642
[96] Evidence of Professor Coaldrake, 31 August 2016, PN5624

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 who, under the current legislation, has responsibility:

> " (b) to monitor compliance with this Act and fair work instruments;
>
> (c) to inquire into, and investigate, any act or practice that may be contrary to this Act, a fair work instrument or a safety net contractual entitlement;
>
> (d) to commence proceedings in a court, or to make applications to FWA, to enforce this Act, fair work instruments and safety net contractual entitlements;"[97]

115. Furthermore, if the NTEU has problems with specific exclusions from academic promotion, it can raise them with universities in relation to their academic promotions policies. In effect, the NTEU is looking in the wrong place for a solution to what it acknowledges to be a "small problem".

[97] *Fair Work Act 2009*, s682

D. AM2014/229, Item 1, Drafting errors re casual Academic rates of pay

116. We refer to the NTEU submission at D3 (page 113) and note that the NTEU advises that it no longer pursues part (a) of its claim, that is any further change in relation to the "PhD point" other than those agreed in during the Exposure Draft process.

117. AHEIA does not oppose the granting of part (b) of the NTEU claim, as the definitions sought to be inserted appeared in the relevant pre-reform awards.

E. AM2014/230, Item 11, General staff working hours and overtime

118. The NTEU has effectively proposed two variations to the General Staff Award overtime provisions at Clause 21 of the modern award.

119. Firstly, it suggests replacing the words "Ordinary hours may be worked in a manner agreed over a four week cycle." With the words "The maximum ordinary hours of work, and the spread of hours during which (other than for shift workers) ordinary hours can be worked, shall be as set out in the following table, provided that ordinary hours may be worked in a manner agreed over a four week cycle."

120. The NTEU indicates in its Final Submissions that it "does not rely on any specific evidence as such to support this proposal"[98], but suggests that its wording would be more understandable by the "ordinary reader". AHEIA sees no problem with clarity of the existing wording, which was introduced at the time of the making of this modern award. There is no evidence of anyone having difficulty understanding the award as it is and this change is unnecessary and should be rejected.

121. The second, and more substantive, change proposed by the NTEU seeks the insertion of a new clause as follows:

> "23.2 The employer must take reasonable steps to ensure that employees are not performing work in excess of the ordinary hours of work or outside the ordinary hours as specified in clause 21 and 27, except where such work has been authorized and compensated in accordance with clauses 23, 24 or 26.
>
> 23.3 An employee at Level 6 or above who responds to or uses email or phone messaging beyond or outside the ordinary hours of work for brief periods, and only occasionally, to meet the needs of the employer, will not be deemed to be performing work beyond or outside the ordinary hours of work, provided that the sending or responding to such email messages at that time is not part of their assigned duties, contract or conditions employment, has not been directed and is in all other senses voluntary."

[98] NTEU Closing Submissions, 3 February 2016, page 119, paragraph E2.

122. There is no overtime clause in any other modern award in anything like these terms. The proposal represents a substantial change to the current clause in the general staff award. The NTEU is incorrect in characterizing this as an area in which "the need for change is self-evident" and asserting that the onus lies with the employer parties to demonstrate why the claim should not be granted (NTEU submissions, para 8). This is a significant change, and the NTEU, as the party proposing the change, is required to make its case, including with probative evidence. It has failed to do so.

123. The NTEU brought two forms of evidence in support of this claim: survey evidence and evidence from individuals.

Survey evidence

124. In relation to survey evidence, much reliance was placed on the research conducted by Professor Strachan. Under cross-examination, this witness agreed that her survey included general staff who were not entitled to overtime or TOIL, and that these staff were included in the survey question about uncompensated extra hours and were not disaggregated:

> My friend took you in evidence-in-chief, the questions she asked you this morning, to essentially uncompensated extra hours?---Yes, that's right.
>
> Are you aware that in the vast majority of enterprise agreements and in the industry award, that HEW 8, 9 and 10 do not have an entitlement to paid overtime?---Yes, I am. I thought HEW 8 and 9 had an entitlement to time off in lieu.
>
> It varies across the sector, but - - - ?---Varies across the sector, yes.
>
> Did you seek to exclude HEW 8, 9 and 10 from your survey question or qualify it in any way?---No. We asked everybody all of those questions. I have, however, data we've worked out by their answers by level there, and so it - I have it in my bag. I can't remember it all in my head, but we have done the cross-tabulation between level and compensation.
>
> Yes?---So I can provide you with that precise detail actually. I know from memory that, was it, 32 or 34 per cent, around that, of levels 1, 2, 3 and 4 said they received no compensation and

being the lowest group of - like, lowest-paid employees, they are definitely entitled to that, so it was just in excess of 30 per cent of that group said that they had no entitlement - they had - did not receive any compensation for work in excess - of excess set hours.

Yes?---You know? But I have actually the exact cross-tab details. I can actually give you, if I can look in my bag?

We'll stick with the statement for the moment?---Right. (PN4418-24)

125. There is thus no evidence before the Commission that 67% - or even 30% - of staff who are entitled to overtime or TOIL are being denied this. In fact, the evidence shows otherwise.

126. Not one of the witnesses put forward by the NTEU gave **direct** evidence that they worked uncompensated hours, with the exception of Clark Holloway (no longer employed by the University) who referred to a single instance in which he had been sent on an international trip (PN3666).

127. The evidence of one NTEU witness – Andrew Giles – regarding his hours worked and compensation as a general staff member was irrelevant as this staff member was classified at HEW 10 and not eligible either for overtime or TOIL.

128. The evidence of witnesses for the NTEU and the employers demonstrated that:

- Many staff are employed under flexible working arrangements under enterprise agreements, and this suits them
- Universities do pay overtime and/or provide TOIL; and overtime is payable to staff who work under flexible arrangements as well as those who do not
- Managers are generally aware of their obligations in regard to overtime/TOIL

129. The NTEU's own witnesses Anthony Wilkes, Steve Adams, Karen Ford, Clark Holloway and Andrea Brown gave evidence to the effect that they had the ability to set their own hours and that this was beneficial to them.

130. NTEU witness Anthony Wilkes relevantly gave the following evidence:

"Obviously what comes through your statement is it fair to say you like your job and like where you're employed?---Yes, definitely.

In your statement is it fair to say you predominantly manage your own time?---Yes.

That's your preference?---Yes, that was my preference. (PN788-90)

….

This is the system that you have used, when you have worked additional hours, this is the system that you have used to ensure that you receive a period of TOIL or time off in-lieu?---Yes, yes. There's all formulas behind the scenes that calculate everything for me and I run by that.

Is it fair to say that from your perspective the systems work well?---I believe so, yes

…...

"So is it again fair to say that you were working extra hours at this time but at this time you weren't claiming TOIL or claiming overtime, because you were concerned that some of the things that you like most about doing your job, some of the anatomical work would actually be reduced to bring your hours down?---I wasn't - it wasn't that I wasn't claiming TOIL. I was still taking time off in lieu but somebody had mentioned to me at the time have I ever pushed to be paid the overtime, and at that point in time that was my fear. That they would say well, perhaps we can remove some of these duties from your job title. But I've since spoken to my supervisor about two or three years ago and she said this was an irrational fear anyway because it's heavily embedded in the role of the anatomy technician preparatory work.

So the system that you've been applying of accessing TOIL, you've given evidence that the system was working for you. Is it your preference to take TOIL rather than to access the paid overtime?---Yes, for me personally I absolutely prefer the TOIL. I like the flexibility it affords me."[99]

…

[99] Evidence of Andrew Wilkes, 22 July 2016, PN831-PN832

"Would you benefit from being directed specifically to go home or to not work through your lunchbreak. Is that something you'd prefer to see happen?---Not really, no ….. The lunch time, that is - that is 100 per cent a choice on my part"[100]

….

"Based upon all the evidence - based upon all the evidence that you've given, Mr Wilkes, do you see any need to change your arrangements in relation to working additional hours?---I don't, no. I like what I have."[101]

131. NTEU witness Steve Adams' evidence relevantly included the following:

"But you accept that as a literal statement the university doesn't record, quantify and measure every aspect of your work life? ……

Your supervisor doesn't sit there and determine exactly when you turn up to work and exactly when you go home at the end of the day?---That is correct.

And to the extent that you were to record your hours, you would record those as the staff member?---It is more of an understanding than recording them."[102]

"Can I just ask, first of all, in terms of you taking an hour or two off how does that work? Do you seek approval, or is it more an understanding that you self-manage those sorts of issues?---We're not going to disappear without some sort of approval, so yes, I would talk to my direct line manager and speak to him and just say, you know, I might be coming in late because I have a matter, or leaving early, and naturally it wouldn't be happening during that peak period, of course, because we don't have the time to do that sort of thing."[103]

. . .

"Are you recording your hours?---My normal hours of work?

No, the additional hours?---No, I don't, but I've always considered it to be fairly obvious. I'm

[100] Evidence of Andrew Wilkes, 22 July 2016,, PN836
[101] Evidence of Andrew Wilkes, 22 July 2016, PN847
[102] Evidence of Steve Adams, 28 July 2016, PN2488-PN2490
[103] Evidence of Steve Adams, 28 July 2016, PN2511

required to put my timetable on my Outlook calendar, so my supervisor can see plainly that I have lab classes from say 8 to 5.30, so it's patently obvious that they're my - well that's the minimum of my hours for that day.

All right, but if you come back to my question, you're not recording your additional hours?---On a bit of paper or something? No.

So to the extent that your statement goes to some suggestion that you're being denied TOIL - or let me break it down. Are you making a point in your statement that you're being denied TOIL?---I think my statement is more that we just don't access it. We don't use it.

But you'd accept that under 57.5 that (indistinct) expressed as an obligation, but -

The staff member must document the hours worked, provide these details to their supervisor within five working days -

but to the extent that you wanted to claim TOIL you could do that in compliance with clause 57.5?---In my view, by my supervisors giving me a timetable which outlines when I'm going to be running labs, there's an implicit - they know what I'm doing during that period, that week, so I don't record it or feel the need to record those excess hours, because it's there in writing in my timetable."[104]

132. NTEU witness Karen Ford's evidence relevantly included the following:

"So it's true, isn't it, if you work under the flexible working hours system, you're not directed to come in at a specific time each day, as long as you're there for the core hours?---Correct."[105]

…..

"So would you agree that there are benefits in staff of having flexible working hours arrangements?---Yes."[106]

….

[104] Evidence of Steve Adams, 28 July 2016, PN2514-PN2520
[105] Evidence of Karen Ford, 29 August 2016, PN3456
[106] Evidence of Karen Ford, 29 August 2016, PN3468

"The overall operation of the flexi time arrangement is at all times subject to departmental convenience. And a department may for a specific reason request a staff member to be placed on standard hours.

Again, do you agree that indicates that a flexi time arrangement is something that is desirable for staff?---Yes."[107] (PN3479-80)

….

"And does Professor Rozenfeld direct you to come to work at a particular time each day?---No.

No. And you're not directed to have lunch at a particular time or a particular duration of the lunch break?---No.

No. And under the flexi time keeping system lunch is the only break that you have to record, isn't it?---Correct.

Okay. So if you have a coffee break you don't have to record that?---No."[108]

….

"And it's the case, as I understand your evidence including in cross-examination, that to work under the flexi time scheme that's an agreed situation? The staff member has to agree to that or indeed seek it? Do you accept that?---Yes, but the role is a the roles are a flexi time role.

Yes. And there's standard hours roles and the university can direct people to work standard hours?---They can.

And if you haven't agreed a flexi time role under the flexi time scheme you work those standard hours?---Mm-hm."[109]

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[107] Evidence of Karen Ford, 29 August 2016, PN3479-3480
[108] Evidence of Karen Ford, 29 August 2016, PN3483-PN3486
[109] Evidence of Karen Ford, 29 August 2016, PN3537-PN3539

….

"Ms Ford, you were asked some questions about the way that your starting hours, your starting time varies?---Mm-hm.

And you agreed that you hadn't been directed to start work at a particular time?---Mm-hm.

What factors do influence when you start work?---Parking on campus, and it's quiet. There's no students on campus at that time, and able to fully concentrate on my workload at that time of morning."[110]

133. NTEU witness Clark Holloway relevantly gave the following evidence:

"And in both of your statements you refer to the flex time arrangements at the university. So you yourself were on a flex time arrangement, were you?---Generally I was on an agreement with my direct manager whereby I would work 35 hours a week but not use the employee Web Kiosk timekeeping system because it didn't allow certain hours to be input.

So were you on a flexi time arrangement system whereby there were core hours that you had to work but you could choose the time that you actually started and finished?---I was on a like I said, I was on an agreement with my direct manager whereby I got the job done, and worked whatever hours necessary to get the job done.

So you weren't directed to come in at a particular time or to leave at a particular time?---I was never directed to come in or leave at a particular time, no."[111]

….

"And it's fair to say that the substance of the evidence that you're giving to these proceedings and this Commission relates to the flexi time recording system, and in your view, the inadequacies and limitations in that system?---That's correct."[112]

---

[110] Evidence of Karen Ford, 29 August 2016, PN3555-PN3557
[111] Evidence of Clark Holloway, 29 August 2016, PN363-PN365
[112] Evidence of Clark Holloway, 29 August 2016, PN3697

….

"And you approached your manager and put in place an arrangement that enabled you to capture your time you were actually working?---That's correct."[113]

134. NTEU witness Andrea Brown relevantly gave evidence that she was aware that Victoria University had a system of flexible working arrangements on request, and that both she and other staff members had utilised this:

"I'm going to hand you a copy of the policy. So you were aware of that policy?---That's right.

On the first page under section 1, purpose and objectives, the second dot point in the purpose was:

To promote and encourage flexible work arrangements to enable staff to successfully combine their life, family and personal responsibilities with work commitments.

Without asking you to reveal anything that's confidential or ask you a question you don't know, were you aware that some of your colleagues working alongside you in the equity and diversity team had flexible working arrangements in place. You might not have known what the arrangements were for other staff?---No, I'm certainly aware of one staff member I believe had flexibility in place in terms of a capacity to work from home one day a week, for example."[114]

….

"After the arrangement of taking the single days of annual leave ceased, what sort of arrangement did you then go onto regarding flexible working hours?---Well I certainly didn't have an annual leave day per week, that's right. That arrangement did cease. I believe for a while there, from memory, I was leaving the university or leaving my workplace one afternoon per week, which fell on a Monday to do school pick up, and then I would work from home.

You didn't have to enter into a formal arrangement with your supervisor in order to do that?---Well formal to the extent that it needed to be thoroughly discussed and it needed to be

[113] Evidence of Clark Holloway, 29 August 2016, PN3701
[114] Evidence of Andrea Brown, 29 August 2016, PN3767-PN3770

approved, not only by my direct supervisor but it would have needed to be approved by my supervisor's manager. So I guess in part it depends on how one might define a formal agreement, but it was formally arranged to that extent."[115]

135. In summary, the above evidence demonstrates that flexible working arrangements for general staff at universities are widespread, and that this is valued by staff, and greatly to their benefit.

136. To the extent that the NTEU is correct in asserting that "the keeping of time records of actual time worked is not widespread in universities for general staff"[116] and that "it is manifestly obvious that [universities] could, at relatively low cost, require all general staff to record their working hours"[117], it would seem that this would be resisted by staff.

137. The evidence also disclosed that universities do pay overtime and/or provide TOIL, and that this is available even where the staff member has elected to work flexible arrangements.

138. As noted above, NTEU witness Steve Adams does have access to TOIL. He also gave evidence that as a supervisor he enables his staff to access both TOIL and overtime:

"You say at 27 "with my own staff", and I understand you supervise three TOs - - -?---Sorry, what - - -

So 27?---Yes.

You're flexible with their TOIL and you remind them to take it, however, they tend to be worried about being visible at work as this is entrenched in the culture. Do you record their hours?---What I have done recently is one of my colleagues, I advised them because they were racking up TOIL to take overtime, and they were eligible for overtime, so they've taken overtime instead of TOIL.

And you approved that?---Yes - well overtime is in the Themis system, so I - - -

[115] Evidence of Andrea Brown, 29 August 2016, PN3780-PN3781
[116] NTEU Closing Submissions, 3 February 2016, page 127
[117] NTEU Closing Submissions, 3 February 2016, page 134

COMMISSIONER JOHNS: How is it recorded? How do you know that?---How do I know? Look, a lot of the time I'm probably there myself so I do know, but also it's timetabling; so if there are lab's say going past 6 o'clock I would, whilst I say I might not be there for the laboratory I would soon know if my staff weren't there because the academics would raise hell, so I would soon know, and students as well; there's fairly direct feedback if something doesn't work.

But then how do you add it up?---Well that's just a - I ask them, especially with the overtime, to sort of log it as overtime and fill it in. With the overtime in Themis it's quite precise. There's the hours worked, dates and all the rest of it, and electronically it bounces to myself for supervision approval, and it goes I think also to my line manager as well.

MR PILL: Have you ever refused their overtime when it's bounced to you through the system?---No, I have not."[118]

139. NTEU witness Karen Ford gave evidence that although she works a flexible arrangement, she also has access to overtime:

"You say, at paragraph 8, that no overtime is paid under a flexible working hours arrangement. Could I take you to page 5 of your attachment one?---Yes.

And half-way down the page at paragraph 28 it states that:

All hours worked outside the band with the automatically overtime if prior approval has been given.

And at paragraph 25 it says that:

Additional hours worked within the band with the automatically part of a staff members' flexi time credit, however if a staff member has hours in excess of their regular hours of work, and such hours have been approved as overtime, then they should be deducted from the flexi time total and paid as overtime by the submission of an overtime claim form.

[118] Evidence of Steve Adams, 28 July 2016, PN2527-PN2533

?---Yes.

So it is possible to be paid overtime notwithstanding that you're under a flexible working arrangement?---True."[119]

…

"Thank you. Now, it's the case, isn't it, that you're responsible for maintaining your own time record?---Yes. That's correct.

And there is a process for seeking approval and claiming overtime at the University of Wollongong?---Yes, there is.
And that can include seeking verbal approval or written approval?---Yes

And you can submit an overtime form?---Yes.

And there's circumstances in which you've done that?---Verbal and written, yes.

Yes. And has your overtime been approved?---I haven't I yes, I've put in for overtime twice that I can recollect.

Yes?---And it was approved."[120]

140. NTEU witness Andrea Brown gave evidence that as a HEW 8 staff member she had access to TOIL at Victoria University, and was unable to deny that general staff at Victoria University are paid overtime:

"Do you accept this proposition, Ms Brown, that as a manager managing an area that where a staff member comes to you and asks you about working additional hours, if the manager has to - wishes to explore that with you the sorts of issues that you've identified are reasonable and appropriate issues to discuss?---Well, to an extent but my experience told me at the time that that level of scrutiny, that level of questioning and why can't you do it at this time or that time or

[119] Evidence of Karen Ford, 29 August 2016, PN3446-PN3452
[120] Evidence of Karen Ford, 29 August 2016, PN3546-PN3552

some other time, and why can't you fit it in here or there, or something along those lines, for example, was at times very intimidating and to me essentially the message was don't come back and do this again. Don't come back and do this anymore. The implicit - at least implicit message was we don't want to approve additional hours so you will then be seeking approval for TOIL. You're expected to manage your workload within your existing hours, that's what's expected of you at that level.

Ms Brown, you've just given evidence it was implicit. Can I take it at least that the evidence that you have given about intimidation, about those sorts of issues, that's not an expressed statement that's been made to you. You weren't told that you can't raise these issues or discuss TOIL. Do you accept that?---I accept that I don't recall being told explicitly you cannot raise that subject.

It's also the case, isn't it, that contrary to your statement at paragraph 23, that the university does pay overtime and provide TOIL to its employees?---I would suggest that it's extremely rare that the university pays paid overtime to all its general staff where it's required.

Are you in a position to tell the Commission how much paid overtime Victoria University paid to its professional staff?---No, I'm not in a position to be clear about that and I know that there would be some employees in the university at some point in time, probably even today on the odd occasion may receive paid overtime for the hours that they do.

So you're not aware, Ms Brown, that the university pays in the millions of dollars for its overtime?---I wouldn't be aware that they pay millions of dollars of paid overtime, no.

Nor would you be aware that they paid in excess of 1300 hours of TOIL over say 2013 to 2015?---I haven't got access to those figures, no."[121]

141. Indeed, NTEU witness Emeritus Professor Michael Hamel-Green, who held senior positions at Victoria University for many years, gave the following evidence that:

"So in relation to the more junior staff up to HEW 7, you say that they did receive overtime?---Up to HEW 6, yes, yes. Overtime up to HEW 6, yes. So long as they applied for the

[121] Evidence of Andrea Brown, 29 August 2016, PN3859-3864

overtime in advance. I mean there was a strong esprit de corps in the whole faculty at the time I was the dean and there was a general willingness to work overtime but in the case of junior staff, there was an effort to compensate for that, yes."[122]

142. AHEIA witness Sue Thomas gave evidence that at the University of Wollongong, eligible general staff are entitled to overtime or TOIL:

"What systems do you have in place to ensure that such staff are compensated, either through overtime or TOIL or flex time?---Well we have a number of policies as you can see that provide that opportunity for staff to have that time recognised."[123]

143. This includes staff who choose to work under flexible arrangements:

"You indicated in relation to a question about the hours of work worked by professional staff, that they are able to make claims for payment for overtime or TOIL. How do they make such claims?---There are forms that can be completed, so in the case of overtime a form for those hours and of course that needs to be prior approval from a supervisor. If all else fails they could email through and that would be verified with the supervisor.

A person who is on a flexible working hours arrangement is entitled nevertheless to claim overtime in certain circumstances. That's correct, isn't it?---That is correct, yes."[124]

144. David Ward, witness on behalf of the Group of Eight Universities, gave the following evidence in relation to arrangements at the University of New South Wales:

"Do you have any idea of what proportion of your professional staff are on flextime arrangements?---I don't have a specific number. I mean I would say that it's the large majority of the university's professional staff, at levels 1 to 9 would have access to such arrangements.

The remainder presumably have access variably to paid overtime and TOIL arrangements?---That's right. I mean as do the people who work flexitime as well if they are required to work the additional hours.

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[122] Evidence of Professor Hamel-Green, 1 September 2016, PN6253
[123] Evidence of Sue Thomas, 29 August 2016, PN4202
[124] Evidence of Sue Thomas, 29 August 2016,PN4266-PN4267

When you say "additional hours" do you mean hours outside the span?---That's right.

Because you can work additional hours inside the flex span and get no overtime or TOIL penalties, is that right, you just get flextime?---Yes, I mean - so it can be not as straightforward as an either/or - well, I suppose it is either/or - so in some circumstances where the university might direct a person to work and recognise that there won't be an opportunity to take - you know, as part of a flexitime arrangement then overtime would be applied."[125]

145. This witness also gave evidence that 500 staff at the University of New South Wales claimed overtime in 2015.

146. David Ward also gave evidence that supervisors at the University of New South Wales are aware of their obligations to ensure that eligible general staff are taking flextime, TOIL or overtime:

"You have talked about supervisors being instructed or advised to ensure people are taking their flexitime and to try to avoid the circumstance described in 23.2(c) occurring, does UNSW also instruct its supervisors about how to ensure that overtime and TOIL hours are claimed?---Yes, I mean we give that information to supervisors and it is also obviously part of the day-to-day advice that HR staff provide to supervisors. [126]

147. The NTEU's own evidence is that it intends to roll this claim over into enterprise agreements if it is granted at award level:

"Given the relationship between the salary levels and the other conditions of employment, some of the claims we would – some of the claims I think we would seek to fairly uniformly roll across. I think the general staff hours claim, which we see really as a system of making the safety net enforceable in a practical way we would."[127]

148. The proposed variation is vague and imprecise, rather than "simple and easy to understand". As a result there could be disputation about "reasonable steps" and other aspects of the clause proposed by the NTEU.

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[125] Evidence of David Ward, 2 November 2016, PN9144-PN9147
[126] Evidence of David Ward, 2 November 2016, PN9149
[127] Evidence of Ken McAlpine, 27 July 2016, PN1052

149. Such a provision does not fall within the matters that may be included in modern awards. Section 139(1)(c) of the *Fair Work Act 2009* covers "arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours" and Section 139(1)(d) refers to "overtime rates". The provision proposed by the NTEU falls well outside these paramters and is not covered by any other permitted modern award matter. Nor is it, as the NTEU claims, "incidental" to allowable modern award matters. It is not designed to give effect to such matters as overtime payment or TOIL, rather it would impose an entirely different obligation on employers.

150. Instead, the NTEU proposal is actually about the administrative processes it would require of universities.

151. The General Staff Award already contains provisions for overtime pay and the granting of Time Off in Lieu of Overtime (TOIL). It is reasonable to expect employees to use the existing award provisions.

152. Together with section 62 of the *Fair Work Act 2009*, which would allow any employee to reject unreasonable additional hours, the existing scheme provides adequate protection for employees.

153. By the NTEU's own admission, if this claim were granted, it would increase the regulatory burden on employers, and therefore is inconsistent with the modern awards principle (s134(1)(f)).

154. Further, the NTEU seems concerned that the award scheme "should not provide an employer with the opportunity for unjust benefit"[128] moreso than being concerned with the entitlements of employees. This is not the role of a modern award.

155. Given this, and the novelty of the scheme, if the NTEU wants to pursue this claim it would be more appropriate for it to do so in enterprise bargaining. The Modern Award is not the place to be addressing what the NTEU, correctly or otherwise, terms a matter of

[128] NTEU Closing Submissions, 3 February 2016, page 142, paragraph E35.

"widespread culture".[129] The modern award already provides an appropriate regime for compensation for overtime by either payment or TOIL for eligible staff, and the NTEU has not established that it needs to be amended in the manner sought.

156. Accordingly, AHEIA submits that this claim should be rejected.

[129] NTEU Closing Submissions, 3 February 2016, page 132

F. AM2014/230, Item 8, Link Wages to Classifications

157. AHEIA makes no submissions in relation to this claim.

G. AM2014/230, Item 13, Minor updates to Classification Definitions

158. No longer pursued by the NTEU.

H. AM2014/229, Item 5, Bond University Staff Association Proposal

159. No longer being pursued by BUASA.

I. AM2014/229, Item 6 & /230 Item 5 “Full-time” or “continuing” employment

160. Matter resolved in Exposure Draft process.

J. AM2014/229, Item 6 & /230 Item 12, ICT Allowance

161. The NTEU is seeking the inclusion of a new allowance in both the Academic and General Staff Awards called an "Information Technology Allowance" if the employee is required to use a telephone connection, email access, an internet connection or any like data connection other than at the workplace. The value of the allowance is expressed to be "reimbursement of the actual cost incurred by the employee, up to the value of the monthly subscription service cost of the cheapest service package ... that is readily available". It is not payable if the employer provides this service to the employee at no cost.

162. There is no such allowance currently in either of the modern awards. The claim represents a significant amendment to the awards.

163. Further, what is being sought by the claim is at odds with the regime for payment of ICT or like allowances in those modern awards that do provide for such allowances, which is a reimbursement regime. Here, what is being sought is upfront payment by the employer of an allowance where the staff member is "required by the nature of their work, including by custom and practice" to use ICT services for work purposes other than at the workplace.

164. The onus is on the NTEU as applicant, to make a substantive case for change. The NTEU is incorrect at asserting (paragraph 8, page 5 of its submissions) that the need for change is "self-evident" and the onus is on the employer parties to justify why such change should not be made.

165. While academic staff enjoy flexibility about where they choose to work more than most other employees in Australia, this by no means leads to the conclusion that it is "inherent" in the nature of this work that a large proportion of it be done from the staff member's home.

166. The evidence before the Commission indicates that Universities generally provide extensive, including up to 24-hour, access to university offices and libraries (see, for example, the witness statement of David Ward, at Paragraph 26). This was confirmed by

oral evidence given by witnesses called by the NTEU, with Michael Dix's evidence included the following interaction:

"Just turning to what you've said about ICT and the use of your personal IT, you say that it's not possible to perform all of your work during office hours. By office hours, do you mean 9 to 5, Monday to Friday?---I use that definition - I don't believe in office hours - but I use that definition, yes.

And you have access to your office outside of standard office hours?---I do."[130]

167. Even where the nature of academic work might require a space in which the staff member can engage in "quiet contemplation", this can be achieved on campus, as noted by Professor Vann:

"But time for quiet contemplation isn't always available on campus. It might be easier found in another setting?---that can be the case. Sometimes it can be very effectively found on campus. I used to like the library, myself"[131] (PN5408)

168. Professor Herberstein also gave evidence of an example in which finding a quiet place on campus had allowed staff to concentrate on work without interruption:

"Thank you. Now, can I take you to paragraph 14 near the end of your statement - in fact in the last sentence. You say:

We have also instigated writing retreats for staff during their not teaching semester, where they work off campus for a period of time with the express aim of finishing off a piece of writing.

Why do you adopt that practice?---It was suggested during one of our staff meetings that this could be a productive way forward. It was discussed at the staff meeting that we should trial it. It's really an odd thing, because they could stay at home and write their papers, anyway. We wouldn't have to do this as formal as that, but I think by calling it a writing retreat it gives the staying away from - or feeling obliged to come to work and hence be interrupted on a daily

[130] Evidence of Dr Michael Dix, 3 November 2016, PN9337-PN9338
[131] Evidence of Professor Vann, 31 August 2016, PN5408

basis. It gives it a more formal commitment to the task. It also indicates, I think, that the department values staff concentrating on writing their papers and finishing their papers, and that the department is supporting them if they want to dedicate time away from the department to finish off a paper. It has been received very positively by our staff and I think as long as it helps them finish their papers - I think we should be retain it."[132]

169. The evidence also disclosed that Universities usually provide, free of charge, a range of ICT equipment to enable staff to perform their work, and it is largely a matter of employee choice as to whether to use the University's facilities or their own. This includes casual academic staff.

170. Dr Michael Dix gave evidence that he was aware that he had the option of using University ICT equipment rather than his own:

"Are you aware that you can borrow a university laptop if you happen to be working away from campus?---I am aware.

And that's either from the faculty or the library?---Yes, I'm aware.

Are you aware that if you've got an ongoing need to do such work you can actually be given a laptop by the university?---I am aware of that possibility. I've not investigated it."[133]

171. Dr Camille Nurka's evidence was as follows:

"Now nevertheless, it is the case that UNSW, they had available to you, standard office based equipment, including computer equipment?---Yes.

There were work spaces specifically available for sessional staff?---Shared work spaces. Yes, shared work spaces but there's a number of desks and a number of computers?---Yes.

And you could also essentially be allocated one, for example, across several days of the week – "Dr Nurka, you have this work station, Monday, Tuesday, Wednesday", are you aware of that?---Nope.

[132] Evidence of Professor Herberstein, date, PN6911-PN6913
[133] Evidence of Dr Michael Dix, 3 November 2016, PN9341-PN9343

Okay. So you're not aware of it? Do you disagree that that was available to you, or you just don't know?---No, I just didn't know. I don't disagree.

No? And the university provided stationary and general office supplies?---Yes. Yes."[134]

and

"Now as I read your evidence, given the geography of where you were, your preference was generally to work from home?---Yes.

Whilst you obviously accept that you replied for and were appointed to a position at the UNSW – was it the Kensington Campus, is that where you were?---Yes. Yes."[135]

172. Dr Caron Dann acknowledged that as a sessional staff member she has access to University ICT equipment, including out of hours access to University systems:

"Now, I took you earlier to the enterprise agreement, and in particular clause 16 and parts of that clause, and consistent with that clause, is it the case that you do have access to computer facilities at the university?---There is a bank of computers in a sessional room.

Yes. There's also computers available in the various libraries, for example?---Yes. I have a tablet computer. It wouldn't be efficient to be doing that. Especially at Caulfield, with all the work going on at the moment, and you can hardly get a seat.

Nevertheless there is access both at Caulfield and Clayton campus where you work?---Access to a computer, yes.

To computers?---Yes.

And to the extent that you need to save or transfer material, that's readily achievable these days with a USB or a hard drive?---Yes."[136]

and

[134] Evidence of Dr Camille Nurka, 2 November 2016, PN8904-PN8908
[135] Evidence of Dr Camille Nurka, 2 November 2016, PN809-PN810
[136] Evidence of Dr Caron Dann, date, PN 8459-PN8462

"You're provided with out of hours access and use of IT systems and software?---Yes, I presume so.

To the extent that you needed any particular software, you're able to seek that through a process at Monash University?---Mm."[137]

173. Dr Dann was not familiar with the policy at her University providing for ICT equipment and facilities to staff, although it was clear that such a policy exists:

"Now, Monash University - the document that I've handed you, it's got conduct and compliance with procedure, provision of university IT equipment and communication facilities to staff. Are you aware that this policy or procedure exists?---No. All right. Are you aware that there's capacity for staff to seek provision of IT facilities and equipment?---No.

Laptops and the like. You're not aware of that?---But when they refer to staff, do they mean sessional staff?

Well, the document speaks for itself. It doesn't exclude sessional staff. But you're not familiar with the policy?---No."[138]

174. Dr Linda Kirkman acknowledged that as a casual staff member she was not prevented from attending the University campus to use ICT facilities on days she was not required to teach, and that rather than work from home using her own ICT equipment she had after-hours access to a University library:

"At paragraph 47 you refer to the fact that you're not required to be on campus unless you're teaching. So it's more practical to work at home. But as a sessional you weren't prevented from coming in to the University on a day when you weren't scheduled to work?---Most of the time, no. Never prevented. I have on occasion had comments from, "Why are you here?" because I was there to use the facilities.

What facilities were you using at that time?---That would be the University internet, and

[137] Evidence of Dr Caron Dann, date, PN8466-PN8467
[138] Evidence of Dr Caron Dann, date, PN8472-PN8474

computers, and printing facilities."[139]

and

"There is a library at the Bendigo campus?---Yes.

Unlike the building that you referred to where you sat outside with your Wi-Fi, the library at the Bendigo campus is open well beyond 5 pm, isn't it?---Longer in term time than outside of term time, but yes. As a sessional staff member I did have afterhours access to the building, so if I were to travel to the main Bendigo campus then I could be there 24/7 if I chose."[140]

175. The problems with such a clause in situations in which the staff member has more than one employer and/or is also using their home ICT equipment to run their own business were also exposed by the evidence. Dr Camille Nurka gave evidence as follows:

"Now at 42 you say, "As a casual employee it is not uncommon to have concurrent employment with two or more employers. It is essential to use my home PC or laptop in order to ensure that I have ready access to all my work"?---Yes, because it's centralised.

Yes. But you accept – we've already heard evidence that you have another online copy editing business?---Yes.

Do you accept that you would have had a computer anyway, and you indeed have a computer, anyway?---Yes.

And internet?---Yes.

And indeed, to run what on its face, is effectively an online portal for clients or potential customers, you would need quality computer equipment and internet access?---Yes. And do you claim in your tax return, tax deductions for home office expenses?---Yes.

And where you have these concurrent employments with more than two employers, given the proceedings that we've got here, which of your employers do you say should be paying for your

[139] Evidence of Dr Linda Kirkman, PN8618-PN8619
[140] Evidence of Dr Linda Kirkman, 8621-PN8622

home internet?---Yes, I see your point. That's a quandary and I don't know how I would address that."[141]

176. The clause would also be unworkable because it is unclear. It would be likely to lead to disputes about what is meant by "required by the nature of the work, including by custom and practice".

177. Further, there are likely to be disputes over the meaning of the words: "the cheapest service package (sufficient to provide the level of data connection required for the performance of the work). The clause cannot be said to be "simple and easy to understand" (s134(1)(g)).

178. The evidence demonstrates that it would not be practicable to direct staff, especially academic staff, not to use their own ICT equipment for work purposes (and therefore presumably to work only on campus, not at home). Dr Camille Nurka gave evidence as follows:

"Dr Nurka, you voted with your feet, effectively, didn't you?---Yes. I'm kind of like, yes, like – I do like working flexibly from home but the office is also appealing for other reasons.

Well, how much time did you spend in the office at UNSW?---Probably not that much time. It would have been, you know, what I was required to for student consultations."[142]

179. It is also relevant that given that it is possible to claim home ICT use as a tax deduction, and evidence from many witnesses was that they either do so (Professor Phil Andrews[143], Professor Michael Leach[144] and Dr Camille Nurka[145], or are aware that they have the option to do so (Dr Michael Dix[146]).

180. The application should be rejected because it is unnecessary, it is not "simple and easy to understand" and would add to the regulatory burden on universities.

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[141] Evidence of Dr Camille Nurka, 2 November 2016, PN8911-PN8917
[142] Evidence of Dr Camille Nurka, 2 November 2016, PN8923-PN8924
[143] Evidence of Professor Andrews, 29 July 2016, PN3311
[144] Evidence of Professor Leach, PN6400
[145] Evidence of Dr Camille Nurka, 2 November 2016, PN8916
[146] Evidence of Dr Michael Dix, 3 November 2016, PN9345-9346

181. In the “real world” that exists in the higher education sector, whereby actual terms and conditions are set by enterprise agreements, the proposed variation would be of no effect unless it was flowed on in enterprise bargaining. It would then significantly add to employment costs in the sector (s 134(1)(f)).

K. AM2014/229, Item 1 change “context” to “content”

182. AHEIA makes no submissions in relation to this claim.

L. AM2014/229, Item 2 and /230 Item 2 Medical Research Institutes

183. AHEIA has no further submissions on this issue.

M. AM2014/229, Item 9, Academic Casual Conversion

184. It is not clear what the NTEU means by ‘’this claim will be scheduled and addressed after the conclusion of the common issue – AM2014/197’’. The NTEU has decided not to pursue the claim under AM2014/197, and did not file any submissions or evidence in that matter. It is unclear whether the NTEU is foreshadowing a future application outside the 4-yearly review under s 157 of the Fair Work Act 2009. Any application to vary the Academic Staff Award to provide for the conversion of certain academic casual work would be strongly opposed by AHEIA. (NB this is from AHEIA’s previous submissions).

II.COMMON CLAIMS REFERRED TO THIS FULL BENCH

185. This Full Bench has had referred to it the “common claims” in relation to Annual Leave (AM14/47) and Award Flexibility (TOIL) (AM2104/300) as they relate to the two higher education awards.

186. AHEIA opposes the inclusion of the Annual Leave model term into the higher education awards. AHEIA relies on its submissions filed on 13 July 2015 (re-filed on 26 October 2015).

187. AHEIA opposes the inclusion of the TOIL model term being included in the general staff award, and supports the submissions made on behalf of the Group of 8 universities filed on 12 November 2015 and 6 June 2016.

Australian Higher Education Industrial Association
8 March 2017