

BEFORE THE FAIR WORK COMMISSION

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

Supplementary submissions of the Bond University Academic Staff Association

1. This submission supplements the written outline of submissions filed by in these proceedings by the Bond University Academic Staff Association (**BUASA**) on 10 March 2016 in support of BUASA's application to vary the Higher Education Industry Academic Staff Award 2010 (**the 2010 Award**) filed on 20 April 2015 (**BUASA's application**).

BUASA's application and the 4 yearly review process

2. It is appropriate for BUASA's application to be determined in the course of the Commission's four-yearly review of the 2010 Award 2010.
3. The 2010 Award presently covers Bond University.¹ BUASA's application is in the nature of an application to extend the coverage of a particular provision of the 2010 Award from which Bond University is presently excluded, namely, the provisions regulating the use of fixed-term employment contracts. It has proposed to do so by expressly including a reference to Bond University, in addition to the existing reference to the employers who were bound to the Higher Education Contract of Employment Award (**the HECE Award**), in clause 10.2 of the 2010 Award.
4. The effect of BUASA's application would be to bring Bond University's fixed-term employment practices into line with the overwhelming majority of the higher education industry. As recognised by Bond University,² BUASA's application does so with respect to the type of employees for which fixed-term employment is permissible³ and the entitlements of fixed-term employees⁴ (for the avoidance of any doubt, BUASA's application would also require the express inclusion of Bond University in clause 12 of the 2010 Award).

¹ Clause 4.1 of the 2010 Award.

² Transcript, 7 June 2016, PN184.

³ Clause 11.3 of the 2010 Award.

⁴ Clause 12 of the 2010 Award.

5. The 4 yearly review process is an appropriate context for the determination of BUASA's application because:
- (a) This review is the principal way in which the 2010 Award is maintained as a fair and relevant safety net of terms and conditions.⁵ The continuing exclusion of Bond University from the coverage of the fixed-term employment provisions of the 2010 Award seriously undermines the fairness and relevance of the safety net of conditions for fixed-term employees under the award. There is no (or at least no longer) any justification for exempting Bond University from compliance with the fair standards and practices in engaging fixed-term employees established in the 2010 Award.
 - (b) The variation of an existing modern award to cover certain employers is an express component of the 4 yearly review process.⁶ The Commission's review of modern awards under s 156 of the *Fair Work Act 2009 (the Act)* is subject to a special rule prohibiting the making of a modern award covering certain employers unless the Commission has considered whether it should, instead, make a determination varying an existing modern award to cover them.⁷ BUASA's application is seeking the variation of the 2010 Award to cover Bond University in respect of the terms and conditions relating to fixed-term employees as contained therein.
 - (c) The present 4 yearly review is broader in scope than the 2 yearly or transitional review conducted by the Commission in 2012. The Commission held that, in the 2 yearly review, it was unlikely to revisit issues considered as part of the Part 10A award modernisation process (unless there were cogent reasons for doing so).⁸ Both the 2 yearly review⁹ and the Part 10A award modernisation process¹⁰ were "one off" processes required by a process of transition to modern awards and a new workplace relations system, and such a transitional process

⁵ Pages 3 [15] and 97 [600] of the Explanatory Memorandum to the Fair Work Act 2009 referred to in the Fair Work Commission Issues Paper – 4 Yearly Review of Modern Awards (AM2014/1), 24 January 2014 at [4]-[5].

⁶ As recently recognised by President Ross: Transcript 7 June 2016, PN191.

⁷ Sections 134(2)(a), 162 and 163(2) of the Act.

⁸ [2012] FWAFB 5600 at [99], referred to in the Fair Work Commission Issues Paper – 4 Yearly Review of Modern Awards (AM2014/1), 24 January 2014 at [8]-[9].

⁹ [2012] FWAFB 5600 at [91].

¹⁰ [2008] AIRCFB 1000 at [6].

militated against the adoption of broad changes to modern awards.¹¹ However, the 4 yearly review proceeds unencumbered by the transitional nature of those two preceding processes, such that broader changes to modern awards are more appropriately dealt with in the context of the present review.¹² In particular, in contrast to the approach taken in the 2 yearly review, there is no constraint on the Commission revisiting issues considered as part of the Part 10A award modernisation process.

- (d) Contrary to the assertion of Bond University,¹³ the Commission in the Part 10A award modernisation process in 2008 did not decide to limit the operation of the fixed-term employment provisions of the 2010 Award to the universities covered by the HECE Award because “those Universities had not been the subject of the original arbitration which formed the basis for the imposition of the restrictions.” Instead, the Commission did so because other universities were not (then) before the Full Bench and, in those circumstances, the Commission was “not prepared to assume that their employment practices and procedures match those of the universities against whom the award was originally made”.¹⁴ Bond University is presently before the present Full Bench in these proceedings. The Full Bench in these proceedings need not proceed by way of mere assumptions. For the reasons outlined below, BUASA submits that Bond University’s use of fixed-term employment reflects the inappropriate practices which the Australian Industrial Relations Commission (**AIRC**) sought to redress by making the HECE Award.
- (e) BUASA’s application is supported by the NTEU, and is not opposed by any other employer in these proceedings.¹⁵

¹¹ [2012] FWAFB 5600 at [91].

¹² [2012] FWAFB 5600 at [91], referred to in the Fair Work Commission Issues Paper – 4 Yearly Review of Modern Awards (AM2014/1), 24 January 2014 at [8]-[9].

¹³ Letter from Minter Ellison to The Hon Justice Ross dated 23 May 2016.

¹⁴ [2008] AIRCFB 1000 at [74].

¹⁵ AHEIA submissions dated 16 October 2015 and 3 June 2016 at [138]; and the Group of 8 reply submissions dated 3 June 2016 at [197] (recognising that the exclusion of Bond University is an anomaly in the 2010 Award safety net).

Inappropriate use of fixed-term contracts at Bond University

6. Contrary to Bond University's professed preference for continuing or ongoing employment for its employed academics¹⁶, the evidence establishes that Bond University's systematic engagement of academic staff on fixed-term contracts extends entirely beyond any reasonable or appropriate justification and purposes underlying the legitimate use of that form of employment.
7. In the course of making the HECE Award, the AIRC held that fixed term contracts in the higher education industry should be used for a specific project or task, or for a recognisable special purpose, and not be a substitute for making a continuing appointment:¹⁷

The growth in fixed-term contracts may have had the effect of reducing responsibility for managing change, disciplining employees, or indeed taking action which could lead to the termination of employment. In the result, it would appear the weight of "management" concerns has had the consequence of restricting access to more stable employment. There has been a consequential restriction of access of some employees to a number of benefits which the community would expect to be available to long serving employees, for example, annual leave, long service leave, superannuation, redundancy, parental leave, etc. Fixed term contracts have been used in a way that divides an employee's service into discrete compartments. Segmentation of service with the same or cognate employers in that manner involves a detriment to the employee and in our view lacks adequate justification. A definition of fixed term contract as a type of employment should be associated with greater identification of the justification and purposes underlying the use of that contract.

8. The AIRC considered that some restriction on the use of fixed term contracts was warranted to protect against this practice, whilst enabling the reasonable employer in the industry to resort to fixed term employment to ensure that it has flexible staffing arrangements to meet exigencies in legitimate and reasonable circumstances. The AIRC did so taking into account, *inter alia*, uncertainty as to revenue in the higher education industry (in this case, the level of Government and research funding available to institutions and their "perennial susceptibility to Government policy changes").¹⁸
9. By clauses 2.3.1 to 2.3.6 of the HECE Award, which are reflected in clause 11.3 of the 2010 Award, the AIRC "*comprehensively defined*" the legitimate and reasonable circumstances in which the

¹⁶ See for example annexure LI9 at p 76 [9] to the statement of Lars Isaksson dated 9 August 2016 at [23].

¹⁷ *National Tertiary Education Industry Union v Australian Higher Education Industrial Association*, Munro J, SDP Watson and Smith C, 18 August 1997, Print P4083 at [6.5].

¹⁸ *NTEU v AHEIA*, Munro J, SDP Watson and Smith C, 18 August 1997, Print P4083 at [5.4].

reasonable employer in the higher education industry may resort to fixed term employment to ensure that it has flexible staffing arrangements to meet exigencies:¹⁹

In other words, it is not reasonable to purport to convert fixed-term employment to a less secure, less protected form of indefinite term employment by including provision for ordinary notice of termination prior to the expiration of the contract, or by the systemic rolling over of contracts from term to term. Such practices belie the important differences between the two types of employment and are characteristic of the inappropriate use of fixed-term contracts in the past. The incidents of fixed-term employment, and the duties we have determined to cover serial fixed-term employments, reflect our view of what should be the minimum standards observed by a reasonable employer using that type of employment in this industry.

10. The AIRC's reasoning was not confined to public universities²⁰ and applies equally to private higher education institutions such as Bond University.

11. The employment of academic staff on fixed-term contracts at Bond University exhibits the same inappropriate and unjustified practices which clause 11.3 of the 2010 Award is directed to redressing:
 - (a) A high proportion of full time equivalent academic staff at Bond University are employed on fixed-term contracts.²¹

 - (b) However, Bond University does not engage any of its fixed-term academic staff in any of the appropriate and permissible circumstances that are "comprehensively defined" in clause 11.3 of the 2010 Award.²²

 - (c) Bond University engages academic staff on fixed term contracts that include provision for notice of termination prior to the expiration of the contract,²³ and are characterised by the systemic rolling over of contracts from term to term.²⁴

¹⁹ *NTEU v AHEIA*, Munro J, SDP Watson and Smith C, 11 May 1998, Print Q0702 at [4.3.3].

²⁰ Statement of Ken McAlpine dated 9 August 2016 at [7]-[9].

²¹ 109.1 FTE staff on fixed term contracts and 138.1 FTE staff on ongoing contracts: Bond University's response to the order requiring production of documents to the Fair Work Commission dated 29 July 2016 at [7]-[8]. See also statement of Ken McAlpine dated 9 August 2016 at [17].

²² See Bond University's response to the order requiring production of documents to the Fair Work Commission dated 29 July 2016 at [1]-[6].

²³ See for example: statement of Joseph Crowley dated 9 August 2016 at [39]; and statement of Lars Isaksson dated 9 August 2016 at [16] and [23].

²⁴ See for example: statement of Laura-Leigh Cameron-Dow (undated) filed on 10 March 2016; statement of Joseph Crowley dated 9 August 2016 at [19], [27], [38],[66] and [71]; statement of

(d) Bond University is able to indulge in the systemic rolling over of contracts from term to term, at the cost to staff of substantial employment insecurity,²⁵ while: (i) planning and scheduling courses beyond the expiration of such contracts for its own convenience, without committing to the employees' ongoing employment,²⁶ and (ii) effectively imposing unilateral changes to the terms and conditions of staff at expiration of such contracts.²⁷

12. Bond University engages in such practices in circumstances where the university has experienced relatively stable student numbers²⁸ and largely consistent profitability over a lengthy period of time.²⁹

13. For the foregoing reasons the Commission should grant BUASA's application.

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9 August 2016

Cherise Hoefler dated 9 August 2016 at [8], [19]-[23], [28], [32]-[35]; and statement of Lars Isaksson dated 9 August 2016 at [7], [9]-[11] and [15].

²⁵ See for example: statement of Joseph Crowley dated 9 August 2016 at [72]-[77]; statement of Cherise Hoefler dated 9 August 2016 at [44]-[52]; statement of Lars Isaksson dated 9 August 2016 at [50]-[59]; and statement of Terence Gygar dated 9 August 2016 at [27]-[28].

²⁶ See for example: statement of Joseph Crowley dated 9 August 2016 at [35] and [56]; statement of Cherise Hoefler dated 9 August 2016 at [19]-[23]; and statement of Lars Isaksson dated 9 August 2016 at [11].

²⁷ See for example: statement of Joseph Crowley dated 9 August 2016 at [39] and [62]-[70]; and statement of Lars Isaksson dated 9 August 2016 at [16].

²⁸ Bond University's response to the order requiring production of documents to the Fair Work Commission dated 29 July 2016 at [9].

²⁹ Statement of Terence Gygar dated 9 August 2016 at [12].