IN THE FAIR WORK COMMISSION

Fair Work Act 2009

s.156 - Four Yearly Review of Modern Awards
AM 2014/229 - Higher Education Industry - Academic Staff Award 2010
AM 2014/230 - Higher Education Industry - General Staff Award 2010

SUBMISSIONS IN RESPONSE TO NTEU REPLY SUBMISSIONS

Filed on Behalf of the Group of Eight Universities

A. Introduction

1. These submissions are made on behalf of the Group of Eight in response to the NTEU's Outline of Submissions in Reply dated 8 March 2017 (**NTEU March 2017 Reply Submissions**) opposing proposed variations sought by the Group of Eight to remove a discriminatory provision in clause 17.6 of the Academic Staff Award and to delete the fixed term severance provisions in the Academic Staff Award and the General Staff Award.

2. The NTEU have previously filed submissions opposing those variations on 3 June 2016 (Exhibit NTEU C) and the Group of Eight filed response submissions on 8 July 2016 (Exhibit 4), prior to evidence in the proceedings.

3. We continue to rely upon the response submission of 8 July 2016 (Exhibit 4) and rely upon the submissions filed on 3 February 2017 in support of the proposed variations (**Go8 February 2017 Submission**).

4. In the Go8 February 2017 Submission, we identified the clear basis on which clause 17.6 of the Academic Staff Award constituted a discriminatory term based upon age, contrary to the prohibition in s.153 of the *Fair Work Act 2009 (Cth)* (**FW Act**).

5. The NTEU had previously acknowledged in Exhibit NTEU C that the clause was likely discriminatory but that the appropriate "solution" was to increase the notice in circumstances of redundancy to 12 months for all employees, plus notice under the NES (or employment contract, whichever was the higher), in addition to the NES redundancy payment in accordance with s.119.

6. The NTEU now submits that:

   (a) the clause is not discriminatory as it is "affirmative action measure" designed to compensate for the otherwise discriminatory impact of redundancy on academic staff over the age of 40, and therefore does not discriminate against employees for reasons of the employee's age (and in effect should be read subject to an exception in the *Age Discrimination Act 2004* (Cth) (**AD Act**);

(b) the Group of Eight argument (that the provision is discriminatory contrary to s.153(1)) "offends the rule that absurd or repugnant interpretations should be avoided where possible";[1] and

(c) that the term "discriminate" as it appears in section 153 of the FW Act must be read to only preclude terms that discriminate insofar as they result in a detriment to employees to whom the term applies and that the clause does not do so.[2]

7. The NTEU makes an alternate submission that if the provision is discriminatory that the appropriate remedy is to increase the notice for all academic employees in circumstances of involuntary redundancy to 12 months (in addition to notice under the NES or the contract of employment) and in addition to the severance pay set out in the NES.

8. The NTEU submissions should not be accepted for a number of reasons:

(a) it seeks to read down the sentence "*discriminates against an employee because of, or for reasons including, the employee's… age*" in a manner that is not supported by:

(i) the wording of the section 153;

(ii) consideration of other provisions in the FW Act; or

(iii) judicial authorities;

(b) further and in any event, even if the term "discriminates against" was to be read subject to the exceptions in the AD Act, the nature and extent of the disparity and differential treatment represented by the clause extends beyond the exception appearing in that legislation (and the equivalent provisions in State legislation) and at the least does discriminate against employees aged under 40, aged 40,41,42,43 and 44 on the basis of their age.

9. Each of these matters are briefly addressed below.

10. In relation to the NTEU's alternate proposal:

(a) there is no basis in the modern awards objective nor on the evidence which warrants the adoption of a 12 month notice payment together with NES notice (or contractual notice, whichever is the higher) and redundancy pay, as being an appropriate "minimum" set of entitlements as an award safety net. There is no

[1] Para 2.11 of the NTEU March 2017 Reply Submissions.

[2] Para 2.13 of the NTEU March 2017 Reply Submissions

evidence that supports providing an additional period of up to a further 6 months' notice in addition to the already generous minimum 6 month notice provisions (which is more generous than any other award that we have been able to identify); and

(b) if the Full Bench determined it was discriminatory and was concerned about the adoption of a flat entitlement (albeit a very generous one by community and award standards) the appropriate approach would be to adopt a service based scale based upon length of service as is the case for notice and severance pay under the FW Act. Such an approach was recently adopted by the Full Bench of the Commission in *Black Coal Mining Industry Award 2010* [2017] FWCFB 584:

> "***[64]*** *Accordingly, we consider some amendment is necessary to Clause 14 of the Modern Award, while retaining the essential characteristics of the scheme. No age-based cap ever applied to the one week per year of service severance payment, and we do not consider it would now be appropriate to impose a cap or make any other change to this aspect of the clause. However we do consider that a cap, based on complete years of employment, should be applied to the retrenchment payment of two weeks for each completed year of employment in order to restore the industrial balance in the scheme in a non-discriminatory way*"
>
> [emphasis added].

B. Meaning of "discriminates against"

11. Clause 17.6(b) of the Academic Staff Award on its face discriminates against persons who are 40 or under, 41, 42, 43 and 44 on the basis of their age in relation to the amount of notice they are provided (or paid in lieu) in circumstances of redundancy. The amount of notice is determined solely on the basis of age. Service and traditional considerations such as loss of non-transferable leave benefits that have accrued, are irrelevant.

12. The terms "discriminates" or "discriminates against", as used in the FW Act, are not defined either in the FW Act, nor are they the subject of relevant guidance in its explanatory memorandum or in Hansard.[3] . The terms have however been judicially considered by the Federal Court.

[3] Whilst there are references to there being "enhanced protections" from discrimination, particularly in the context of the general protections provisions of the FW Act (see for example the Second Reading speeches from Ms Julia Gillard, Ms Kirsten Livermore, Mr Mike Symon, and Mr Damien Hale) the term is not defined either by reference to discrimination legislation or otherwise.

13. In the decision of the Full Court of the Federal Court in *Australian Building and Construction Commissioner v McConnell Dowell Constructors (Aust) Pty Ltd* [2012] FCAFC 93, Buchanan, Flick and Katzmann JJ conduct a detailed analysis of the term "discriminates against" and its use in Commonwealth legislation, when considering its meaning in section 45 of the *Building and Construction Industry Improvement Act 2005* (Cth). This section provides:

> *"A person (the first person) must not discriminate against another person (the second person) on the ground that:*
>
> *(a) the employment of the second person's building employees is covered, or is not covered, by:*
>
> *(i) a particular kind of industrial instrument; …"*

14. In three separate judgements, their Honours set out a number of propositions in relation to the meaning of "discriminate against":

(a) that the term "discriminate against" requires identification and consideration of a burden or adversity and its consequences:

> *"[26] The examples I have given are obviously drawn from different areas of the law, and are neither comprehensive nor exhaustive. However, they are unified by one feature: the notion of "discriminate against" requires identification and consideration of burden or adversity and its consequences".*[4]

(b) that even though the same term is used in different Commonwealth legislation – e.g. in discrimination legislation, the Australian Constitution, the FW Act, etc., the meaning of the term must be discerned from the words of the particular legislation being considered, even if that leads to an undesirable outcome:

> *"[42] Sometimes a parliamentary draftsman employs the term "discrimination" and thereafter defines that conduct which constitutes "discrimination". Sometimes there is a legislative specification of those criteria which are "irrelevant" to any assessment as to whether or not there has been "discrimination". On other occasions, the parliamentary draftsman will employ phrases such as "discrimination between" or "discriminate against". Whether there is any difference in the ambit of the conduct that comes within the particular statutory phrase in issue will obviously depend upon the statutory context in which the phrase is used.*

[4] Per Buchanan J. See also [71]-[73] per Flick J, and [111] per Katzmann J.

….

[50] ***Although the same phrase may thus be used in a number of discrete Commonwealth statutory provisions and (indeed) in the Constitution itself, the meaning of any particular phrase must be discerned by reference to the statute in which the phrase is employed****. The duty of the Court is to construe and apply statutory language in the context in which it appears. It is no part of the function of the Court to construe the statutory language in order to achieve what it perceives to be the desirable outcome or to avoid a "draconian" outcome".*[5]
[citation omitted and emphasis added].

and

(c) the term should be interpreted consistently with the underlying purpose or object of the legislation, and should not lead to a construction antithetical to that purpose or object.[6]

15. These principles are supported by the decision of Tracey J in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* [2012] FCA 480, which considered the meaning of the term "discriminate against" as it appears in the context of section 153 of the FW Act. The decision pertained to amendments made to clause 13.4 of the *General Retail Industry Award 2010* which provided for a lower minimum daily engagement for casual employees who are full-time secondary school students employed after school hours (1.5 hour minimum engagement, down from 3 hours), provided certain criteria are met (e.g. parental consent to work less than 3 hours). The SDA applied for judicial review of the decision to vary the award on the basis that the amendment discriminated against employees who were rendered less attractive to potential employers because they could not be engaged for less than 3 hours. In other words, that the provision discriminated against employees who are not in high school, constituting indirect discrimination on the basis of age.[7]

16. In interpreting section 153 of the FW Act, His Honour relevantly held:

"[52] The Act does not define the word "discriminate" or the words "discriminate against". ***The ordinary and natural meaning of the word 'discriminate'***

---

[5] See also [73]-[74],

[6] At [61].

[7] It is noted that Tracey J found that indirect discrimination was not covered by the FW Act and on that basis he dismissed the application. This is further discussed below at paragraph 19.

connotes the making of distinctions. In the context of s 153(1) this involves the making of distinctions between employees whose employment is regulated by the Award.

[53] It is next to be noted that not all discrimination is proscribed. What is proscribed is discrimination against an employee. That means ***the making of an adverse distinction between employees****.* ***The adverse distinction must be drawn for one of the reasons, including age, which appear in the sub-section****"* [emphases added and citations omitted].

17. This broad interpretation of the terms "discriminate" or "discriminates against" is consistent with a number of other decisions considering their meaning within the context of the FW Act. For example:

(a) In *CFMEU v Rio Tinto Coal Australia Pty Ltd* [2014] FCA 462, Flick J held that, in the context of section 342(1) Item 1.(d) of the FW Act (which defines adverse action as including discrimination between employees):

> *"[58]…the term "discriminate" simply means to treat employees differently. That simple meaning underlies, it is considered, other provisions in the Fair Work Act which use the same term. Those provisions are ss 153, 195 and 354…"*

and

(b) In *Klein v Metropolitan Fire and Emergency Services Board* [2012] FCA 1402, Gordon J held (also in the context of section 342(1) Item 1.(d) of the FW Act) that:

> *[89] … The word "discriminate" used in Item 1(d) of s 342(1) is not defined in the FW Act. The MFESB referred the Court to dictionary definitions of the word "discriminate". The utility of such an exercise is limited … Of course, the text of Item 1(d) is to be construed in the context of the FW Act and in a manner consistent with the policy and purpose of the legislation, in particular Pt 3-1 … The ordinary and natural meaning of the word "discriminate" connotes the making of distinctions … Of course, here the discrimination must be "between the employee and other employees of the employer"* [citations omitted]

18. Interpreting the meaning of the term "discriminates against" in the context and having regard to the objects of the FW Act (rather than linking it to particular provisions in other legislation) is also consistent with section 15AA of the *Acts Interpretation Act 1901* (Cth), which provides:

> ***"15AA*** *Interpretation best achieving Act's purpose or object*

In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation".

19. It is noted that there is judicial divergence as to whether discrimination under the FW Act includes indirect discrimination or whether it is simply a reference to direct discrimination only.[8] However, even if it was limited to direct discrimination, that debate is not relevant for present purposes as it is manifest that Clause 17.6 of the Academic Staff Award directly discriminates against employees below the age of 45 and as between employees aged 40, 41, 42, 43, 44 and 45. This debate does however demonstrate that the Federal Court, when interpreting the meaning of the word "discriminate" in the FW Act, has not been substantively guided by the scope of Commonwealth discrimination legislation, but rather has looked to the provisions of the particular Act. The suggestion of the NTEU to the contrary is not therefore supported by the weight of binding judicial authority and applies the wrong statutory test.

C. Application of judicial principles to the Academic Staff Award

20. As a starting point, the plain or ordinary interpretation of section 153 is to avoid inclusion of clauses that provide for differential entitlements based upon the listed attributes or characteristics. It is clear that that was not intended to be a part of the role of the awards and their terms. Accordingly, awards should not, for example, provide different entitlements based upon the sex of the employee.

21. This is then reinforced by the specific calling out of a list of identified exceptions in s.153(2), supporting the view that outside of those specifically identified exceptions, the Award must not include a provision that differentiates for the reason or a reason that includes the employee's age, sex and various other proscribed attributes. This undermines the primary NTEU submission that the term "discriminates against" must be read down to exclude any provision that provides for conduct that falls or could fall within an exception found in Federal anti-discrimination legislation.

Detrimental effect of the clause

[8] See for example the decision in *Klein v Metropolitan Fire and Emergency Services Board* [2012] FCA 1402 (in particular [94] to [97]) in which it is suggested that discrimination between employees (in the context of section 342) should not be narrowed to exclude forms of indirect discrimination from constituting an adverse action for the purposes of the FW Act. This contrasts to the decision of Tracey J in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* [2012] FCA 480 (see paragraphs [56] to [58]) in which he found that it would have been unlikely that Parliament would have intended for discrimination in the context of section 153 to extend to indirect discrimination.

22. As set out at paragraph 29 of Exhibit 3, clause 17.6 of the Academic Staff Award directly discriminates against employees on the basis of their age as it contains lesser or greater entitlements based upon their age rather than their length of service, to the detriment of employees at each age group of 39 and under, 40 41, 42, 43 and 44 relative to all older employees..

23. The proposition advanced by the Group of 8 (that providing double the benefit to an employee because they are 5 years older than another employee discriminates against an employee or group of employees on the basis of age) is not controversial. We note that:

(a) it is clear that age discrimination protections are not solely to protect against discrimination against older persons, but also includes protection for younger workers against being discriminated against on the basis of age (subject to specific identified exceptions such as provision for youth wages); and

(b) the NTEU acknowledges at paragraph 2.29 of the NTEU March 2017 Reply Submissions that clause 17.6 does have a detrimental effect, resulting in a large group of employees (approximately 50% of academic employees) being discriminated against on the basis of their age.

Underlying purpose and objects of the legislation

24. The NTEU's submission is that the term "discriminate against" should be interpreted consistently with a conclusion about unlawful discrimination under a Federal equal opportunity legislation (and should therefore be read down to exclude any conduct that could fall within an exception under equal opportunity legislation – in particular the AD Act. However, this applies the wrong statutory test and is inconsistent with the judicial authorities set out above. As noted above, each legislative instrument must be viewed in its own context having regard to its objects and purposes, not by importing additional exceptions or provisions drawn from other legislative instruments.

25. The objects or purpose of the FW Act are set out at section 3 and relevantly include:

"The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

….

(b) ***ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through*** *the National Employment Standards,* ***modern awards*** *and national minimum wage orders; and*

….

(e) … ***protecting against*** [a range of matters, including] ***discrimination*** *….."*

26. This object is supported by adopting an expansive interpretation of when a provision or clause "discriminates against" an employee, rather than limiting or importing qualifications or exceptions.

27. Also of relevance is section 578(c) of the FW Act which provides that the Fair Work Commission, when performing any of its functions or exercising any of its powers (including in relation to modern awards) must take into account "*the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.*"

28. There is no suggestion that these objectives are guided by the meaning of discrimination in the AD Act or other equal opportunity legislation. Further, the various pieces of equal opportunity legislation at Federal and State level are also not uniform, nor are the exceptions), and in the absence of such guidance, it is not appropriate to confine the role of the Fair Work Commission. when considering whether clauses are discriminatory for the purposes of the FW Act or in considering the modern awards objective, to adopt a narrower rather than broader interpretation of discrimination under the FW Act.

NTEU submission about internal consistency with section 351

29. With respect to the NTEU's submission that s.153 should be interpreted in the same way as the general protections provisions and in particular s.351, such a comparison is not supported by the actual provisions in both ss. 351 and.153 for a number of reasons:

(a) First, section 351 deals with a concept broader than discrimination and deals with adverse action taken against a person because of certain identified attributes or elements, whether in accordance with discrimination legislation or otherwise. To the extent that ss.351(1)-(3) deals with discriminatory action and conduct, it extends beyond the provisions of an industrial instrument. Further, it specifically and expressly excludes from the concept of unlawful conduct (in breach of the general protections provisions as specified in s.351), conduct that is **not unlawful** under any anti-discrimination law in force in the place where the action is taken:

> *"(2) However, subsection (1) does not apply to action that is:*
>
> ***(a) not unlawful under any anti-discrimination law in force in the place where the action is taken**; or*
>
> *(b) taken because of the inherent requirements of the particular position concerned; or*
>
> *(c) if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed--taken:*

(i) in good faith; and

(ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed."

[emphasis added]

(b) This can be compared and contrasted to the prohibition on terms that discriminate against an employee on the basis of age (and other attributes) being included in awards in s.153(1) and the listing of certain specific exceptions that appear in s.153(2).

"Certain terms are not discriminatory

(2) A term of a modern award does not discriminate against an employee:

(a) if the reason for the discrimination is the inherent requirements of the particular position held by the employee; or

(b) merely because it discriminates, in relation to employment of the employee as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed:

(i) in good faith; and

(ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.

(3) A term of a modern award does not discriminate against an employee merely because it provides for minimum wages for:

(a) all junior employees, or a class of junior employees; or

(b) all employees with a disability, or a class of employees with a disability; or

(c) all employees to whom training arrangements apply, or a class of employees to whom training arrangements apply."

(c) As is evident from the above extracts, the broad based exception or qualification in s.351(2) relied upon by the NTEU does not appear in s.153 (nor in s.195). Applying well established principles of statutory interpretation, this supports the view that the that types of clauses precluded by s.153(1) are not read subject to a general exception or qualification as appears in s.351 (2) (which has clearly not been included in s.153(2)).

(d) Secondly, if the term "discriminate against" was interpreted to exclude any conduct that is otherwise discriminatory but falls within the exception in a piece of anti-discrimination legislation (as suggested in the NTEU March 2017 Reply Submissions), then the exceptions that appear in s.153(2) would be unnecessary.

For example all State and Federal Disability Discrimination Act include exceptions based upon the inherent requirements of the position held by an employee. Yet this is identified in s.153 as a qualification to what would otherwise be a term that discriminates against an employee for a listed proscribed reason.

30. Finally, as noted above, despite the term "discriminate" (as it appears in the FW Act) having been the subject of judicial consideration on a number of occasions, there has been no indication that section 153 should be interpreted subject to the exceptions set out in section 351 or in anti-discrimination legislation generally. To the contrary, the omission of section 351 from the list of clauses referenced by Flick J in the *Rio Tinto* decision mentioned above at paragraph 17(a) implies that section 351 should be set apart from other references to discrimination in the FW Act – namely those in sections 153, 195, 342 and 354 of the FW Act.

31. Accordingly, consideration of the terms and exclusions at each of 153(1) and (2), the surrounding provisions of the FW Act, and judicial consideration of the FW Act does not support the more limited interpretation sought to be given by the NTEU as to what terms "discriminate against an employee" for the purposes of s.153.

C. The Modern Awards Objective

32. As noted above, one of the purposes of the FW Act is linked to achieving the modern awards objective. For the NTEU's submission (that clause 17.6 of the Academic Staff Award addresses a disadvantage suffered by employees aged over 40) to be accepted, this means that the Full Bench must be satisfied that clause 17.6 of the Academic Staff Award should continue in its discriminatory form in order to achieve the modern awards objective.

Relevance of "Positive Discrimination"

33. The NTEU's submission is that the discriminatory provision is necessary to provide a fair and relevant minimum safety net because it amounts to "positive discrimination" within the meaning of equal opportunity legislation (though it notes that primacy should be given to s.33 of the AD Act rather than State-based equal opportunity legislation).

34. This submission should be rejected for the following reasons:

(a) as set out at paragraph 22 of Exhibit 3, the entitlements conferred under clause 17.6(b) of the Academic Staff Award pre-date the commencement of the AD Act and were not therefore intended to fit within the "positive discrimination" exception set out at section 33 of the AD Act. The NTEU has not otherwise led any evidence to suggest that when the clause was established it was "intended to reduce a disadvantage experienced by people of a particular age" (noting that this is the statutory test imported by section 33 of the AD Act, as described in the table below at paragraph 35); and

(b) having regard to sections 26, 27(1A) and 29 of the FW Act (which preserve the operation of State discrimination legislation as against the FW Act and industrial instruments), an approach that requires s.153 to be read down to align with one piece of anti-discrimination legislation (in this case the AD Act) is fraught, as unless there is the same exception in each piece of State discrimination legislation, the Award could be permitted to include provisions that require the employer to unlawfully discriminate in contravention of the state anti-discrimination legislation (even if it was not a breach of the Federal AD Act because of a particular exception in that legislation).

35. Against this background, it is noted that the nature and extent to which discrimination is permitted in favour of particular groups differs between each jurisdiction, which distinction was not properly considered by the NTEU in its submissions. A summary of the relevant provisions is as follows:

Jurisdiction	**Sections**	**When Positive Discrimination applies**
AD Act	s.33	To actions that provide a bona fide benefit to persons of a particular age and are intended to do so, **to meet a need** that arises out of the age of a person of a particular age, or that are intended to **reduce a disadvantage** experienced by people of a particular age.
Discrimination Act 1991 (ACT)	s.27	Actions taken to ensure equal opportunities between people of different ages or access to facilities, services or opportunities to meet their special needs. Actions must be reasonable to achieve that purpose.
Anti-Discrimination Act 1977 (NSW)	s.49ZYR	Actions taken to afford persons who are of a particular age or age group access to facilities, services or opportunities to meet their special needs or promote equal or improved access to those facilities, services and opportunities.
Anti-Discrimination Act 1977 (NT)	s.57	Implementing a program, plan or arrangement designed to promote equality of opportunity for a group of people who are disadvantaged or have a special need because of an attribute. The exception only applies until equality of opportunity has been achieved.
Anti-Discrimination Act 1991 (Qld)	s.105	Actions taken which are designed to promote equal opportunity for a group of people with an attribute, provided that their purpose is not inconsistent with the act. The exception only applies until equality of opportunity has been achieved.

Equal Opportunity Act 1984 (SA)	s.85P	Actions taken for the purpose of carrying out a scheme or undertaking for the benefit of persons of a particular age or age group in order to meet a need that arises out of, or that is related to, the age or ages of those persons.
Anti-Discrimination Act 1998 (Tas)	ss.25-26	Actions taken for the purpose of carrying out a scheme for the benefit of a disadvantaged group, or in any program, plan or arrangement designed to promote equal opportunity for a group of people who are disadvantaged or have a special need because of a protected attribute.
Equal Opportunity Act 2010 (Vic)	s.12	Any special measure taken for the purpose of promoting or realising substantive equality for members of a group with a particular attribute, provided that it is undertaken in good faith for achieving that purpose, is reasonably likely to achieve that purpose, is a proportionate means of achieving that purpose, and is justified because of the particular need for advancement or assistance.
Equal Opportunity Act 1984 (WA)	s.66ZP	Actions taken to afford or ensure persons of a particular age have equal opportunities with other persons or have access to facilities, services or opportunities to meet their special needs in relation to employment, education, training or welfare.

36. As is evident from the above table, many of these "positive discrimination" exceptions only apply to the provision of special needs programs, facilities or services (e.g. NSW and SA, and arguably in NT, Tasmania and WA) and to that extent, would not extend to the provision of additional notice of termination in the context of a compulsory redundancy. In those jurisdictions, the differential entitlement would therefore likely constitute unlawful discrimination. In the majority of other cases, the provision is also limited by principles of proportionality or reasonableness (e.g. the benefit is only lawful to the extent that it is necessary to address the relevant disadvantage).

37. It is not clear if the NTEU's position is that "positive discrimination" is necessary to achieve the modern awards objective, but in any event clause 17.6 is not consistent with the concept of proportionality as it goes well beyond a provision consistent with reducing disadvantage experienced by people of a particular age, relative to those of a different age.

    (a) First, the extent of the differential treatment extends well beyond what could be described as compensating for the otherwise discriminatory impact of redundancy on academic staff over the age of 40. The effect of the provision, amongst other matters, is that for an employee aged 45 to overcome the relative disadvantage to someone who is 40, they need to be provided with double the notice – that means 12 months' (rather than 6 months') notice? Further, an additional month for an

employee that is 41 rather than 40 is not defensible as a benefit provided to address the relative disadvantage for being 41 years old when compared to 40 .

(b) Secondly, while the NTEU rely upon an additional one week's notice under the NES (s.117(3)(b) of the NES) for employees with more than 2 years' service or over 45 years of age in support of positive discrimination for persons over 45, this provision further highlights the extent to which clause 17.6 of the Academic Staff Award goes beyond reasonable measure to address disadvantage for older workers (particularly as a minimum entitlement). Section 117 still provides for a service based entitlement. Accordingly, an employee who has 2 years of service and is aged over 45 years of age still receives less notice than an employee who has in excess of 5 years of service. Further, the quantum of additional notice is limited to one week. It is also notable that the FW Act does not provide additional redundancy pay based upon age or additional notice based upon age in circumstances of redundancy. Rather, the entitlement is a service based entitlement.

(c) In comparison, clause 17.6 is solely based upon age and ignores length of service and other matters that would have a significant impact on the relative disadvantage to the employee in circumstances of redundancy. An employee with 20 years' service and aged 40 receives 6 months' notice plus another 4 weeks' notice under the NES, whereas a 45 year old employee with one year's service (or indeed one week's service) receives at least 12 months' notice of redundancy, plus notice and severance under the NES. Even if the exception in s.33 of the AD Act were required to be applied to interpreting "discriminates against", such clause cannot sensibly be defended as being permissible discrimination under the AD Act, or otherwise necessary to achieve the modern awards objective.

38. As to the general suggestion that the age-based scale was specifically intended to reduce disadvantage experienced by people over 45, as set out above there was no evidence lead that clause 17.6 was intended to do this, nor that in the higher education industry, older academics are less employable or impacted to a greater extent by redundancy. The fact that the clause also provides different notice entitlements based upon fine distinctions between ages 40, 41, 42, 43, 44 and 45 and no additional benefits for employees over (say) 47 or 48 or 49 etc. or 60 also undermines this argument.

s.134 considerations

39. Applying the statutory list of mandatory considerations set out at section 134(1) of the FW Act:

(a) <u>relative living standards and the needs of the low paid</u>

there is no suggestion that continuing academic staff are low paid.

(b) <u>the need to encourage collective bargaining</u>

there is no suggestion that the clause is necessary to encourage collective bargaining, however it is noted that the provision of additional notice can be the subject of collective bargaining.

(c) the need to promote social inclusion through increased workforce participation

there is no suggestion that the discriminatory scale increases workforce participation. To the contrary, the potential for 12 month' notice plus notice payments (including for employees with very short service) acts as a disincentive to employment generally and employment of over those aged over 45 years' old, potentially reducing workforce participation.

(d) the need to promote flexible modern work practices and the efficient and productive performance of work

there is no suggestion that the clause promotes such practices.

(da) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden

there is no suggestion that the clause is necessary to meet this objective, however as set out above, the clause effectively prevents universities from implementing redundancies for a period of up to 12 or more months.

(e) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards

the disparate nature of this entitlement relative to all other awards does not support a stable award system.

(f) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy

there is no suggestion that clause 17.6 supports this matter.

D. Group of 8 proposal

40. The NTEU refers to the effect of the Group of 8 variation as removing or absorbing the NES notice entitlement. As set out at paragraph 8 of the Go8 February 2017 Submission, the Group of 8 have proposed to vary clause 17.6 of the Academic Staff Award to remove the entitlement to an aged-based notice scale upon redundancy.

41. This criticism is misconceived and highlights a further problem with the existing provisions. Clause 17.6 was included as part of an industry specific redundancy scheme (a matter

acknowledged and relied upon by the NTEU)[9]. The current age based notice scale is in addition to notice and redundancy provided under the NES. However, an employee to whom an industry-specific redundancy scheme in a modern award applies is not entitled to the redundancy entitlements in Subdivision B of Division 11 of Part 2-2[10], which includes notice and redundancy pay. Therefore in addition to the discriminatory effect of clause 17.6, to the extent that the clause references entitlements in addition to 6-12 months' notice as being in addition to notice and severance entitlements under the NES, the clause is inconsistent with the requirements of the Act, and the Award needs to be varied to remove that "double dipping".

E. NTEU alternative proposal

42. The NTEU alternative proposal is that the clause's discriminatory effect be addressed by varying the clause to provide for 12 months' notice for all employees in addition to NES notice (or contractual notice, whichever is the higher) plus NES redundancy pay. Such a submission should clearly be rejected.

43. It is very difficult to see how such an entitlement for every retrenched employee reflects a fair and relevant safety net or how such variation varies the award only to the extent necessary to provide such safety net in accordance with section 156.

44. The NTEU relies upon certain reports filed in the proceedings about demographics of employees in the sector. Even if these reports are accepted on their face (and noting that no evidence was called about them) the data in them, including as referenced by the NTEU, does not support the NTEU's propositions and submissions made in paragraphs 2.34 - 2.40 of the NTEU March 2017 Reply Submissions.

45. First, the NTEU make a "cute" submission that the clause only discriminates against people because those under 45 years of age have less than 12 months' notice. Obviously, the reason why they are discriminated against is because other employees are provided a higher entitlement based solely on age.

46. This is not a basis for increasing an entitlement by up to an additional 6 months relative to the existing award.

47. In relation to the data, the NTEU submits that the data "leads to the conclusion that the vast majority of the continuing employees who might be made involuntarily redundant are aged 45 or over". This submission is both inaccurate and is not responsive to the fact that there are a

[9] Exhibit 3, [23]; Exhibit NTEU C, [3]-[5].

[10] FW Act, section 123(4)(b).

very significant numbers of employees who are under 45 for whom the clause clearly has a discriminatory effect.

48. Whilst asserting "the vast majority are aged 45" or over, the NTEU's own submissions identify that the data relied upon does not support this. For example, the University of Queensland Annual Workforce Profile Report identifies that:

(a) the median age for academic staff at the Group of Eight Universities was 42;

(b) and at all Australian universities was 45;

(c) that only 42.9% of all UQ academics were aged 45 or over (see 2.36 of the NTEU March 2017 Reply Submissions), and

(d) that only 46.4% of fixed term and continuing academic staff at the Group of Eight and 53.2% across all Australian Universities were aged 45 years or over.

49. These submissions do not support the sweeping conclusions submitted by the NTEU that "the vast majority of the continuing employees who might be made involuntarily redundant are aged 45 or over".

50. With respect to the NTEU's submission that its conclusion is supported by the Universities' failure to provide evidence about the age profile of academic staff eligible for notice of termination under clause 17.6(b) of the Award (and that the Commission should draw adverse conclusions in respect of that failure)[11], this submission should be rejected. Such evidence is not necessary to identify whether or not clause 17.6(b) is directly discriminatory and it is noted that it was not until after all evidence was filed and heard that the NTEU departed from its initial concession that the clause is discriminatory.

51. If the Commission accepts that clause 17.6(b) of the Academic Staff Award is discriminatory but that entitlements in excess of 6 months' notice should be replaced in a non-discriminatory way, then a service based scale could be adopted.

52. The adoption of a requirement that all staff be given at least 12 months' notice (which must be actual notice) would also be inconsistent with a fair and relevant safety net of minimum terms and conditions and effectively imposes on an employer a compulsion to continue to employ that staff member whose position has been identified as redundant, for at least a further year before the staff member is retrenched. Such an approach should not be endorsed by the Full Bench in this matter.

[11] NTEU March 2017 Reply Submissions, [34].

F. Deletion of fixed term "severance"

53. The NTEU submissions largely repeat its previous submissions and to that extent, the Group of 8 relies upon its previous submissions, including the Go8 February 2017 Submission.

54. As noted by the NTEU, the NES sets out Parliament's view of the appropriate minimum standards and conditions of employment, and in relation to entitlement to redundancy pay, has clearly identified which employees are entitled and which employees are excluded, and has specifically excluded employees employed on contracts for a specified period of time or a specified task from severance pay.

55. In relation to paragraph 4.9 of the NTEU Reply Submissions, the NTEU submits that the Commission is empowered to create an award that provides a scheme for redundancy payment that supplements or sits alongside an industry specific redundancy scheme. It is unclear whether the NTEU submit that fixed term severance constitutes an "industry specific redundancy scheme". This was not the stated basis on which the provision was included in the modern awards, nor does it withstand proper scrutiny.

56. The NTEU submit that awards should be able to include redundancy payments for employees upon the expiration of their fixed term contract, notwithstanding it is inconsistent with the provisions in the NES, as to find otherwise would have absurd effects, as it would exclude awards and enterprise agreements from including redundancy pay or notice periods for casual employees. Such examples are theoretical and we note that modern awards do not include such provisions providing redundancy pay for or NES notice of termination for casual employees.

57. The NTEU rely upon the making of the HECE Award in 1996 which included the fixed term severance payments and that some of the objects of s.88A of the *Workplace Relations Act 1996 (Cth)* at the time have parallels to the modern awards objective in the current legislation. However, the specific severance pay provisions of the NES and in particular, the provisions identifying and including a legislative redundancy scheme and specifying which employees are and not entitled to redundancy payments, was introduced by the FW Act itself and was not a feature of the legislative scheme at the time of making the HECE Award.

58. The severance payment provisions should be deleted in the manner sought by the Group of 8.

Clayton Utz
Solicitors for the Group of Eight
23 March 2017