

## BEFORE THE FAIR WORK COMMISSION

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

#### Reply submissions of the Bond University Academic Staff Association

##### *The inappropriate use of fixed term employment at Bond University*

1. Contrary to the submissions of Bond University dated 30 August 2016 (**the Bond submissions**),<sup>1</sup> Bond University's use of fixed term contracts is exceptional when compared with most other universities subject to the award restrictions on such contracts.
2. The universities with a comparatively high proportion of 'research-only' full-time equivalent (**FTE**) academic staff generally have a higher proportion of FTE staff on fixed term contracts; whereas the universities with a comparatively low proportion of 'research-only' FTE academic staff generally have a lower proportion of FTE staff on fixed term contracts.<sup>2</sup> This correlation between the proportions of research-only staff and fixed term employment in the higher education industry is to be expected. The Commission has recognised that discrete research grants and identifiable fixed term projects feature prominently among the recognisable "special purposes" for which fixed term contracts are legitimately used in the industry.<sup>3</sup> Accordingly, the use of fixed term contracts for persons engaged on research-only functions is permitted by the Higher Education Industry Academic Staff Award 2010 (**the 2010 Award**).
3. Bond University, in contrast, distinguishes itself with an unusual combination of a (comparatively) very low proportion of 'research-only' academic staff (only 2% or 13 FTE staff) and a (comparatively) very high proportion of staff on fixed term contracts (41.28%).<sup>4</sup> Its high proportion of fixed term staff is comparable to universities with research-only staff representing between 10% and 30% of their total FTE staff. Of the universities with over 40% of their staff on fixed term

---

<sup>1</sup> At paragraph 5(c)(i).

<sup>2</sup> See Schedule A- Figures derived from statement of Ken McAlpine dated 9 August 2016 at [17] and annexure KM-3 at pp 25-28.

<sup>3</sup> *NTEU v AHEIA*, Munro J, SDP Watson and Smith C, 18 August 1997, Print P4083 at [6.5].

<sup>4</sup> See Schedule A. As a proportion of all FTE academic staff, the percentage of FTE fixed term academic employees is 44.13%: Reply statement of Terence Gygar dated 27 September 2016 at [3] and [4] and annexure TG5.

contracts, only Bond University - together with the University of Divinity, The University of Notre Dame and the Batchelor Institute of Indigenous Tertiary Education - employ research-only staff comprising less than 10% of their total staff.<sup>5</sup> Unsurprisingly, this group consists of the main institutions that are presently exempt from the restrictions on the use of fixed-term contracts in the 2010 Award (**the excluded group**). Bond University is the largest institution within the excluded group, in terms of total FTE staff.<sup>6</sup> Other than two of the institutions within the excluded group, the universities with a proportion of research-only staff that is comparable to Bond University have a substantially lower proportion of fixed term staff: Charles Sturt University (2.7% research-only and 26.34% fixed term) and Avondale College of Higher Education (1.2% research-only and 3.7% fixed term).

4. The exceptional combination of low research-only and high fixed term staff at Bond University is a manifestation of its inappropriate and unjustified use of fixed term employment contracts. Clause 11.3 of the 2010 Award “comprehensively”<sup>7</sup> defines the appropriate and permissible circumstances in which fixed term employment may be used in the higher education industry.<sup>8</sup> Bond University claims that it does not engage any of its comparatively high proportion of fixed-term academic staff in any of these circumstances.<sup>9</sup>
5. It follows that Bond University utilises fixed term employment in circumstances that are inappropriate. The claims made in the Bond submissions<sup>10</sup> should be rejected. The evidence filed by Bond University demonstrates its inappropriate reliance on fixed term contracts as a substitute for responsibility for managing employee performance and managing change.<sup>11</sup> Continuing employment is offered as a privilege or reward for academic accomplishment and seniority<sup>12</sup> or as

---

<sup>5</sup> Respectively: 0.7%, 1% and 7.4%.

<sup>6</sup> Statement of Ken McAlpine dated 9 August 2016 at [17] and annexure KM-3 at Table 1.6 pp 17-18.

<sup>7</sup> *NTEU v AHEIA*, Munro J, SDP Watson and Smith C, 11 May 1998, Print Q0702 at [4.3.3].

<sup>8</sup> See Bond University’s response to the order requiring production of documents to the Fair Work Commission dated 29 July 2016 at [1]-[6].

<sup>9</sup> Reply statement of Terence Gygar dated 27 September 2016 at [3] and [4] and annexure TG5. But see paragraph 14 below.

<sup>10</sup> At sub-paragraphs 5(c)(ii), 5(c)(iii) and 23-26.

<sup>11</sup> *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], recognising that “[t]he 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.”

<sup>12</sup> Statement of Nickolas James dated 30 August 2016 at [3].

an exceptional aid to recruitment<sup>13</sup>; whereas fixed term employment is used as a de facto probationary period of employment,<sup>14</sup> as an instrument of performance management including by way of altering the duties of an employee<sup>15</sup> and by using employment insecurity as a means of addressing perceived performance issues.<sup>16</sup>

6. The prudent recruitment and management of *permanent* employees by employers who face similar issues across other private sector industries is routine and unremarkable. Bond University's reliance on its status as a "private" university<sup>17</sup> does not justify the use of serial fixed term contracts as a substitute for prudent and commonplace systems for the recruitment and management of continuing employees.
  
7. A Full Bench of the former Australian Industrial Relations Commission (**AIRC**) found that the restriction of access to more stable employment in the higher education industry in this manner, with consequential restriction of access to a number of benefits which the community would expect to be available to long serving employees, "lacks adequate justification".<sup>18</sup> In conducting this review of the 2010 Award, the Commission will have regard to the historical context of clause 11.3 of the 2010 Award, and should follow the AIRC's findings as to the appropriate use of fixed term employment in the higher education industry.<sup>19</sup> The evidence of the detriment to long-serving employees wrought by Bond University's segmentation of their service is cogent support for doing so.<sup>20</sup> It is clear, for instance, that the engagement of an employee on 22 distinct fixed term contracts over a period of 8 years<sup>21</sup> or on 36 separate contracts over 12 years<sup>22</sup> (most of which were for the duration of a single trimester spanning only 14 weeks), "lacks adequate justification".

---

<sup>13</sup> Statement of Raoul Mortley dated 14 September 2016 at [7].

<sup>14</sup> Statement of Nickolas James dated 30 August 2016 at [6].

<sup>15</sup> Statement of Nickolas James dated 30 August 2016 at [14]-[15].

<sup>16</sup> Statement of Terry O'Neill dated 30 August 2016 at [7].

<sup>17</sup> The Bond submissions at [27]-[30].

<sup>18</sup> *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].

<sup>19</sup> *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24]-[27].

<sup>20</sup> 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]; statement of Terence Gygar dated 9 August 2016 at [27]-[28]; and statement of Laura-Leigh Cameron-Dow filed on 28 September 2016 at [55]-[68].

<sup>21</sup> Statement of Laura-Leigh Cameron-Dow (undated) filed on 10 March 2016. See also statement of Lars Isaksson dated 9 August 2016 at [7]-[33] (about 21 contracts over 8 years).

<sup>22</sup> Statement of Laura-Leigh Cameron-Dow (undated) filed on 10 March 2016.

### *Modern Awards Objective*

8. The variation sought by BUASA is necessary to achieve the modern awards objective of ensuring that the 2010 Award provides a 'fair and relevant minimum safety net of terms and conditions' taking into account and balancing the competing considerations identified in paragraphs 134(1)(a) to (h) of the *Fair Work Act 1996 (FW Act)*.<sup>23</sup>
9. As noted in paragraph 3, Bond University is the largest institution within the excluded group in terms of total FTE staff. It is also among the institutions with the greatest reliance on fixed term contracts, albeit wholly or largely<sup>24</sup> outside the appropriate uses of such contracts as codified in the 2010 Award. Its continued exemption from the restrictions on the use of fixed term employment that apply to the overwhelming majority of institutions in the higher education sector seriously undermines the function of the 2010 Award as a safety net for employees within that sector in terms of the security and stability of their employment.
10. There may be *no one set* of provisions in the 2010 Award which can be said to provide a fair and relevant safety net of terms and conditions: "[d]ifferent combinations or permutations of provisions may meet the modern awards objective".<sup>25</sup> Thus, the submission that BUASA's application is not "adapted to meeting the Modern Awards Objective" because a handful of other institutions would remain exempt from the restrictions,<sup>26</sup> should be dismissed. The inclusion of Bond University within the fixed term restrictions in the 2010 Award is no less necessary to ensure a 'fair and relevant minimum safety net of terms and conditions' because the inclusion of one or more of the remaining members of the excluded group may also be so necessary.
11. In addition, the *prima facie* position that the 2010 Award achieved the modern awards objective at the time it was made<sup>27</sup> must be considered in the context<sup>28</sup> of the transitional nature of that review and the Commission's explicit reason for limiting the operation of the fixed-term employment provisions of the 2010 Award to the universities covered by the HECE Award, namely, the absence

---

<sup>23</sup> *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [31]-[33].

<sup>24</sup> See paragraph 14 below.

<sup>25</sup> *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [34].

<sup>26</sup> The Bond submissions at [5(b)] and [20]-[22].

<sup>27</sup> The Bond submissions at [9]-[11].

<sup>28</sup> *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [60] (at paragraph 3).

of evidence in the transitional review proceedings about the employment practices of the institutions within the excluded group.<sup>29</sup> In these proceedings, the merit argument in support of BUASA's application is supported by probative evidence of the inappropriate employment practices of Bond University, and justifies the change sought by BUASA.

12. Furthermore, contrary to paragraphs 13 to 17 of the Bond submissions, there is no inconsistency between making the variation sought by BUASA and the encouragement of collective bargaining:

- a. *Firstly*, the prevalence of enterprise agreements dealing with fixed term employment among other universities referred to in paragraph 13 of the Bond submissions exemplifies the harmonious co-existence between the restrictions on fixed term employment in the 2010 Award and the ability of universities to apply more tailored arrangements by way of collective bargaining.
- b. *Secondly*, the “no further claims” provision in the memorandum of understanding between BUASA and Bond University (**the MOU**) referred to in paragraph 15 of the Bond submissions is expressly confined to “the terms and conditions of employment dealt with in” the MOU, and therefore does not extend to the imposition of restrictions on the use of fixed term employment, with which the MOU does not deal.<sup>30</sup> The issue of restrictions on the use of fixed term contracts was explicitly reserved, to be addressed outside the terms of the MOU.<sup>31</sup> This application does not interfere with any process of collective bargaining that may be embodied in the MOU.
- c. *Thirdly*, the MOU is not an enterprise agreement under the FW Act and is not an enforceable collective agreement in any relevant sense.<sup>32</sup> In any event, an unregistered agreement such as the MOU cannot validly impose obligations that conflict with the

---

<sup>29</sup> Which is addressed in the supplementary submissions of BUASA dated 9 August 2016 at [5(d)]: note that the reference to paragraph [74] of the Commission's Part 10A Award Modernisation decision ([2008] AIRCFB 1000) is incorrect – the correct paragraph is at [174].

<sup>30</sup> Statement of Jay Forder dated 27 September 2016 at [19], and statement of Christopher Andrews dated 30 August 2016 at [32].

<sup>31</sup> Statement of Jay Forder dated 27 September 2016 at [16]-[20].

<sup>32</sup> *Ryan v Textile Clothing and Footwear union of Australia* (1996) 130 FLR 313 at 352.

statutory regime, including the terms of a modern award that provides a 'fair and relevant minimum safety net of terms and conditions'.<sup>33</sup>

d. *Fourthly*, Bond university's claim<sup>34</sup> that the modern award objectives "requires claims of the kind advanced by BUASA to be progressed at enterprise level" does not withstand scrutiny. The 2010 Award achieved the modern awards objective at the time it was made by regulating the use of fixed term contracts across the overwhelming majority of the higher education industry to address the kind of inappropriate employment practices engaged in by Bond University.<sup>35</sup>

13. BUASA's application is consistent with the modern awards objective at s 134(1)(c) in that the enhancement of employment security for academic employees at Bond University, in line with the overwhelming majority of their professional colleagues across the higher education sector, will promote social inclusion through increased workforce participation. The evidence is that the use of rolling "sessional" fixed term contracts at Bond University leaves staff under-employed (and unremunerated) during breaks between each semester.<sup>36</sup> The appropriate engagement of staff on an continuing basis would increase their participation in the workforce during the academic year.

14. Contrary to the Bond submissions,<sup>37</sup> BUASA's application is also consistent with the modern awards objective at s 134(1)(d), (f) and (h). The categories of permissible fixed term employment in the 2010 Award creates more stable employment opportunities but "*not at the expense of destroying flexibility, or over-burdening the institutions with obligations to extend generally conditions that were designed to meet needs associated with only a segment of the academic or general workforce.*"<sup>38</sup> The permissible categories are applicable to some employees at Bond University. For example, the nature of funding for universities relying on student fees is expressly contemplated in the category of fixed term employees working on a "specific task or project" (clause 11.3(a)); and, contrary to Bond University's claim that it does not employ any fixed term

---

<sup>33</sup> Cf. *John Holland Group Pty Ltd v AMWU* (2011) 34 VR 635, and *Toyota Motor Corporation Australia Ltd v Marmara* (2014) 222 FCR 152 at [97].

<sup>34</sup> The Bond submissions at [18].

<sup>35</sup> The Commission's Part 10A Award Modernisation decision [2008] AIRCFB 1000 at [174].

<sup>36</sup> See for example statement of Laura-Leigh Cameron-Dow filed on 28 September 2016 at [9].

<sup>37</sup> See the assertions at [19] and [28]-[30].

<sup>38</sup> *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].

employees within those categories, the University's evidence expressly shows that it does employ some fixed term staff within the permissible categories such as "research".<sup>39</sup>

15. Bond University overstates the significance or "profundity" of the difference of its funding model in regard to the use of fixed term employment.<sup>40</sup> It assumes a level of comparative stability of funding in other universities that is not borne out in past or present reality;<sup>41</sup> the true nature of which was recognised by the AIRC when making the HECE award as being perennially susceptible to Government policy changes.<sup>42</sup>
16. Furthermore, the Commission should accord little weight to Bond University's claims<sup>43</sup> about any increased casualisation of its staff if BUASA's application is granted. *Firstly*, the claims of the University's executive witnesses are not supported by those responsible for the University's staffing at the departmental level. For instance, Professor James expresses a preference for more fixed term or "sessional" contracts, which are not casual in the true or legal sense.<sup>44</sup> *Secondly*, the research relied on by Bond University in fact demonstrates that, in relation to the imposition of restrictions in the HECE award, the most significant correlation in the industry sector has been that between the reduction in fixed term contracts and an increase in ongoing employment.<sup>45</sup> In any event, the issue of restrictions on casual employment within the industry is presently a matter before the Commission in these proceedings.<sup>46</sup> *Thirdly*, any impact of the variation to the 2010 Award on Bond University can be minimised by excluding fixed term employees at Bond University under contracts executed not later than the date of the operation of the variation from the operation of the definitions of employment type within the award.

---

<sup>39</sup> Statement of Christopher Andrews dated 30 August 2016 at [14].

<sup>40</sup> The Bond submissions at [27].

<sup>41</sup> Statement of Ken McAlpine dated 28 September 2016 at [9].

<sup>42</sup> *NTEU v AHEIA*, Munro J, SDP Watson and Smith C, 18 August 1997, Print P4083 at [5.4].

<sup>43</sup> The Bond submissions at [30] and [37]-[40].

<sup>44</sup> See statement of Lars Isaksson dated 27 September 2016 at [3] statement of Laura-Leigh Cameron-Dow filed on 28 September 2016 at [9]-[11] and statement of Cherise Hoefler dated September 2016 at [3]. Bond university staff engaged on "sessional" contracts are evidently not employed "by the hour" pursuant to clause 13.1 of the 2010 Award: *Il Migliore Pty Ltd T/A Il Migliore v Kelly McDonald* [2013] FWCFB 5759 at [51]. See also: *Hamzy v Tricon International Restaurants* (2001) 115 FCR 78 at [38]; *Shop, Distributive & Allied Employees' Association v Harris Scarfe Australia Pty Ltd* [2014] FCA 283 at [26]; *Ledger v Stay Upright Pty Ltd* [2016] FCA 659 at [17].

<sup>45</sup> Statement of Christopher Andrews dated 30 August 2016 at annexure CA-3 at page 12; and see also statement of Ken McAlpine dated 28 September 2016 at [6] and annexure KM4.

<sup>46</sup> Statement of Ken McAlpine dated 28 September 2016 at [8]. The risk of inappropriate acceleration of the use of casual employment was also explicitly addressed by the AIRC in making the 2010 Award in *NTEU v AHEIA*, Munro J, SDP Watson and Smith C, 11 May 1998, Print Q0702 at [5.6].

**David Chin**

Counsel for BUASA

*29 September 2016*



Schedule A<sup>47</sup>

|    | Institution   | Proportion and number of fixed term staff | Proportion and number of research-only staff |
|----|---|---|--|
| 1  | <i>University of Notre Dame</i>                             | 100% (678)                                | 1% (7)                                       |
| 2  | The University of Queensland                                | 50.66% (3,440)                            | 30% (1,999)                                  |
| 3  | University of Western Australia                             | 48.27% (1,775)                            | 21.7% (798)                                  |
| 4  | Queensland University of Technology                         | 47.40% (1,871)                            | 12.2% (483)                                  |
| 5  | Monash University   | 45.97% (2,915)                            | 15.3% (972)                                  |
| 6  | The University of Adelaide                                  | 44.95% (1,504)                            | 22.24% (744)                                 |
| 7  | <i>Batchelor Institute of Indigenous Tertiary Education</i> | 44.44% (12)                               | 7.4% (2)                                     |
| 8  | University of South Australia                               | 43.3% (1,124)                             | 16.53% (429)                                 |
| 9  | The University of Melbourne                                 | 43.01% (2,902)                            | 20.5% (1,382)                                |
| 10 | <i>University of Divinity</i>                               | 42.66% (61)                               | 0.7% (1)                                     |
| 11 | University of Sydney  | 41.63% (2,555)                            | 17.5% (1,078)                                |
| 12 | <b>Bond University</b>                                      | <b>41.28% (258)</b>                       | <b>2% (13)</b>                               |
| 13 | Flinders University   | 41.2% (873)                               | 12.69% (264)                                 |
| 14 | University of Tasmania                                      | 40.65% (980)                              | 10.37% (250)                                 |
| 15 | The University of New South Wales                           | 39.39% (2,361)                            | 17.3% (1,037)                                |
| 16 | Griffith University   | 35.97% (1,308)                            | 8.7% (316)                                   |
| 17 | Charles Darwin University                                   | 35.97% (218)                              | 7.43% (45)                                   |
| 18 | The University of Newcastle                                 | 35.6% (942)                               | 14.9% (394)                                  |
| 19 | James Cook University                                       | 34.42% (581)                              | 13.33% (225)                                 |
| 20 | Curtin University of Technology                             | 33.25% (1,080)                            | 12.56% (408)                                 |
| 21 | Southern Cross University                                   | 33.05% (269)                              | 6.9% (56)                                    |
| 22 | Swinburne University of Technology                          | 32.4% (488)                               | 13.5% (203)                                  |
| 23 | Murdoch University  | 31.82% (449)                              | 6% (84)                                      |
| 24 | University of the Sunshine Coast                            | 30.57% (266)                              | 3.9% (34)                                    |
| 25 | Victoria University   | 30.31% (408)                              | 8.8% (118)                                   |
| 26 | Australian Catholic University                              | 29.25% (511)                              | 3.84% (67)                                   |
| 27 | University of Southern Queensland                           | 28.89% (427)                              | 6.43% (95)                                   |
| 28 | Macquarie University  | 28.49% (719)                              | 15.29% (386)                                 |
| 29 | Central Queensland University                               | 28.44% (341)                              | 4.2% (50)                                    |
| 30 | University of Wollongong                                    | 28% (626)                                 | 12.8% (285)                                  |
| 31 | University of Western Sydney                                | 27.5% (743)                               | 3.6% (98)                                    |
| 32 | Charles Sturt University                                    | 26.34% (521)                              | 2.7% (53)                                    |
| 33 | University of Technology, Sydney                            | 25.8% (665)                               | 10.9% (282)                                  |
| 34 | University of Canberra                                      | 23.08% (216)                              | 6.1% (57)                                    |
| 35 | The University of New England                               | 22.48% (274)                              | 6.6% (81)                                    |
| 36 | Edith Cowan University                                      | 22.11% (315)                              | 4.4% (63)                                    |
| 37 | The Australian National University                          | 22.04% (852)                              | 23.12% (894)                                 |
| 38 | Deakin University   | 21.62% (710)                              | 12.3% (404)                                  |
| 39 | La Trobe University   | 17.4% (407)                               | 9.7% (228)                                   |
| 40 | RMIT University   | 17.2% (520)                               | 7.6% (231)                                   |
| 41 | Federation University Australia                             | 10.45% (103)                              | 3.7% (36)                                    |
| 42 | Avondale College of Higher Education                        | 3.7% (6)                                  | 1.2% (2)                                     |
|    | <b>TOTAL</b>  | <b>36.19% (37,276)</b>                    | <b>14.23% (14,556)</b>                       |

<sup>47</sup> Figures for 2015 derived from statement of Ken McAlpine dated 9 August 2016 at [17] and annexure KM-3 at pp 25-28.

