

IN THE FAIR WORK COMMISSION

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

AM 2014/196 & AM 2014/197 - Casual Employment & Part Time Employment

HIGHER EDUCATION INDUSTRY - GENERAL STAFF - AWARD 2010 (MA000007)

THE GROUP OF 8 UNIVERSITIES FINAL SUBMISSIONS IN REPLY TO THE COMMON CLAIMS
(as they relate to the Higher Education General Staff Award 2010)

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A. Introduction and Previous Submissions

1. These submissions are made on behalf of the eight research intensive universities in Australia, comprising the University of Western Australia, University of Adelaide, University of Melbourne, Monash University, Australian National University, University of New South Wales, University of Sydney and University of Queensland (**Group of 8**).
2. The submissions are filed pursuant to the Directions of the Fair Work Commission (**Commission**) issued on 9 March 2016 and comprise these submissions and **Attachment A** which is the Group of 8's response to the Issues Paper published by the Full Bench on 11 April 2016.
3. The submissions are made solely in respect of the variations sought by the ACTU to the Higher Education General Staff Award 2010 (**Higher Education GS Award**).
4. The first and fundamental point is that the Higher Education GS Award already contains a detailed conversion clause for casual staff, provisions providing for minimum periods of engagement for casual staff and provision of information in writing upon appointment. Those provisions are tailored and relevant to the sector, with a significant industrial history and reflect current practice. There is no proper basis for the existing provisions in the Higher Education GS Award to be varied as sought by the claims. The existing provisions meet the modern awards objective and should be maintained.¹
5. The Group of 8 previously filed comprehensive (27 page) written submissions on 25 February 2016 opposing the claim by the ACTU to vary the Higher Education Industry - General Staff - Award 2010 (**Higher Education GS Award**) ([Group of 8 February Submissions](#)).
6. The evidence given in the proceedings in June with respect to the Higher Education GS Award reinforces and strongly supports the matters set out in those February Submissions.
7. This final submission therefore does not repeat all the matters set out in the February Submissions. They are relied upon in conjunction with these final written submissions. We respectfully submit that in dealing with the Higher Education GS Award the Full Bench should give significant weight to and have primary regard to those February Submissions. The February Submissions remain valid and clearly identify why the particular ACTU application to vary the Higher Education GS Award Commission should not be accepted.
8. We have highlighted below general comments about the nature of the review and common claim, summarised some of the key matters raised and made further comments in relation to the evidence given in June 2016. We have commented on some of the specific matters raised by the ACTU, including identifying submissions that are a significant overreach and misrepresent what the weight of the evidence shows about the Higher Education GS Award.

¹ *Fair Work Act 2009* (Cth) s 134; *Preliminary Jurisdictional Issues Decision* [2014] FWCFB 1788 at [60(3)].
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B. General Submission and the Nature of These Proceedings

Risk of being swept away

9. Our clients are significant Universities, employing approximately half of the staff across the total of 40 universities in Australia and play a critical role in the higher education sector in Australia. However in this aspect of the 4 yearly award review, dealing with a "common claim" under a broader common process, they have a relatively limited role. Their interest is limited to one award being the Higher Education GS Award. Our clients are also not a "peak body" such as ACCI, AIG or ACTU with interests in the 100 plus other awards that are being dealt with in this hearing. However, those bodies have no direct interest in the Higher Education GS Award, nor a previous role in its history or establishment as a modern award.
10. There is therefore a concern that the Group of 8 submissions will be "lost in the wash"; swept away by voluminous materials relevant to other industries and under other awards. There is also concern of a perceived presumption in favour of an homogenous outcome, without due and proper regard to the industrial history of the Higher Education GS Award 2010, the previous union support for the current provisions that presently operate within the industry which are now being sought to be removed, the entrenched application of those provisions and the requirements and circumstances of the sector and casual employment within it.
11. The merit of the arguments of the Group of 8 in respect of the Higher Education GS Award are not diminished simply because their interest is in the Higher Education GS Award alone.

Review of the Higher Education Award

12. The Act requires the Higher Education GS Award to be reviewed having regard to its own circumstances, its content and history, as confirmed by the Full Court of the Federal Court in *National Retail Association v Fair Work Commission*² and by the Commission itself³.
13. Further, the ACTU claims are, in any event, not the same or "common". This is evident from noting that:
 - (a) the application by the ACTU to vary the Higher Education GS Award Application seeks an automatic deeming provision for casual staff (this is in comparison with the 103 other Awards that are sought to be varied by inserting a different conversion provision);
 - (b) unlike the vast majority of other awards, the ACTU are not seeking to vary the award by including a conversion provision where none exists, but to vary by deleting the existing conversion provision and replacing it with another provision (automatic deeming after 6 months); and

² [2014] FCAFC 118 (11 September 2014)

³ *Preliminary Jurisdictional Issues decision* [2014] FWCFB 1178.

- (c) there is no claim or application to vary the Higher Education Academic Staff Award 2010 being considered as part of the common claim, nor is there any application to vary other educational awards, including the Educational Services - Post Secondary Award 2010, the Educational Services - Teachers Award 2010 or the Educational Services General Staff Award 2010.

14. Therefore, notwithstanding the characterisation of the variations sought by the ACTU as a "common claim":

- (a) the task for the Commission remains a review of the existing particular award provisions in the Higher Education GS Award;
- (b) the Higher Education GS Award is an award based on the particular circumstances and industrial regulation in the higher education industry. It is an industry award for the industry. It is important that minimum terms and conditions in a modern award relating to casual employment are relevant to the industry covered. Further, the fact that it may differ from other awards does not mean it is not easy to understand or stable and sustainable, as it is well established in the industry. It is applied in practice and the award only covers employers and employees within the higher education industry; and
- (c) the Commission is not required to undertake a task of setting common standards as if it was establishing the NES. Nor is there any requirement or presumption in favour of a common claim requiring the same outcome to be adopted⁴.

Principles

15. The above matters are also supported by applying the legislative provisions and the guidance of the Full Bench of this Commission in the *Preliminary Jurisdictional Issues* decision:⁵

- (a) whilst broader in scope than the Transitional Review of modern awards completed in 2013, the nature of the task remains one of review of the existing award provisions;⁶
- (b) the Higher Education GS Award must be reviewed in its own right;⁷
- (c) the Commission is obliged to ensure that the Higher Education GS Award together with the NES provide a fair and relevant minimum safety net;⁸

⁴ [2014] FWC 8583, [15], Statement of Ross J, President, 1 December 2014.

⁵ [2014] FWCFB 1178.

⁶ *Ibid* [60(1)].

⁷ *Fair Work Act 2009* (Cth) s 156(5).

⁸ *Ibid*, s 134(1)(g).

- (d) the Commission will have regard to the historical context applicable to the higher Education GS Award;
- (e) the characteristics of employees and employers covered by the Higher Education GS Award influences the determination of a fair and relevant safety net; and
- (f) on its face the Higher Education GS Award will be considered by the Commission as achieving the modern awards objective at the time that it was made in 2010;⁹
- (g) any party seeking to vary the Higher Education GS Award must advance a merit argument accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation;¹⁰ and
- (h) the ACTU must demonstrate that if the Higher Education GS Award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective.¹¹

16. All of these principles weigh against granting the ACTU/NTEU claim in respect of the Higher Education GS Award and support the retention of the existing provisions.

"Onus"

17. The ACTU case effectively proceeds on the basis of ignoring the existing casual conversion clause, the nature of the legislative review process and the circumstances of Universities.

18. As set out in paragraphs 23 - 31 of the February Submissions, the ACTU's approach to the task the Commission is required to undertake in these proceedings is incorrect. The ACTU seek to cast a presumption against the existing provisions of the Higher Education GS Award and shift the onus to the employers to defend the existing clauses and demonstrate why the ACTU clause should not be adopted, as if it were otherwise required to be adopted.

19. For example, the ACTU original submission at paragraph 59 asserts that if there is a compelling case for a general right of conversion and for the principle of 4 hour minimum periods of engagement, the Commission should only refrain from extending those rights to a particular modern award if there is compelling evidence preventing it from doing so. There is no basis for this submission in the Fair Work Act or in the Preliminary Jurisdictional Issues decision and to adopt the ACTU approach would be to depart from the required task of the Commission.

20. The task of the Commission is clear which is, relevantly to the Group of 8, to review the Higher Education GS Award in regard to its existing provisions. The ACTU must demonstrate through

⁹ [2014] FWCFB 1178, [24].

¹⁰ [2014] FWCFB 1178, [60(3)].

¹¹ Ibid, [36].

probative evidence that the variation of the existing provisions that it seeks in the Higher Education GS Award must be made (i.e. is necessary) to achieve the modern awards objective (and that the variation does so only to that extent).

21. That case has not been established by the ACTU in respect of the Higher Education GS Award.
22. These matters are referred to further at paragraphs 23 - 31 of the February Submissions.

Lack of relevance of ACTU submissions and evidence

23. The ACTU submissions and evidence do not refute and generally do not engage with the vast majority of the matters in the February Submissions in relation to the Higher Education sector and the Higher Education GS Award.
24. The vast majority of the ACTU evidence and submissions make a case for inclusion of casual conversion provision in awards. To that extent, it is irrelevant to the Higher Education GS Award as it already contains a detailed casual conversion clause. That clause has been entrenched in enterprise agreements across the sector and has resulted in a majority of applicants being converted. The employer Universities have not sought to have it removed or otherwise varied in this 4 yearly review of modern awards.
25. The ACTU's evidence otherwise generally relates to industries other than Higher Education. Accordingly, the overwhelming majority of the ACTU's evidence and submissions are simply not relevant to the Higher Education sector and the Higher Education GS Award at all.
26. The key expert witness for the ACTU, Dr Raymond Markey, is the only person other than Ms Linda Gale of the NTEU who gives evidence on behalf of the ACTU/NTEU that is relevant to the Higher Education Sector. However, Dr Markey acknowledged in his evidence that in preparing his reports for the proceedings he did not look at the existing casual conversion provisions that apply to casual general/professional staff in the Higher Education GS Award¹². Further, Dr Markey acknowledged that all of the matters contained in his reports that relate to the Higher Education sector related solely to casual academic staff, as did the articles he cited¹³. Casual academic staff are not covered by the ACTU claim or by the Higher Education GS Award. Their circumstances, the nature of their sessional appointment and numerous other matters arising from academic employment are quite different to casual general staff and the regulation of their conditions of employment.
27. Comments regarding Ms Gale's evidence are detailed below. Her evidence is generally unattributed anecdotal hearsay, has limited probative weight. It does not provide a proper basis for the variations sought by the ACTU to delete the existing casual conversion and

¹² PN9816-PN9817.

¹³ PN9819-PN9826.

minimum engagement provisions in the Higher Education GS Award and replace them with the proposed ACTU provisions.

Level of casual employment of general staff in Higher Education

28. Professor Markey's evidence does highlight one issue relevant to the Higher Education GS Award. He cites with approval the relatively low level of temporary contract of "just 12%" as the average for OECD countries, in comparison with Australia's high level of casual employment in Australia at approximately 24%¹⁴.
29. The general ACTU submissions regarding high levels and recent spike in casual employment generally across Australia, is not reflected in the evidence that was given concerning casual general staff in higher education. The evidence in these proceedings is that casual employment of general staff at Universities is low (approx. 12.3%)¹⁵, has not significantly increased since 2003 and also compromises large numbers of University students concurrently studying. Ms Gale acknowledged in cross examination¹⁶ that there had not been a significant increase since 2003, which is also the date of development and adoption by the AIRC Full Bench of a casual conversion clause now reflected in the Higher Education GS Award.
30. Further information drawn from the Commonwealth Government, DET published statistics are set out at paragraphs 48-55 of the February Submissions.

C. Deeming Claim

31. Submissions opposing the adoption of the deeming provision are set out at paragraphs 56 to 77 of the February Submissions.

Existing Award Provisions

32. The Higher Education GS Award includes:
 - (a) requirements to be provided with a written instrument of appointment that informs the employee of terms of engagement, including specific provisions for casual employees (clause 14.1(d) and (f));
 - (b) provides a detailed casual conversion process (clause 12.3) which:
 - (i) includes employer obligations to provide advice upon appointment of the rights to apply for casual conversion and a copy of the conversion provisions from the Award;

¹⁴ Exhibit 110, page 26.

¹⁵ Exhibit 14, Extract from Selected Higher Education Statistics for Staff 2013/2014; cf the average of 24% in Australia - per Markey, Exhibit 110, page 26; PN9827-9831.

¹⁶ PN1865.

- (ii) in summary, entitles an employee whose been employed on a regular and systematic basis for 12 months for 50% of hours or for 24 months, regardless of hours, to apply for conversion to non-casual employment;
 - (iii) compels the employer to not unreasonably refuse an application for conversion, but provides capacity to refuse an application on reasonable grounds. It provides some specific guidance on what might constitute reasonable grounds for refusal;
 - (iv) requires that if an application for conversion is rejected, written reasons must be provided by the employer; and
 - (v) sets out provisions dealing with the hours of work to be offered in the non-casual employment and provides for recognition of an employee's casual service where they are converted to non-casual employment; and
- (c) provides a minimum period of engagement for casual staff of 3 hours, with appropriate exceptions (and 1 hour minimum engagement) for employees who:
- (i) are also students of the University and expected to attend the University on that day in their capacity as students; or
 - (ii) are employees who have a primary occupation elsewhere or with the University, in which case a minimum period engagement of 1 hour applies.

33. The evidence of Steve Smith from Monash University set out the relevant history of the existing Higher Education GS Award. The evidence was supported by acknowledgments made by Ms Gale in cross examination¹⁷ that the existing provisions:

- (a) were developed through an Australian Industrial Relations Commission (**AIRC**) process in 2003/2004.¹⁸ That process involved significant consideration of the higher education sector and resulted in a conversion clause and minimum engagement provision that were appropriate, fair and relevant to the sector. The provisions were endorsed by the AIRC, (being the subject of a recommendation of a senior member of the AIRC and then adopted in formal orders of the Full Bench) and fully supported by the relevant unions including the NTEU and CPSU;

¹⁷ PN1797-PN1805

¹⁸ Disputes: C Nos 31999 of 1999, 31071 of 1992, 90011 of 1993, 30495 of 1995, 30052 of 1996, 34925 of 1995, 34932 of 1995, C2002/1764 and C2002/2032; Applications for variation: C2002/4410 to C2002/4425, C2002/4428 to C2002/4433 and C2002/4491 to C2002/4498; Decisions regarding final orders: PR94137, PR946928; Orders varying the various general staff awards: PR948411, PR948284, PR948408, PR948461, PR948417, PR948483, PR948472, PR948477, PR948261, PR948450, PR948284, PR948497, PR948474, PR948455, PR948410, PR948447.

- (b) were tailored and relevant to the features of the higher education industry, the universities operations and employees covered by the Higher Education GS Award;
- (c) were then substantively adopted and agreed in almost all enterprise agreements for professional staff in the higher education sector in each bargaining round since that time. This followed claims for their inclusion (and then retention) by the NTEU and other unions;
- (d) were substantively adopted by the Commission as the industry standard for higher education in making the Higher Education GS Award in 2010 as part of the award modernisation process.

34. The provisions in the existing Higher Education GS Award take into account and reflect the nature of University operations.

35. This is confirmed in the evidence of Mr Ward¹⁹, Ms Dalton²⁰, Ms Shields²¹ and Mr Smith²². It is also largely acknowledged in cross-examination by Ms Gale of the NTEU²³ and includes that the provisions take into account and reflect the nature of University operations:

- (a) the Universities are generally operating on an annual cycle based around 2 teaching semesters;
- (b) the Universities have very diverse operational requirements, employing staff across roles supporting teaching and/or research of the Universities, technical roles, library roles, student assistance and support roles, administrative roles and a variety of roles in IT, retail, sporting, residential and other operations;
- (c) there are significant variations in requirements that are only clear over the annual cycle and potentially longer;
- (d) based on operational requirements and the nature of universities and experiences in higher education, a number of staff are being engaged across periods of 6 months or more in casual roles but whose duties or roles are not required on an ongoing or "permanent basis". This includes:
 - (i) employees who are employed casually across a season or a particular period of time are engaged for periods of less than 6 months but re-engaged at other periods throughout the year or in consecutive years (for example exam supervision, enrolment support for graduation

¹⁹ Exhibit 44, paragraphs 19 to 27.

²⁰ Exhibit 48, paragraphs 13, 15 to 28.

²¹ Exhibit 45, paragraphs 8, 12 to 18.

²² Exhibit 43, paragraphs 15 to 17, 46 to 52.

²³ PN1805-PN1805; PN1809-PN1814; PN1980-PN1995.

ceremonies, support for some teaching periods) but are not otherwise required during the remainder of the year;

- (ii) staff working in new or developing areas or on new projects, such as new curriculum or research areas, with developing and indefinite needs;
- (iii) many staff already employed at the University who take up other casual roles at the same time or who go from one casual engagement to another in different roles and performing different work which can lead to lengthy periods of engagement. This means that while their overall periods of engagement will exceed a period of 6 months, that period comprises a number of roles which are short term or variable and not required permanently;
- (iv) a significant proportion of casual employees at Universities are students, both as a function of providing vocational development in conjunction with the University studies and also as a general policy position of the University to seek to encourage and support its students, including through formal programs for students. Such appointments often involve casual work for a period of a year, but there is no permanent requirement for the student to be appointed;
- (v) research assistants where the work is dependent upon progress towards or on completion of the particular research project, research and/or activity or the external funding provided. For example a proportion of staff are engaged casually to support research tied to funding from external grants from the Commonwealth Government's National Health and Medical Research Council (NHMRC) and Australia Research Council (ARC). Some may be employed on a fixed term basis and others on a casual basis depending upon the requirements of the research and engagement of staff with relevant subject matter expertise. While the casual support may be required for a period of time, the research and particular requirements will often evolve and the casual staff member is not required on an ongoing basis given that the research and the grant funding is time limited;
- (vi) casual professional staff are also sometimes engaged for longer periods of time when covering staff absences, which are of indefinite duration and may become prolonged absences. This can include covering for a single absence that continues for a lengthy period or a series of absences covering for a number of staff; and

- (vii) student ambassador roles which are often year-long appointments to undertake periodic activities in those roles and then a new ambassador is appointed the next year.

36. With minor modifications the existing casual conversion provisions have been adopted in enterprise bargaining agreements across the sector, sought by the NTEU and other unions. Ms Gale acknowledged their inclusion in almost every enterprise agreement made since the provisions were made by the Full Bench in 2004 and since their inclusion in the Modern Award which involved 4 or 5 separate rounds of bargaining across approximately 39 different universities²⁴.
37. The ACTU Submissions appear critical of the involvement of the Group of 8 in opposing the ACTU variation on the basis that comprehensive enterprise agreements are in place across the sector and that the Group of 8 need not be an active participant in the proceedings²⁵. This fails to take into account a number of matters, including:
- (a) the particular Award needs to be relevant to the employees and employers that it covers. The content of enterprise agreements that are common and predominant in the sector with a high degree of uniformity provides a strong indication of the relevant appropriate industrial regulation for that particular industry and in identifying what would be relevant and fair conditions;
 - (b) the significantly different paradigm of deeming and the clause put forward by the ACTU would depart from what is in place and operates in practice relevantly for the Higher Education sector. This significant departure from the established terms and practices in the industry is not a "relevant" safety net; and
 - (c) further, the primary role of the award safety net in that context is to operate as a basis underpinning collective bargaining at the enterprise level. The employers are not award dependent for their terms and conditions. The uncontested evidence is that the Higher Education GS Award has operated successfully within the industrial framework set up by the Fair Work Act to support the making of enterprise agreements and has functioned effectively as a safety net underpinning bargaining. The necessity of the change in the provisions of the Higher Education GS Award as submitted by the ACTU must be questioned.
38. The evidence of the University witnesses is that existing casual conversion provisions have operated and worked well without significant issues and disputation²⁶.

²⁴ PN1817-1824.

²⁵ ACTU Final Submissions dated 20 June 2016, paragraph 83.

²⁶ See for example, Exhibit 48 (Dalton), paragraphs 30 to 33; Exhibit 45 (Ward), paragraphs 36 to 38, 39(f), 40 and 41 to 45; Exhibit 43 (Smith), paragraphs 32 to 42.

39. More generally, there is also no evidence that there had been any significant relevant changes in the Higher Education sector in relation to casual general staff employment since the making of the modern award in 2009/2010.
40. The ACTU final submissions criticise the Group of 8 witness evidence for not providing detailed analysis of employee numbers that may be relevant to the ACTU clauses it proposes as variations, trying to impose an evidentiary onus on employers to demonstrate why the ACTU variation should not be made. The ACTU concludes that "The absence of that necessary factual detail should lead to the rejection of the general claims"²⁷.
41. However, this is not a matter of whether the Commission should be rejecting the "general claims" of the Group of 8 as to why the ACTU clause should not be adopted. Rather, it is a matter of whether the Commission is satisfied that the ACTU has advanced a merit argument accompanied by probative evidence properly directed to demonstrating the facts supporting their proposed variation²⁸ to require the variation to be made. When the evidence of Linda Gale is considered, the ACTU clearly has not done so.

Merit based claim for deeming is very weak - consideration of the ACTU evidence

42. The ACTU submit that it is necessary to adopt a deeming provision in the Higher Education GS Award automatically deeming all casual employees other than (irregular casual employees) permanent after 6 months. The ACTU submission is based upon the evidence of Linda Gale in which she asserts the existing provisions have been problematic and seeks to highlight 3 issues:
- (a) that there is a "steady stream of disputes" arising from employer refusals to convert fixed term employees;
 - (b) that university management takes an inordinate time to deal with conversion requests; and
 - (c) a number of casual workers have told Ms Gale that they do not feel able to exercise their right to request conversion because of their insecurity in employment.
43. These matters were not established on the evidence.
44. The existing conversion provisions have been in place for greater than 10 years. If there were significant problems:
- (a) it would be reasonable to expect that the ACTU/NTEU would bring a volume of substantive evidence of that experience; and

²⁷ see paragraphs 83 to 90 of the NTEU Final Submissions

²⁸ *Preliminary Jurisdictional Issues Decision* [2014] FWCFB 1178, [60(3)]

- (b) the Commission should also expect to see some significant or exponential increase in casual employment.

However, neither of these things is evident. There is almost no evidence at all and the limited evidence brought by the ACTU/NTEU is of limited scope and weight.

45. In relation to a "steady stream of disputes", Ms Gale acknowledged that she was not referring to disputes regarding casual conversion, that the disputes she was referring to related to employees who were not covered by the proposed variation²⁹. Ms Gale on cross-examination accepted that there had been no steady stream of disputes about casual conversion and ultimately could not identify a single dispute taken to the Commission, although she thought there were "a few"³⁰ [being over the 10 plus years in respect of which the existing provisions had been operating].
46. The absence of disputes acknowledged by Ms Gale in cross-examination was also supported by the direct evidence of witnesses called by the University under which it had been identified that taking into account the existing provisions had been in place for in excess of 10 years the Group of 8 witness evidence had identified a total of 2 disputes across the sector.³¹ The evidence from the University witnesses identified that the majority of applications for casual conversion under the existing provisions had been approved and that there were not significant issues. For example, Mr Ward from UNSW gave evidence that over the last 6 years there were 27 applications for conversion of which 25 had been approved³².
47. In relation to the evidence of Ms Gale of "inordinate delay" the clear weight of the evidence showed that the applications for conversion under the existing provisions were usually dealt with in a timely manner. Mr Ward gave evidence that the average length of time for dealing with the applications including confirming eligibility, considering the application, seeking advice from the business unit, potential discussions with the staff member and communicating the outcome, including written reasons was approximately 1 month³³. Mr Ward was not cross examined on this evidence and it should be accepted.
48. Mr Smith gave evidence that the average time for dealing with applications at Monash had been approximately 17 days and that cases of longer periods of time were due to requesting further information from the staff member or relevant area to properly consider the request³⁴.
49. Ms Gale's evidence³⁵ and cross-examination of Mr Smith³⁶ identified 3 discrete examples over a 13 year period where lengthy periods had gone by without the application being approved.

²⁹ PN2000-PN2001

³⁰ PN2005-PN2006

³¹ Exhibit 43 (Smith), paragraphs 38 and 42; Exhibit 45 (Ward), paragraph 43.

³² Exhibit 45, paragraph 43.

³³ Exhibit 45, paragraph 44.

³⁴ Exhibit 43, paragraph 40.

³⁵ PN2013-2016.

The circumstances of that delay were not led in evidence in the Commission and save for the single employee identified in the cross-examination of Mr Smith, the other employees are not even identified. We can inform the Commission, the employee identified in cross-examination of Mr Smith did convert to non-casual employment.

50. The ACTU Submissions extrapolate from the limited evidence of delay to submit that such evidence demonstrates a compelling need for deeming rather than the established existing conversion provisions which provide for an application process and an obligation on the employer not to unreasonably refuse a request for conversion but with capacity to refuse on reasonable grounds. The existing provisions are also amenable to the disputes procedure in the Higher Education GS Award.
51. The ACTU Submissions and the conclusions on these issues sought to be drawn from the evidence are a significant overreach and do not reflect the weight of the evidence.
52. Further, even if contrary to our submission the Commission accepted that there was an issue with the timeliness of dealing with an application for conversion, the variation to the existing award provision to the extent necessary to address that issue is to include an express obligation that the application be considered in a timely way or within a particular specified timeframe. It does not support the variation proposed by the ACTU/NTEU.
53. The ACTU case for deeming therefore largely comes down to the statement by Ms Gale that "some staff have told me they do not feel able to exercise their right to request conversion because of their insecurity of employment." This evidence and its extent is of very limited probative value including because it is unsubstantiated hearsay. It is inconsistent with and not supported by the direct evidence given by the University witnesses that the vast majority of applications for casual conversion were approved³⁷. Ms Gale also acknowledged in her evidence that in the Higher Education sector the bringing of disputes on other issues was common (belying any general reluctance for issues to be raised). This evidence was also given by Mr Ward³⁸. In the circumstances, such a statement by Ms Gale does not support removal of the existing conversion application process within the current provisions as being a necessary variation to the Higher Education GS Award.
54. The existing casual conversion provisions in the Higher Education GS Award contain protections for staff from unreasonable refusals by employers and access to the disputes procedure. Staff also have access to various legal protections under the general protections provisions of the Fair Work Act and other legislative provisions.

³⁶ PN4242.

³⁷ Exhibit 43 (Smith), paragraph 39; Exhibit 44 (Ward), paragraph 43.

³⁸ Exhibit 44, paragraph 45.

55. The fact that the ACTU have submitted to the Commission that 103 Awards need to be varied to include a right for casuals to seek conversion and that such a clause would meet the modern awards objective also undermines the claim that it is necessary to include a deeming clause in the Higher Education GS Award because staff do not feel able to exercise their right to request conversion.
56. Even on the ACTU's own survey only 27.5% of casual employees with in excess of 6 months' service wanted to become permanent, yet the default position under the proposed ACTU clause for the Higher Education GS Award is to deem 100% of casual employees (other than irregular casuals) permanent.

Deeming ill-suited to Higher Education and does not meet the Modern Awards Objective

57. As set out in paragraphs 68 to 77 of the February Submissions, and for the reasons set out above in these Submissions, the ACTU Deeming Claim cannot constitute a fair and relevant minimum safety net of terms and conditions in the Higher Education sector.
58. Even upon a cursory consideration of the existing casual conversion provisions in the Higher Education GS Award as against the proposed automatic deeming of all casual employees to be permanent after 6 months, it is abundantly clear that the existing provisions are more suited to Universities and provide a fair and relevant safety net of terms and conditions. The deeming provision includes no consideration of, and capacity to accommodate, factors such as the semester based nature of the academic calendar covering 26 weeks of the year, seasonality of work, changing volume and operational requirements based upon student enrolments and demands, and unique factors such as the high proportion of employment opportunities being specifically provided for students and a contingent of retirees.
59. An approach that does not take into account these matters specific to higher education and circumstances within the industry does not meet the modern awards objective of providing a fair and relevant minimum safety net of terms and conditions.
60. As demonstrated by the evidence, the 6 month deeming provision sought by the ACTU is ill-suited to the Higher Education sector and would compel deeming of casual employees in a range of circumstances where it would be unreasonable and/or make no operational sense to do so.
61. Paragraph 35(d) above identifies a range of circumstances where staff are engaged across periods of 6 months or more in casual roles but whose duties or roles are not required on an ongoing or "permanent basis". The ACTU deeming clause would nevertheless deem such staff to be permanent staff.
62. Similarly, Ms Gale in cross-examination acknowledged a number of circumstances in the Higher Education industry where employees have regular and systematic casual engagements

over 6 months, but for whom there is no ongoing permanent work or role or where such a role would not be reasonable, including³⁹:

- (a) that there are a significant proportion of casual employees in the Higher Education sector who would not prefer full-time employment;
- (b) that there are a significant proportion of casual employees who have other full time or part-time employment, including with the University;
- (c) that there are employees at Universities who have more than 1 casual engagement with the University either concurrently or consecutively and which may involve completely different duties;
- (d) that a significant proportion of casual employees at Universities are also students of the University and that:
 - (i) Universities have programs that provide and encourage support for student employment;
 - (ii) on occasions the students who are working are doing so between their lectures and other study commitments; and
 - (iii) student employment includes employment specifically directed to their education to assist them in their degree and some student employment is coincident on them being students;
- (e) where there is no ongoing requirement for the employee's duties, for example, in situations where the casual employee has been engaged to provide support, assistance or expertise in relation to a new area being developed at the University and where the future of that new area is uncertain.

63. These acknowledgements by Ms Gale are consistent with the evidence of the University witnesses which was not challenged.

64. Ms Gale also acknowledged in cross-examination that it was irrelevant to the deeming of casual staff to permanent under the ACTU clause, the circumstances of the employee's role, the area within the employee worked, whether the employee held multiple casual roles, whether the work is continuing and whether the work is being done by a student⁴⁰.

D. Minimum Engagement Claim

65. The existing minimum engagement provision (clause 14.3) of the Higher Education GS Award is a fair and relevant safety net.

³⁹ See for example, PN1880-1801, PN1888, PN1892-1896, PN1942-1946.

⁴⁰ PN1913-1959.

66. The existing provision was established by the Commission in 2002/2003, was supported and endorsed by the Commission and included in the modern award in 2009/2010. There have been no significant changes in the Higher Education sector or its engagement of casual staff since the making of the modern award as acknowledged by Ms Gale in cross-examination⁴¹.
67. Employment for shorter durations for students enables work to be performed between lectures and other student commitments and students comprise a significant proportion of the casual employees at Universities⁴².
68. The 4 hour blanket minimum engagement sought by the ACTU also does not support or reflect a number of existing roles in which casuals are engaged at Universities, including:
- (a) exam invigilators who supervise students undertaking discrete exams or assessments of shorter duration (e.g. invigilating a 2 hour exam);
 - (b) those providing note taking for students with disabilities during a 1 hour lecture;
 - (c) fitness instructors taking a 1 hour class;
 - (d) student ambassador roles who are promoting the University to prospective students and parents in a 1 hour presentation;
 - (e) there is also evidence which is not contested that employees often request and agree to shorter engagements to meet their personal circumstances⁴³.
69. Mr Ward gave evidence that the minimum engagement of 4 hours would likely result in a student not being offered or being able to accept work due to attendance of lectures and tutorials, other jobs and study and that given that a high proportion of casual professional staff within the sector are also students (including approximately 50% at UNSW) the introduction of a 4 hour minimum engagement would have a significant impact on the University's ability to engage casual professional staff.
70. Further, the Higher Education sector is a relatively high paying industry, with wages 50% - 60% in excess of the Award⁴⁴ with "wall to wall enterprise agreements". The ACTU rationale based on a sustainable wage, using lower level retail workers as a basis for calculating a 4 hour minimum engagement has limited relevance to the Higher Education sector and the operation of the Higher Education GS Award as a fair and relevant safety net in the Higher Education industry.

⁴¹ PN2057.

⁴² Exhibit 43 (Smith), paragraphs 49 to 52; Exhibit 44 (Ward), paragraphs 28 to 32; Exhibit 48 (Dalton), paragraphs 19, 22 to 26; Exhibit 45 (Shields), paragraphs 15 to 17; see also PN1888.

⁴³ Exhibit 44 (Ward), paragraphs 50 and 51.

⁴⁴ Acknowledged by Linda Gale in cross-examination, see PN2061.

71. Further to the extent that the proposed minimum period of engagement is based in part upon the travel necessary for casuals to attend for work to undertake their role, the existing Higher Education GS Award clause recognises that this does not apply in respect of students who are already expected to be at the University on that day or other staff who have other roles or non-casual employment with the University.
72. These matters are addressed in more detail at paragraphs 78 to 90 of the February Submissions.

E. Administration of Employment Claim

73. The ACTU/NTEU claim seeks to include a new provision precluding engagement of an increased number of casual or part time staff without first allowing all existing casual and part time staff engaged in similar work whose normal working hours are less than 38 hours a week an opportunity to increase their hours. These matters are addressed in the February Submissions in more detail at paragraphs 91 - 98. Those submissions identify that it is ill-suited and unworkable given the size and structure of Universities, with multiple departments and faculties, generally across multiple campuses and cohorts of employees across each of those organisational units who may be performing similar work, which cannot be sensibly canvassed prior to offering a casual appointment.
74. Ms Dalton from the University of Melbourne who is a Faculty Executive Director and has firsthand direct experience of what sort of impact such a provision could have gave evidence that the clauses would be unworkable and virtually impossible for Universities to comply with if they were adopted. Ms Dalton identifies that they would effectively require, prior to each appointment of a casual or part time staff member, the University to:
- (a) identify all casual and part time staff who work less than 38 hours a week across the University's 7 campuses, affiliated schools, centres and teaching hospitals;
 - (b) know and understand the type of work they perform to consider whether it is similar to the work which would now be offered as part of the appointment of the casual/part time staff member; and
 - (c) offer all of those relevant staff the opportunity to increase their hours and only if all of those existing relevant staff do not take up the work could the University then seek to engage additional casual professional staff members to undertake the work.
75. The evidence of Ms Dalton was that such a process would cause very significant practical difficulties and significant delay, would require an entire reconfiguration of the University systems of work processes and would result in significant additional costs and administrative

burden for Universities⁴⁵. Similar evidence was given by Mr Ward in relation to UNSW⁴⁶ and Mr Smith in relation to Monash University⁴⁷.

76. The evidence of Ms Dalton also identifies 3 other problems with the clause⁴⁸:
- (a) the fact that some staff members may be performing similar work does not mean that they have the requisite skills and subject matter or knowledge for the particular new or additional work that may be being offered to a new part time/casual staff member;
 - (b) that has the capacity to create tension and place pressure on part time staff who are being offered and continually not accepting additional hours. Many of those staff in Universities work the part time hours that they work because it suits their needs and responsibilities as carers and parents; and
 - (c) the offering of casual employment to new students is proactively encouraged by the University and could be adversely impacted and limited if such work had to be first offered to all existing casual and part time staff.
77. Ms Shields gave evidence that there is in excess of approximately 200 organisational units at Monash University⁴⁹, all of whom would potentially have to be canvassed to identify and offer additional increased hours to casual and part time staff across the various campuses and organisational units before an offer of part time or casual employment could be made to a new staff member.
78. Accordingly, while such a provision could potentially operate in a small, centralised workforce it is ill-suited to large and complex organisations such as Universities.

F. Response to a Particular Issue Raised in ACTU Submissions

79. The ACTU make a number of criticisms in its Final Submissions about the Group of 8 Universities omitting to lead evidence which would allow the Commission to further assess the impact of the ACTU claim and that adverse inferences should be drawn against the Group of 8's evidence by the Commission in this regard⁵⁰. Such criticisms and inferences should not be accepted.
80. Given the nature of this process as a review and given there are significant existing award provisions covering the areas sought to be covered by the ACTU common claim in the Higher Education GS Award, the Group of 8 were under no obligation to lead such evidence. This is

⁴⁵ Exhibit 48, paragraphs 38 to 41.

⁴⁶ Exhibit 45, paragraphs 46 to 49 and 54(d).

⁴⁷ Exhibit 43, paragraphs 64 and 65.

⁴⁸ Exhibit 48, paragraphs 40 and 41.

⁴⁹ Exhibit 45, paragraph 30.

⁵⁰ See for example, paragraphs 83, 88-90.

particularly the case where the Universities are not seeking to remove the existing casual conversion provisions or minimum engagement provisions or otherwise vary the existing provisions in the Higher Education GS Award.

81. Nevertheless the Group of 8 provided evidence to the Commission about a range of matters relevant to the Commission's review, including:

- (a) the history of the existing provisions in the Higher Education GS Award, their adoption with the NTEU support in the modern award and their application in practice;
- (b) the nature of university operations and how the existing conversion and minimum engagement clauses are tailored to those operations;
- (c) staff in the industry and how the 6 month automatic deeming and a minimum engagement provision does not accommodate students or other types of staff engaged to perform a variety of casual work at Universities;
- (d) how the ACTU common claim would be ill-suited to the Higher Education sector; and
- (e) the lack of disputes and issues that have arisen under the existing provisions.

82. Further, statistics regarding the composition of staff at Universities are available publicly and published annually by the Commonwealth Government Department responsible for Higher Education. Those statistics were drawn to the attention of the Commission in the evidence of Mr Ward from UNSW⁵¹ and in cross examination of Ms Gale⁵².

83. There is no adverse inference available to be drawn by the Commission in relation to these matters.

G. Conclusion

For all of the reasons set out above and in the February Submissions, the specific ACTU claim to include casual conversion, minimum engagement and other related provisions in the Higher Education GS Award should be rejected.

Clayton Utz
Solicitors for the Group of Eight
8 August 2016

⁵¹ See Exhibit 44, paragraphs 34.

⁵² PN1840-1866.

Annexure A to the Group of Eight Final Submissions Regarding the Higher Education General Staff Award

Response to Issues Paper of FWC dated 11 April 2016

Initial Comments

The Group of 8 have provided comments against a number of the questions contained in the issues paper released by the Commission on 11 April 2016.

A number of the questions below appear to be premised on there being no existing award casual conversion provision that is required by the Full Bench to be reviewed. This would be contrary to the review requirements and the *Preliminary Jurisdictional Issues decision*.

The Higher Education General Staff Award 2010 (**Higher Education GS Award**) already includes a casual conversion provision which was the subject of orders of, a Full Bench of the AIRC in 2003/2004 and subsequently substantively maintained in the modern **Higher Education GS Award**, the unions submitting that its inclusion was required to provide the fair and relevant safety net.

Many of the matters canvassed below are apparent on the face of clause 12.3 of the existing Higher Education GS Award and reflects that these issues have effectively already been taken into account in establishing the industry specific casual conversion clause for the Higher Education industry. Further, given that there are existing provisions that already clearly regulate and define the fair and relevant safety net in the Higher Education GS Award, we have not sought to answer all the questions in the issues paper.

Many of these matters are also addressed in the Submissions made by the Group of 8 on 25 February 2016 (**February Submissions**) and the final Submissions to which these responses are an annexure.

Finally, as there is no application to vary the part-time provisions of the Higher Education GS Award we have not addressed questions directed solely at part time employment.

B. Casual and part -time employment - general

1. What, apart from the difference in the mode of remuneration, is the conceptual difference between casual and part- time employment?

The main difference between casual and part-time employment is that part-time is a subset of continuing or fixed term employment and consequently involves the employee being employed continuously i.e. they work every week of their employment throughout the year (other than when on leave).

It should be noted that part-time employment is not seasonal or part year employment, in which an employee does not work for parts of the year.

A casual employee does not have ongoing employment and is engaged to perform particular activities or role and does not have a continuing employment contract.

A casual employee may ultimately be employed to work a lesser number of hours or more hours than a part-time employee. The number of hours is not a defining feature of casual employment. However, it is a defining feature of part-time employment, being a proportion or subset of full time hours. A part-time employee may work every day for a lesser number of hours than a full time employee or may work full time hours on, say three days a week, or a combination thereof.

A part-time employee's engagement or roster will involve a specified number of regular hours. This is reflected in the existing Higher Education GS Award regulation which defines part-time

employment and includes a requirement to provide notification of the pattern of work specifying at least the hours to be worked each day, the days of the week the employee will work and the actual starting and finishing times each day (clause 14.1(c)). Casual employees may be engaged more flexibly and can accept or refuse work.

Part time employees receive pro-rata entitlements to those of full time employees. Casual employees receive a casual loading in compensation for leave and other benefits that are not applicable to casual employees.

2. **What are the fundamental elements of part-time and casual employment?**

Refer above.

3. **What factors lead employers to engage casuals?**

The factors that lead Universities to engage casuals are set out in the witness statements of the Group of 8 filed in these proceedings including the witness statements of Bronwyn Shields, Faculty General Manager at Monash University¹, Ms Diana Dalton, Faculty Executive Director of the Faculty of Business and Economics at the University of Melbourne², David Ward, the Vice President, Human Resources of UNSW³ and Steven Smith, Manager, Workplace Relations (Operations) at Monash University⁴. These factors include:

- (a) the operational requirements in Universities are impacted by the cyclical nature of universities, with the organisation of its operations around academic calendars, predominantly based upon semester models of 2 x 13 weeks of teaching and with seasonal peaks and troughs, taking into account enrolment periods, assessment periods, graduations and similar events;
- (b) many of the support activities and surrounding infrastructure and campus services are very busy during times students are on campus but some are very quiet and cease altogether at other times including semester breaks and particularly over the Christmas period until approximately mid-February each year;
- (c) the diversity of the University operations together with the cyclical nature of the University's business creates a strong operational need for the use of casual staff in a variety of roles and across various periods of time to supplement the cohort of continuing and fixed term staff;
- (d) to provide jobs for students of the University for a variety of reasons, including to support the broader University community and its students by providing them with employment opportunities and remuneration to enrich their student experience and enhance their job readiness and, in some cases, specifically as part of their vocational development associated with their degree;
- (e) to provide opportunities for retirees, particularly to support functions such as examination invigilation;
- (f) additional resources are often required during peak workload periods;
- (g) flexibility is needed in terms of the hours required to perform the work;
- (h) the work is "seasonal" or at specific times during the year such as casual laboratory assistant supporting labs that only occur during some of the teaching period and are also dependant on the course being offered to students, employment to support

¹ Exhibit 45, paragraphs 10 to 14.

² Exhibit 48, paragraphs 14 to 21.

³ Exhibit 44, paragraphs 21 to 27.

⁴ Exhibit 43, paragraphs 46 to 48

assessment and exam periods, Open Day, enrolment periods, and other activities such as teaching swimming or fitness classes that are only offered to school children during school terms or have greater demand during semester times;

- (i) the nature and extent of the work is unclear or is emerging;
- (j) there is a need to fill in for staff on unexpected leave or to cover other staff absences of indefinite duration;
- (k) certain types of work, such as research projects, have a limited time span and the work is only required for that period or a part of the period and may be evolving;
- (l) specialist skills are sometimes required to assist with certain projects or work activities which are also carried out in a concentrated period of time (e.g. writing grant applications).

It should be noted that the Higher Education GS Award does not provide for seasonal or part year employment. Further, unique to Higher Education Awards there are significant limitations and restrictions on the appointment of staff on fixed term contracts. Outside of some discrete categories such as pre-retirement or where professional practice is required or replacement staff member to say cover maternity leave, the University is only entitled to appoint staff on a fixed-term basis under the Higher Education GS Award if it is for a "specific task or project" or if they are "research staff" (clause 10.3). The effect of those restrictions is if work does not specifically fall within one of those fixed term categories, it cannot be offered for a fixed period. If it is not ongoing work or there is significant uncertainty about whether it will be ongoing work, then the University would be either required to appoint them on a continuing basis (which given that role is not continuing or permanent, would not occur) or on a casual basis.

4. **What are the positive/negative impacts of casual work on employees?**

The Group of 8 do not comment generally on this question but do draw attention to the uncontested evidence which has been led that the Universities employ a significant proportion of students as casuals and do so to create a range of casual employment opportunities equipping them with skills and experience and also providing financial support for them whilst they are undertaking their studies⁵. The evidence in relation to the Higher Education sector also identified significant cohorts of casual employees who have other full time employment, including some with the University and who use casual employment to broaden their skills and supplement their income⁶.

C. **Casual conversion**

General concepts

6. **Is it appropriate to establish a model casual conversion clause for all modern awards?**

No. The Higher Education GS Award has an industry specific casual conversion provision.

The ACTU claim seeks to adopt a generalised proposition about insecure employment and in doing so this undermines a set of established fair and relevant safety net provisions in respect of the Higher Education sector. The ACTU claim has no real regard for the requirements or circumstances of the sector and the nature of casual employment within it, the industrial history or the previous union support for the provisions now sought to be removed. The existing provisions have also been adopted in practice and entrenched in enterprise agreements. This is a matter which is relevant when reviewing an industry award and, in

⁵ Exhibit 43 (Smith), paragraphs 49 to 52; Exhibit 44 (Ward), paragraphs 28 to 32; Exhibit 48 (Dalton), paragraphs 19, 22 to 26; Exhibit 45 (Shields), paragraphs 15 to 17.

⁶ Exhibit 45 (Ward), paragraph 33; Exhibit 48 (Dalton), paragraph 28.

particular, is relevant to the task of the Commission as part of this process, which is to review the existing award provisions under the Higher Education GS Award.

If a "model" casual conversion clause was to be adopted the Full Bench should identify that it would not apply to awards that have an existing casual conversion provision in them and/or to specifically identify the Higher Education GS Award as an award to which the model provision does not apply. This is consistent with the approach that the Full Bench of the Commission⁷ adopted in relation to the flexibility provisions concerning TOIL in which it identified that at least 3 particular awards that were before it, (*Building and Construction General On-Site Award 2010*, the *Joinery and Building Trades Award 2010* and the *Seagoing Industry Award 2010*) would not be subject of the model clause given the evidence and the material that was led about the historical award regulation in that particular industry. Similar considerations apply in relation to the Higher Education industry in this matter.

7. **Should the establishment of any model clause be subject to the right to apply for different provisions or an exemption in a specific modern award based on circumstances peculiar to that modern award?**

Refer to the answer to question 6. In circumstances where there is an existing casual conversion provision in the Higher Education GS Award, the Group of 8 should not be required to apply for an exemption, as if the model clause applies. The existing regulation and existing provision should continue to apply.

8. **Does or should a casual conversion clause simply involve a change in the payment and leave entitlements of an existing job, or the creation in effect of a new and different job?**

Under the existing casual conversion clause in the Higher Education GS Award, the clause upon application requires the employer to offer conversion to non-casual employment. This is technically the creation of a new contract of employment. Under clause 12.3(d)(ii), the offer of conversion will indicate the hours and pattern of work which, subject to due consideration of the employer's operational requirements and the desirability of offering the employee work which is as regular and continuous as is reasonably practicable, will be consistent with the employee's casual engagement. In the Higher Education sector the non-casual employment may also have different consequences for superannuation entitlements and reporting.

9. **Does or should a casual conversion clause require an employer to convert a casual employee to a permanent position with a pattern of hours which is different to that which currently exists for that casual employee?**

This is already dealt with under the existing casual conversion provision in the Higher Education GS Award at clause 12.3(d).

The evidence in this proceeding also highlighted that casual staff at Universities may have a number of casual engagements in different areas of the University (for example performing administrative work for a department and also casual employment in the sports centre)⁸. This is addressed under the existing casual conversion clause in the Higher Education GS Award in the eligibility requirement that the employee be employed on a regular and systematic basis in the same or similar position in the same department (or equivalent) for the requisite period (clause 112.3(b)). These matters are not addressed in the ACTU deeming clause.

10. **Should employers be required to convert a casual employee to permanent employment (at the employee's election) where the employee's existing pattern of hours may, without major adjustment, be accommodated as permanent full time or part-time work under the relevant award?**

These matters are dealt with under the existing casual conversion clause in the Higher Education GS Award and generally the answer will be "yes" and the employer must not

⁷ [2015] FWCFB 4466, at [297] and following

⁸ Exhibit 45 (Ward), paragraph 33; Exhibit 48 (Dalton), paragraph 28.

unreasonably refuse an application for conversion. There may be other matters outside of hours which means that it would be unreasonable to convert and these can be appropriately addressed by a provision requiring the employer to not unreasonably refuse an application but with capacity to refuse on reasonable grounds.

11. **What would be the consequences for employers if “regular” casuals had an absolute right to convert to non - casual employment (after 6 or after 12 months)?**

The consequences for Universities if there was an absolute right to convert or deeming would be that there are a range of casual employees in a range of circumstances that would be required to be treated as permanent/continuing employees where this was not reasonable and/or could not be accommodated.

For example, where their casual engagements over the 6/12 month period were actually constituted by appointments in a range of different roles and that there is no ongoing or regular need for their most recent casual role.

Ultimately, it would deem permanent/continuing some casual employees for whom there is not any ongoing work needed or requirement. These matters are identified in witness evidence given by University witnesses in the hearings and include⁹:

- (a) staff who are employed on research and other projects with developing and indefinite needs;
- (b) a range of staff for whom there is only "seasonal" work who would be deemed permanent notwithstanding there are periods of the year where their work is not required, including:
 - (i) library assistants/shelvers supporting students during semesters;
 - (ii) exam invigilators where work is only required to be performed at particular times of the year;
 - (iii) staff supporting processing of examination results and staff supporting student enrolment on a repeated basis over more than one semester or year;
 - (iv) laboratory assistants;
 - (v) staff covering for one or more ill/injured employees over a period of time;
- (c) staff supporting research grant cycles through to research assistants where the work is dependent upon progress towards or on completion of the particular research project and discrete external funding has been provided by grant funding bodies;
- (d) students who may be employed casually over a period of 6 or 12 months, to enhance the student experience, provide income and support for the students, opportunities to develop skills and experience generally and, in some instances, specific to their areas of study. This occurs under formal and informal student employment programs the University does not wish or intend to provide ongoing employment but seeks to use those roles to provide opportunities for new students, to provide;
- (e) event support staff who are engaged on a casual basis across periods of in excess of 6 months as there are multiple events occurring at the University each year, but with no need for permanent employment; and

⁹ Exhibit 45 (Shields), paragraphs 12, 13, 15 to 18; Exhibit 48 (Dalton), paragraphs 15, 17 to 21 and 27; Exhibit 44 (Ward), paragraphs 21 to 23, 25 to 27, 28 to 31 and 54(c); Exhibit 43 (Smith), paragraphs 43, 46 to 48, 51 and 56.

- (f) where a non-casual role has been offered and is to be filled from a number of applicants through a merit-based selection process.

More generally it would likely have a suppressing effect on employment of new staff. Universities would be extremely cautious about the creation of roles and appointment of employees given the prospect of them becoming permanent employees in circumstances where there is no clear ongoing role or requirement for them. This may commonly be the case where Universities are pursuing new or developing areas where there is significant uncertainty about the future need for that particular area.

It could also reduce the ability for Universities to appoint new casual staff who have the particular expertise or skills required as the University would have a greater cohort of converted staff and will need to allocate them to other work in areas in which they are not expert and/or do not have the relevant skills and experience, driving down the quality and efficiency of work.

It would also potentially lead to a significant increase in redundancy payments which in the Higher Education sector are generally a minimum of 6 months and more commonly 12 months irrespective of length of service.

The deeming provision sought would also create significant additional administrative costs for Universities including because Universities would be obliged to provide further instruments of appointment in respect of the non-casual roles, consistent with clause 14 of the Higher Education GS Award and to monitor and track all casual engagements and their circumstances. This is particularly the case if the deeming variant is adopted as there will be no application or election by the staff member to trigger the necessary processes for the application of continuing employment.

12. **Should any casual conversion clause provide greater certainty as to when an employer is and is not required to convert a casual employee in circumstances where the Commission may not have the power under the Fair Work Act 2009 and the dispute resolution procedures in modern awards to arbitrate disputes about casual conversion?**

The existing casual conversion clause in the Higher Education GS Award does provide greater certainty as to when an employee is eligible to apply for conversion and some guidance on when an employer is and is not required to convert a casual employee. This is apparent on the face of the existing clause 12.3 which, amongst other things:

- (a) recognises that in the Higher Education sector employees are often employed in a number of different (and potentially unrelated) casual positions, both consecutively or concurrently, and which may be at different classification levels, and the mere fact that employment as a casual over a particular period is not necessarily supportive of conversion. Therefore eligibility is based upon employment in the same or a similar and identically classified position in the same department (or equivalent) (clause 12.3(b));
- (b) imposes an eligibility threshold of 12 months (clause 12.3(b)) recognising that Universities operate over an annual cycle generally based on two semesters with very diverse operational requirements and significant variations in those requirements that are only clear over the annual cycle and sometimes longer (for example the development of a new course and the support required for that new course);
- (c) recognises generally that Universities provide employment for significant numbers of students across their studies and to fit in with their lectures and other commitments, but that such employees are not required permanently and that the University has a desire to progressively provide those employment opportunities to new students entering the University;
- (d) includes a provision concerning refusal, specifically, that Universities cannot unreasonably refuse a conversion application but recognises that a right to refuse

on reasonable grounds is fair and appropriate and identifies some of the circumstances in the Higher Education sector where that arises to provide clarity and to guide the parties (clause 12.3(c)).

13. **Would changes to the part-time employment provisions in awards to make them more flexible facilitate casual conversion? If so, what should those changes be? Should any greater flexibility in the rostering arrangements for employees be subject to an overriding requirement that part - time employees may not be rostered to work on hours which they have previously indicated they are unavailable to work?**

If Universities did not have the capacity to refuse applications for conversion on reasonable grounds then other flexibilities would need to be introduced, including providing the capacity for seasonal, part year and potentially annualised hours employment. To take an existing and straight forward example there would also need to be greater flexibility in hours that can be allocated to part-time employees with capacity for the Universities to determine what their hours are, bearing in mind that in the Higher Education industry (as reflected in the Higher Education GS Award), the hours of staff are not (with some limited exceptions) rostered. If the University was required to convert a casual library shelver who worked for 12 weeks in semester 1 and 12 weeks in semester 2 to permanent the part-time provisions do not enable that employee to be only employed in those weeks and they have to be employed in weeks where their work is not required and indeed the library may not be open.

Definition of irregular casual

14. **Does the exclusionary expression “irregular casual employee” provide a workable basis for the operation of a casual conversion clause?**

The existing casual conversion clause in the Higher Education GS Award already contains an eligibility requirement (clause 12.3(b)). It requires the staff member to have been "employed on a regular and systematic basis". It then identifies as an example of a reasonable ground for refusal that the work is ad hoc, intermittent, unpredictable or involves hours that are irregular (clause 12.3(c)). It is submitted that this is a better paradigm than seeking to rely upon an exclusionary concept of an "irregular casual employee". Given that the Higher Education GS Award already has an existing and workable casual conversion clause (and such provisions are required to be reviewed as part of this process), we have not addressed the further questions at 15 - 17.

Employer Notification

18. **Having regard to a number of factors, including in particular the continuing decline in union density, would the abolition of a requirement for the employer to notify employees of any casual conversion rights lead to casual conversion clauses becoming inutile due to lack of employee knowledge?**

The existing casual conversion provision in the Higher Education GS Award:

- (a) contains obligations to advise the casual employee upon commencement that they may have the right to apply for conversion and to make available a copy of the conversion provisions of the award; and
- (b) requires the employer to take reasonable steps from time to time to inform casual employees of the conversion provisions in the award.

The Group of 8 have not proposed the abolition of that requirement, consistent with their overarching approach which is to accept the existing casual conversion process and established industrial regulation.

19. **Are there any means by which the requirement to notify employees of casual conversion rights may be made administratively simpler for employers (such as, for**

example, requiring all casual employees to be notified upon first being engaged, or by defining “irregular casual employee” in a way which provides clarity as to who is required to be notified)?

The existing casual conversion provisions in the Higher Education GS Award already address this issue. Consistent with the provisions and the response to question 18 above they require Universities to notify all casuals upon commencement of their potential conversion rights.

It is suggested that adding additional definitions regarding "irregular casual employee" would be unhelpful, administratively burdensome and fails to recognise that there is a spectrum of casual employees. In part that is why the issue is better dealt with by capacity to refuse an application on reasonable grounds including where the work is ad hoc, intermittent, unpredictable or involves hours that are irregular, as presently provided for in clause 12.3 of the Higher Education GS Award.

Period prior to conversion right

20. **Is a 6 month period of engagement sufficient to account for seasonal factors that may affect the number and pattern of hours worked by a casual employee?**

No. In some instances a 6 month period might be sufficient but generally in the Higher Education sector a 12 month period across the annual academic cycle with different teaching semesters, different offerings in semesters, cycles of enrolment, examination and graduation require at least a 12 month period to consider such issues. Further it is not just hours of work that may be affected by "seasonal factors" but the ongoing need or viability of the work itself and how it will be performed.

21. **Where an existing or claimed casual conversion clause requires a 6 or 12 month period before the conversion entitlement arises, is that period to be calculated simply from the first engagement of the casual, or by reference to the period over which the casual has been engaged on a regular and systematic basis?**

This question highlights the difficulty in applying a 6 month deeming provision or election provision to the Higher Education sector. It is common for staff to be engaged on a casual basis for a particular activity (for example to support a particular activity in semester 1). That activity is not required in semester 2, but is required in the following year and the same staff member performs casual employment in that position. It is not clear how the ACTU's proposed clause would be applied in those circumstances.

In relation to the specific question, it would be the latter.

22. **Are existing or claimed casual conversion clauses intended to give a one-off only opportunity to convert at the end of the specified time period, or a continuing opportunity to do so?**

The existing casual conversion provision in the Higher Education GS Award already addresses this issue (clause 12.3(e)) providing for further applications. It provides that an employee whose application for conversion is rejected will not be entitled to apply again within 12 months of refusal unless the refusal was based solely on a particular ground that the work was going to cease to be required within a short time period and that ground for refusal ceased to apply. Again, this clause was specifically developed and took into account circumstances in the Higher Education sector and its predominantly annual cycles based around the academic year.

Employer capacity to refuse

23. **Should any casual conversion clause permit employers to refuse to convert employees to non-casual work on reasonable grounds? If so, should detailed guidance be provided as to when it would be reasonable to make such a refusal?**

Yes and potentially yes. The employer evidence in relation to the Higher Education sector shows the significant diversity and circumstances in which casual employees are engaged. It also highlights that an employee may be regularly and systematically engaged as a casual but in a variety of roles and in a variety of circumstances.

Further in the Higher Education sector casual employment may be a function of external grant funding from the Australian Research Council or the National Health and Medical Research Council which provides discrete tied funding for particular activities and employment to support those activities. These matters (amongst others) identify that there needs to be some flexibility and capacity to assess an individual's circumstances, their role and the consequences of conversion to non-continuing employment. This is best done by providing (as does the current casual conversion process) that the employer cannot unreasonably refuse an application but can refuse an application on reasonable grounds.

The current clause also provides some guidance on when it would be reasonable in the Higher Education context to make such a refusal. The experience of the Group of 8 is that guidance does assist in providing clarity for both the employer and employees as to when refusal may be acceptable and when it would generally not be acceptable. This is also reflected in the absence of any disputation regarding the provisions.

24. **If there is a capacity for employers to refuse to convert employees to non-casual work on reasonable grounds, would it be reasonable or unreasonable to refuse conversion in the following circumstances:**

The following examples are based predominately around hours. There are other matters beyond ability to match hours that would significantly impact upon whether refusal was reasonable or unreasonable, many of which have been addressed in response to some of the questions above and in the Group of 8 submissions.

24.1 **Where an employee has been working close to full time hours over a 6 month period (taking into account periods of leave which would be accessible to a full time employee and the capacity to average full time hours to the extent provided for in the relevant award)?**

It would generally be unreasonable provided that there is some ongoing requirement for the work and activities of the employee, but all circumstances would need to be taken into account, such as whether the employment was provided under a particular program providing for casual employment for students or whether they had been working in the same role over that 6 month period or if it is made up of a number of different casual appointments , etc.

24.2 **Where an employee has been working close to full time hours over a 12 month period (taking into account periods of leave which would be accessible to a full time employee and the capacity to average full time hours to the extent provided for in the relevant award)?**

As per the response to question 24.1 above, recognising that it is less likely to be reasonable to refuse conversion.

24.3 **Where the employer can demonstrate that the work requirement which has been met by the casual employee will not be continuing over the next 6 months and adjustment to the remaining casual pool is unable to meet normal or likely fluctuation in work demand?**

This would generally be a reasonable basis for refusal, but again all of the circumstances would need to be taken into account.

24.4 **Where the pattern of on-going part-time hours required to meet business needs is able to be accommodated by the part-time provisions of the relevant award?**

This question focuses solely on hours and the part-time provisions of the relevant award. It is simply one element which would need to be taken into account in determining whether a refusal was reasonable or unreasonable. The hours sought by the employee and/or able to be agreed by the employer would obviously also impact on this question as would other issues concerning the role and the employee's circumstances.

- 24.5 **Where the pattern of on-going part-time hours required to meet business needs is unable to be accommodated by the part-time provisions of the relevant award?**

As per the response to question 24.4 above.

26. **If employers retain the capacity to refuse to convert employees to non-casual work subject on reasonable grounds, should the employer be required to engage in a discussion with the employee about the issue before making a decision about conversion?**

Under the existing casual conversion clause in the Higher Education GS Award there is no express obligation to engage in a discussion with the employee. However, there is an obligation to provide the employee with written reasons if the employee's application for conversion is refused. In practice, discussions do occur with the employee.

27. **Could any absolute right to convert be subject to the capacity for an employer to seek an exemption by application to the Commission or some other mechanism?**

For all of the reasons contained in the Group of 8 submissions, an absolute right to convert should not be included in the Higher Education GS Award. If nevertheless an absolute right to convert was included (i.e. no ability to refuse on any grounds no matter how reasonable), there would need to be some practical capacity to seek relief from such an absolute obligation.

Labour hire

30. **Have casual conversion clauses encouraged, or will they encourage, employers to source casual labour from labour hire businesses?**

In the experience of Universities who already have casual conversion provisions in place, such provisions in their current terms have generally not encouraged employers to source casual labour from labour hire businesses. However, if, for example, there was no basis to refuse conversion on reasonable grounds, it is highly likely that to avoid the prospect of employment of casual staff who will ultimately become permanent in circumstances where there is no ongoing requirement for their duties or an unpredictable requirement for their duties, sourcing casual labour from labour hire businesses is more likely to occur in order to maintain operational flexibility and to avoid the other consequences associated with conversion of such staff in these circumstances (as per the response to question 11 above).

D. Allocation of additional work

31. **In relation to the ACTU claim that the number of existing part-time or casual employees not be increased before allowing existing part-time or casual employees the opportunity to increase their hours, what would the practical steps be that the employer would have to take to discharge this obligation (particularly if it is a very large employer of casuals such as McDonalds)?**

The Group of 8 have specifically led evidence about this proposed obligation and identify that it would be unworkable. This is canvassed in the evidence of Diana Dalton, Executive Director, Faculty of Business and Economics at the University of Melbourne in paragraphs 39 to 40¹⁰,

¹⁰ Exhibit 48.

witness evidence of Bronwyn Shields, Faculty General Manager of the Faculty of Engineering and the Faculty of Information Technology at Monash University at paragraphs 26 - 31¹¹.

That evidence highlights that Universities have multiple departments, faculties and often multiple campuses and cohorts of employees across each of those organisational units who may, and often will, be performing similar work, who cannot sensibly be canvassed prior to offering a new casual or part-time appointment. As appointment of casual staff is determined and managed at the faculty and departmental level the new provision would impose requirements for significant new systems to be purchased and/or developed across the Universities.

More fundamentally, the evidence highlights exposing Universities to a breach of an award for employing an additional part-time or casual staff member of the type suggested by the ACTU is neither practical nor sensible given (amongst other things):

- (a) the nature and size of Universities;
- (b) the number of staff within the Universities; and
- (c) in particular, the fact that the exact number of casual staff is constantly fluctuating and is not readily known at any particular point in time, often changing on a daily basis.

32. **Is there anything in the modern awards objective in s.134(1) of the Fair Work Act which suggests that the interests of existing employees should be preferred over those of potential new employees in a fair and relevant award safety net?**

No. Elements of the factors that are required to be taken into account impact differently on existing and new employees.

E. Casual minimum engagement

33. **Is it appropriate to establish a standard minimum engagement period for all or most modern awards in circumstances where the purpose for which casual employees are engaged may differ as between different industries?**

No. The casual minimum engagement period should take into account the particular circumstances of the particular industry. In relation to the Higher Education industry the specific features and circumstances surrounding the engagement of casuals are reflected in the existing minimum engagement provisions in the Higher Education GS Award.

These include accommodating student employment, including between lectures and classes, and particular activities which necessarily are less than 4 hours (some exam invigilation, student note takers for students with disabilities during a 1 hour lecture, fitness instructors (generally 1 hour) and simulated patient work in medical faculties (with a minimum engagement period of 2 hours).

The prevalence of low paid workers in particular industries would also vary and in the Higher Education sector the wage rates across the sector are significantly higher than those in award dependent sectors and activities such as retail.

34. **Should there be scope for the parties to agree to a shorter minimum period of engagement than the award standard? If so, what arrangements/protections should apply, e.g. should it be solely at the request of an employee?**

Yes, there should be scope for parties to agree to a shorter minimum period of engagement. Although such provision is not presently included in clause 12 of the Higher Education GS

¹¹ Exhibit 45.

Award it has been included in many enterprise agreements across the sector and is generally upon request of the employee.

35. **Should there be a shorter minimum period of engagement for school students engaged as casual employees? If so, what should the minimum period be and should it only apply at specific times, e.g. school days?**

Whilst not commenting on the issue of school students the issue of University students generally is raised squarely and at some length in the Group of 8 materials and evidence and demonstrates the importance of University programs and offerings of casual employment to students as part of their development, enhancing the University community, to enhance the student experience, provide income and support for the students. This employment also includes employment specifically to complement their degree studies, and related matters. For example at UNSW 50% of casuals are students of the University, generally already on campus and mixing work with their lecture and study commitments.

The existing clause 12.2 in the Higher Education GS Award already addresses this issue providing for a minimum engagement of 1 hour where the employees are students who are "expected" to attend the University on that day in their capacity as students and confirms that a student will be taken to be expected for attendance on any Monday to Friday during the main teaching weeks of the University other than public holidays (see clauses 12.2(i) and (ii)).