



DECISION

Fair Work Act 2009
s.225—Enterprise agreement

Murdoch University
(AG2016/7598)

MURDOCH UNIVERSITY ENTERPRISE AGREEMENT 2014

Educational services

COMMISSIONER WILLIAMS

PERTH, 29 AUGUST 2017

Application for termination of the Murdoch University Enterprise Agreement 2014.

Introduction

[1] Murdoch University (Murdoch or the Applicant) has applied under section 225 of the *Fair Work Act 2009* (the Act) to terminate the *Murdoch University Enterprise Agreement 2014* (the Agreement). The nominal expiry date of the Agreement was 30 June 2016.

[2] The Agreement currently covers approximately 3,500 employees, both academic staff and professional staff.

[3] At the hearing of this matter in July 2017 Murdoch was represented by Mr S. Wood QC and Mr A. Manos of counsel and the Respondent unions being the National Tertiary Education Industry Union (NTEU), the Community and Public Sector Union (CPSU) and United Voice (collectively, the Unions) were represented by Mr R. Attiwill SC and Mr J. Kirkwood of counsel.

Background and evidence

[4] Ten days of the hearing was devoted to the extensive witness evidence led by the parties. This included expert evidence concerning the financial circumstances of Murdoch both historically and currently and the economic consequences of terminating the Agreement. Other witness evidence dealt with amongst other matters the significant historical influences affecting universities in Australia and today, the history of awards and agreements in the tertiary sector, comparisons of the terms of Murdoch's Agreement with agreements in other universities, the operating environment in which Murdoch currently finds itself, the concerns Murdoch has with particular provisions of the Agreement, the history of the parties negotiations for a new agreement, the nature of the changes to the Agreement Murdoch has been seeking during those negotiations, the benefits Murdoch sees from these changes, the NTEU's position in those negotiations, the concerns the Unions and some employees have about changes to provisions of the Agreement, the views of Murdoch, the Unions and some

employees about terminating the Agreement and the circumstances of and likely effect upon Murdoch, the Unions and the employees if the Agreement is terminated.

Witnesses for Murdoch

[5] The witnesses called by Murdoch are listed below.

- Mr Martin Langridge – Partner at Deloitte Touche Tohmatsu
- Mr John Nicolaou - Executive Director at ACIL Allen Consulting
- Mr Peter Raymond – Workplace Relations Consultant at the Australian Higher Education Industrial Association
- Mr Daniel Scasserra – Director of Progressive Employee Relations
- Mr David Flanagan – Chancellor of Murdoch University
- Mr Darren McKee – Chief Operating Officer at Murdoch University
- Ms Susan Mary Ashcroft – Former Librarian at Murdoch University
- Mr Neil Andrew Cullingford – Acting Director, Marketing and Communications at Murdoch University
- Mr Steven Watson Dickson – Senior Executive Director, Property, Development, Facilities Management and Commercial Services Office at Murdoch University
- Ms Fiona Feist – Executive Business Manager for the School of Veterinary and Life Sciences at Murdoch University
- Ms Rikki Kersten – Dean of the School of Arts at Murdoch University
- Mr Shaun Major – School Manager of the School of Business and Governance at Murdoch University

Witnesses for the Unions

[6] The witnesses called by the Unions are listed below noting those with an asterisk where not cross examined.

- Mr Campbell Jaski – Partner at PPB Advisory
- Mr Richard Denniss – Chief Economist at The Australia Institute
- *Ms Marian Baird – Professor of Gender and Employment Relations and Head of Discipline of Work and Organisational Studies at The University of Sydney
- *Ms Robyn Dale – Office Manager to Nick Staikos MP State Member for Bentleigh
- *Mr Rob Pascoe – Dean Laureate and Professor of History at Victoria University
- *Ms Kelly Maree Thomas – Associate at Maurice Blackburn Lawyers
- *Mr Grahame McCulloch – General Secretary at the National Tertiary Education Industry Union
- *Mr Adam Frogley – Aboriginal and Torres Strait Islander Unit Coordinator at the National Tertiary Education Industry Union
- *Mr Marty Braithwaite – Senior State Organiser at the National Tertiary Education Industry Union, WA Division
- Mr Alex Cousner – Industrial Officer at the National Tertiary Education Industry Union, WA Division
- *Ms Donna Shepherdson – Industrial Officer at the National Tertiary Education Industry Union, WA Division
- *Mr Phillip Adams – Electrical Technician, Assets and Maintenance Team at Murdoch University

- Ms Kirsty Bayliss – Senior Lecturer, School of Veterinary and Life Sciences at Murdoch University
- Mr Peter Batskos – Marketing Lecturer in the School of Business and Governance at Murdoch University
- *Mr Grahame Bowland – Software Developer, Centre of Comparative Genomics at Murdoch University
- *Mr Michael Broderick – Associate Professor of Media Analysis, School of Arts and Murdoch University
- *Mr Michael Calver – Associate Dean of Learning and Teaching, School of Veterinary and Life Sciences at Murdoch University
- *Mr Guy Curtis – Senior Lecturer in Psychology, School of Psychology and Exercise Science at Murdoch University
- *Ms Kate Fitch – Senior Lecturer in Public Relations, School of Arts at Murdoch University
- Mr David Hill – Emeritus Professor, School of Arts at Murdoch University
- *Ms Amy Hoogenboom – Student Centre Assistant, Academic Registrar’s Office at Murdoch University
- *Ms Leonie Hughes - Lecturer, School of Engineering and Information Technology at Murdoch University
- *Mr Jim Jackson – Emeritus Professor at Southern Cross University
- Ms Elizabeth Jackson-Barrett – Lecturer, School of Education at Murdoch University
- *Ms Nany Kusumo – Former Graphic Designer, Marketing Services Area at Murdoch University
- *Ms Catriona Lawson – Associate Lecturer, School of Education at Murdoch University
- *Mr Ian McKernan – Senior Laboratory Technician, School of Veterinary and Life Sciences at Murdoch University
- *Ms Tracie Pollin – Librarian at Murdoch University
- Mr Nino Sekyere-Boakyere – Lecturer, School of Business and Governance at Murdoch University
- Mr Robert Trand – Former Digital Platform Coordinator, IT Directorate at Murdoch University
- Mr James Warren – Emeritus Professor, School of Arts at Murdoch University
- *Ms Joelene Washington-King – Former Academic Support Officer, School of Nursing at Murdoch University
- Ms Jo-Ann Whalley – Development Officer, Office of Advancement at Murdoch University
- *Ms Deborah Williams – Casual Lecturer in Public Relations, School of Arts at Murdoch University
- *Mr Kenneth Young – Senior Lecturer in Radiology, School of Health Professions at Murdoch University
- *Ms Lisa Young – Lecturer, School of Law at Murdoch University

The Murdoch University Act 1973

[7] Clause 3– Parties Bound and Application of the Agreement says the Agreement will be binding on Murdoch University.

[8] Clause 2—Definitions of the Agreement defines “*University*” to mean “*Murdoch University constituted under the authority of the Murdoch University Act 1973 (WA)*.”

[9] *The Murdoch University Act 1973 (WA)* (the Murdoch Act) is an Act to establish and incorporate Murdoch University, to make provision for the government of the University, and for incidental and other purposes.

[10] Section 4 of the Murdoch Act says there shall be a University called ‘Murdoch University’ which shall be a body corporate.

[11] Section 4(3) says Murdoch may in its corporate name acquire, accept, hold, deal with, charge, or dispense of real and personal property and is capable of suing and being sued in its corporate name and of doing and suffering all such other acts and things as bodies corporate may by law do and suffer.

[12] Section 5 says the objects of Murdoch shall be the advancement of learning and knowledge, and the provision of university education.

[13] Section 6 prescribes the functions of Murdoch as follows,

“(1) The functions of the University include the following —

(a) to provide courses of study appropriate to a university, and other tertiary courses;

(b) to encourage and participate in the development and improvement of tertiary education to meet the needs of the community;

(c) to undertake and support scholarship, pure and applied research, invention, innovation, education and consultancy, and to apply those matters to the advancement and application of knowledge —

(i) to the benefit of industry, business and government; and

(ii) to the benefit and wellbeing of the Western Australian, Australian and international communities;

(d) to commercially develop or commercially use, for the University’s benefit, any facility, resource or property (real or personal) of the University or in which the University has a right or interest (including, for example, study, research, knowledge and intellectual property and the practical application of study, research, knowledge and intellectual property), whether alone or with others;

(e) to generate revenue for the purposes of funding the carrying out of its functions;

(f) to serve the Western Australian, Australian and international communities and the public interest by —

(i) enriching cultural and community life; and

(ii) raising public awareness of educational, scientific and artistic developments; and

(iii) promoting critical and free enquiry, informed intellectual discussion and public debate within the University and in the wider society;

(g) to provide the facilities that are necessary or conducive to the attainment of the objects of the University and the performance of its functions.

(2) The University has all the powers, rights and privileges that are reasonably necessary to enable it to carry out its functions.

(3) The University may carry out its functions and exercise its powers, including the power to enter into business arrangements, within or outside the State.”

[14] Section 17 says that the governing body of Murdoch shall be the Senate and the Senate shall have control and management of the affairs and concerns of the University and may act in all matters concerning the University in the manner which to it appears most likely to promote the objects and interests of Murdoch.

[15] Section 29 says that the Senate on behalf of the University may grant leases of university land for any term not exceeding 21 years or with the approval of the Minister for a term exceeding 21 years but not exceeding 99 years.

[16] Subsection 29(1)(b) says the Senate may enter into any business arrangements.

Murdoch’s operations and its subsidiaries

[17] Murdoch is a university providing courses of study for students seeking tertiary qualifications and also engages in research.

[18] Murdoch’s main campus is located in Perth on a landholding of 240 hectares. In addition there are minor campuses located in Rockingham, 30 km south of the main campus and Mandurah, 60 km south of the main campus.

[19] Murdoch also has a campus in Singapore in partnership with Kaplan Singapore and an International Study Centre in Dubai.

[20] Approximate student numbers in 2016 were 15,532 students at the Australian campuses, 6983 in Singapore and 634 in Dubai, making a total of 23,149 students.¹

[21] Murdoch has the following wholly owned subsidiaries:

1. Murdoch Singapore, which is as an education provider.
2. Innovative Chiropractic Learning Pty Ltd, which is a vehicle through which the business of a teaching Chiropractic Clinic is conducted as part of the University.

3. Murdoch Ventures Pty Ltd, which manages investments which provide ongoing funding to various aspects of Murdoch's operations.
4. Murdoch College Properties Pty Ltd, which is a vehicle through which certain buildings utilised by Murdoch are held and leased to the University. Its principal activities are property investment.
5. The Murdoch University Foundation, which is a trust that manages donations and bequests received which provide funding to Murdoch's operations.
6. The Murdoch University Veterinary Trust, which is a trust that manages donations and bequests received which provide funding to Murdoch's operations.
7. The Alan and Iris Peacocke Research Foundation, which is a trust that manages donations and bequests received which provide funding to Murdoch's operations.
8. Murdoch Investments Company Pty Ltd, which did not earn any income in 2015 or 2016.
9. M.U.F.T Company Pty Ltd, which did not earn any income in 2015 or 2016.
10. Murdoch Retirement Services Pty Ltd (MRS). Murdoch leases some land to MRS and has built buildings on this as an investment. Murdoch leases these buildings, which constitute a retirement village, to MRS. MRS has contracted with St Ives Villages Pty Ltd (trading as St Ives Retirement Living) to manage the land and buildings as a retirement village. The financial aspects of these arrangements will be explained in more detail later in this decision when considering Murdoch's financial circumstances.

[22] The existence of these subsidiaries may be relevant when considering Murdoch's finances however it should be noted that Clause 3—Parties Bound and Application of the Agreement at 3.2(c) says that the Agreement does not bind or apply to “*Subsidiary companies or related bodies corporate of the University and the employees of those companies.*”

The financial circumstances of Murdoch

[23] Both Murdoch and the Unions commissioned expert reports on Murdoch's financial situation.

[24] Mr Langridge was engaged by Murdoch to provide an expert report on Murdoch's financial state. Mr Langridge is employed by Deloitte Risk Advisory. He graduated in 1983 with a Bachelor of Arts with Joint Honours in Accounting and Economics. Between 1987 and 1996 he worked at Arthur Andersen. In 1998 he was admitted to the Partnership at Deloitte Touche Tohmatsu, Chartered Accountants (Deloitte). He currently works as a Partner at Deloitte and has led the Forensic Practice in Perth since 2001. He is a fellow of Chartered Accountants Australia and New Zealand.

[25] The letter engaging Mr Langridge requested him to “*prepare an independent report which provides an overview of the current financial state of Murdoch University, taking into*

consideration historical trends in order to determine the financial capacity of the University to continue to operate.”

[26] Mr Langridge produced an initial report² and subsequently three supplementary reports.³

[27] Mr Langridge in his overview explained as follows,

“Murdoch University, as the parent entity, prepares consolidated financial statements on a calendar year basis which include a statement of the assets, liabilities and financial performance of Murdoch University (as an education provider) together with its eight subsidiaries.

For the purpose of this report, any reference to Murdoch Consolidated refers to the consolidated group of entities. Any reference to Murdoch University refers to the business that provides education services.

In order to understand the trends affecting Murdoch Consolidated, it is essential to understand the different factors which are driving those trends in each of the disparate areas of activity of Murdoch Consolidated.

With this purpose in mind, I have grouped the entities into the following three broad categories:

<i>Education</i>	<i>Murdoch Retirement Village</i>	<i>Charitable Trusts</i>
<i>Murdoch University</i>	<i>Murdoch Retirement Services Pty Ltd</i>	<i>Murdoch University Foundation</i>
<i>Murdoch Singapore Pte Ltd</i>		<i>Murdoch University Veterinary Trust</i>
<i>Innovative Chiropractic Learning Pty Ltd (ICL)</i>		<i>The Alan & Iris Peacocke Research Foundation</i>
<i>Murdoch Ventures Pty Ltd</i>		
<i>Murdoch College Properties Pty Ltd</i>		

In preparing this report, I have not examined the performance of each of the subsidiaries and their relative contribution to Murdoch University and Murdoch Consolidated. However, I have separately addressed Murdoch Retirement Services Pty Ltd (MRS) at section 8 of this report due to the significant differences in the drivers of performance in this business compared to those of Murdoch University.”

[28] Mr Langridge’s summary of key observations were,

“The following are my key observations in respect of the financial performance of Murdoch Consolidated which are discussed in detail in this report:

- *Net result (after tax) has declined from a surplus of \$35.9m in 2013 to a deficit of \$5.4m in 2016*

- *Net result (after tax) deficits were recorded in 2015 and 2016 of \$4.8m and \$5.4m respectively*

- *Net asset position has deteriorated by approximately \$6m from 2013 to 2016*

- *Two thirds of revenue is derived from student fees which is largely driven by student load and mix:*

- o *Murdoch University’s domestic student and international onshore student load peaked in 2013 and has remained below that peak through to 2016*

- o *Total domestic Equivalent Full-time Student Load (EFTSL) across WA increased steadily from 2011 to 2014, then experienced a decline in 2015, however Murdoch University’s share of WA EFTSL has steadily declined in each of the years 2011 to 2015*

- o *Murdoch University’s transnational student load increased significantly in 2012 and 2013 (due to expansion of Singapore operations) but this has since plateaued*

- o *Total International EFTSL across Australia has been increasing since 2012, however WA’s share of this market has been declining at the same time with Murdoch University’s share of the WA market share falling since 2013*

- *Employee costs represent approximately 60% of total costs and from 2013 to 2016 have increased at a Compound Annual Growth rate (CAGR) of 3.3%*

- o *In 2015 the domestic EFTSL to Full Time Equivalent (FTE) teaching staff ratio was 30% lower than the comparable ratios for UWA and Curtin*

- o *Between 2013 and 2016, both academic and non-academic employee costs have increased (by approximately 10%) because:*

- *academic and non-academic FTE has increased; and*

- *the average cost per academic and non-academic FTE has increased*

- *Whilst Murdoch University continues to generate positive cash flow from operating activities, this has fallen to \$15m per annum for 2014 to 2016 compared to in excess of \$55m in 2012*

- *MRS has been a significant source of funding income over the period 2014 to 2016 contributing \$52.5m, this will fall to \$4-\$5m per annum from 2017.*

If Murdoch Consolidated continues to experience pressure on its student fee income, then it is likely that net result deficits will continue unless Murdoch Consolidated can effectively manage its costs. Employee costs are a major driver of total costs. From 2013 to 2016, the rate of increase in employee costs (10%) exceeded the rate of increase in student fee income (2%). This position is evident in the domestic EFTSL to FTE teaching staff ratio which is significantly below other universities in WA.”

[29] Mr Langridge’s conclusions on the future outlook were as follows,

“The financial performance of Murdoch Consolidated in the future is affected by a complex range of factors, some of which are in the direct control of the University and some of which are not. I have been unable within the scope of my instructions to model the many complexities of the environment in which Murdoch Consolidated operates, however I have prepared a high level outlook for the next four years based on broad assumptions that historic income and expenditure trends will continue in this period.

In this analysis I have removed the impact of non-cash accounting entries relating to depreciation and asset revaluations to derive adjusted income and adjusted expenses.

The graph (right)⁴ compares adjusted income and adjusted expenses and shows that:

Over the historic period 2013 to 2016:

- income is greater than expenses by an aggregate of approximately \$110m (Adjusted Surplus)*
- the amount of the Adjusted Surplus declined year by year*
- the Adjusted Surplus funded capital expenditure of approximately \$55m.*

Over the future period 2017 to 2020:

- in aggregate, expenses are greater than income by approximately \$5m*
- the amount by which income exceeded expenses reduced year by year resulting in a deficit in 2019 and 2020*
- As no Adjusted Surplus is generated in this period, capital expenditure cannot be funded from this source.*

Although this analysis is rudimentary, it does serve to illustrate directionally that if Murdoch Consolidated does not take appropriate action and adopt appropriate strategies to arrest the current trends of income and expenditure, it will face significant challenges in funding future capital expenditure and experience continued deterioration of its net asset position.”

[30] Mr Langridge was cross-examined about the point he makes above that the future outlook indicates Murdoch’s capital expenditure cannot be funded from surpluses and agreed that the alternative was for Murdoch to consider the option of debt financing for future capital expenditure. The context for this would be, as Mr Langridge agreed, that Murdoch has very

little debt.⁵ The option of debt financing of course will incur costs for Murdoch if it is acted on.

[31] With respect to MRS Mr Langridge reported as follows,

“The retirement village is located on Murdoch University land and the buildings were constructed and are owned by Murdoch University. The village is leased to a subsidiary company, MRS, which contracts with the residents, incurs operational expenses and contracts with St Ives to manage the village for a fee.

A key feature of MRS is that it collects upfront payments (or bonds) from residents in return for the grant of a ‘lease for life’ for occupancy of each individual unit. Initially this payment generates both a cash balance and a liability to MRS. This liability is reduced over time as management and other fees are charged to the residents, deducted from their bond balance and recorded as income by MRS.

The significant cash balances resulting are available to fund the initial construction and ongoing operational and capital costs of the village. Unlike more traditional retirement villages where the entity granting the lease for life also undertakes and owns the village, in this case MRS has passed much of the cash received from the residents to Murdoch University which in turn has constructed and owns the village.

As a result, at 30 June 2016, the draft financial statements show that MRS has liabilities (unearned income, DMF, resident loans) of \$229.6m. The only assets of MRS are cash and short term investments of \$9.3m and net working capital of (\$0.3m) and therefore MRS has a total deficiency of \$220.6m.

Prima facie, MRS is insolvent, however its solvency and continuation as a going concern is maintained on the basis that all payments required to outgoing residents would be funded by cash inflows from incoming residents as stated in the 2015 audited financial statements. To further support this position Murdoch University has provided a letter of support to MRS undertaking to ensure that it can pay its debts as and when they fall due.

Between 30 June 2013 and 30 June 2016, the total liabilities in respect of unearned income, DMF and residents loans increased steadily from \$202.2m to \$229.6m (\$27.4m increase), however over the same period the net working capital declined from \$35.4m to \$9m (\$26.3m decrease).

The following table reconciles the movement in the balance sheet over this period to the components of profit and loss that have led to this movement:

	\$m
<i>Increase in liability to residents</i>	27
<i>Fair value movement</i>	(16)
<i>Decrease in net working capital</i>	26

	38

<i>Operational surplus</i>	15

<i>Lease/rental fees paid to Murdoch University</i>	<i>(18)</i>
<i>Donations to Murdoch University</i>	<i>(35)</i>
	<i>----</i>
	<i>(38)</i>
	<i>----</i>

In simple terms, over the period 2014 to 2016, Murdoch University has received income (by way of lease fees and donations) from MRS totalling \$52.5m which is \$37.8m more than the surplus generated by MRS in the same period.

This has been possible by drawing down on the accumulated cash holdings, however the ability of Murdoch University to continue to receive income in excess of the profits generated into the future is limited for the following reasons:

- The village is now at a mature stage where additional capital funds will only be derived if the underlying value of the units continues to increase, otherwise outgoing residents repayments will simply be funded by incoming residents with total funds held remaining relatively stable (note these liabilities only increased by \$27.4m, or 13.5%, over the last three years and by only \$10.7m, or 5% in the last 2 years)*
- Investment income which reached a peak of \$1.5m in 2015 (on average investment funds of approximately \$50m) will continue to decline since the investment holdings have been reduced to only \$9m at 30 June 2016 with the balance already transferred to Murdoch University*
- MRS has remaining cash holdings of only \$9m and therefore limited capacity to fund deficits*
- The operating surplus before revaluations and lease payments to Murdoch University is reasonably stable at approximately \$3.8m per annum and while this may increase over time, on a break even basis this surplus could be considered to be the real amount available to Murdoch University by way of lease or rental charges*

Over the period 2014 to 2016, Murdoch University has benefitted from MRS by way of lease rentals and donations as follows:

	<i>\$m</i>
<i>2014</i>	<i>7.1</i>
<i>2015</i>	<i>7.6</i>
<i>2016</i>	<i>37.8</i>
	<i>----</i>
	<i>52.5</i>
	<i>----</i>

Over the same period the underlying surplus generated by MRS has only been \$14.7m. The excess of \$37.8m has been funded from losses in MRS, however this will not be a sustainable position into the future.

Based on a high level assessment, the likely contribution to Murdoch University from MRS for the next few years is in the order of \$4m - \$5m per annum.”⁶

[32] Mr Langridge's supplementary witness statements and reports, some of which are responsive to the expert report commissioned by the Unions (Mr Jaski's report), involve some clarifications and amendments to the calculations and detail but do not involve any material changes to the conclusions he drew in his first report as detailed above.⁷

[33] Mr Jaski was engaged by the Unions to provide an expert report on Murdoch's financial state. Mr Jaski is a Partner with PPB Advisory and in charge of their national valuation and dispute advisory practice. He graduated with a Bachelor of Science (Honours), Geology and Geophysics. He has completed an MBA studying Accounting, Economics and Finance at Melbourne Business School, Australian Graduate School of Management and New York University. He is an Affiliate of Chartered Accountants Australia and New Zealand and a Fellow of the Financial Services Institute of Australia. In 2007 he joined PPB Advisory where he provides financial and strategic advice in relation to disputes, transactions and restructuring and turnaround. He has 20 years' experience in corporate finance and project management. He has particular experience in financial and operational analysis of businesses, projects and contracts.

[34] The letter engaging Mr Jaski advised him,

"The report of Martin Langridge dated 23 February 2017 examines and comments upon the financial performance of Murdoch Consolidated, being Murdoch University and its subsidiaries, in the years 30 June 2013 to date.

1. *Please examine and comment on the financial performance of Murdoch University (as an education provider) in the financial years ended 30 June 2013 to date.*
2. *Please provide any comments you have on the analysis and conclusions contained in the Langridge report, including:*
 - 2.1 *any disagreement you have with any aspect of the analysis or conclusions, and the reasons for any such disagreement; and*
 - 2.2 *any other matters not addressed in the report that you consider relevant to an overview of the current financial state of Murdoch University, taking into consideration historical trends in order to determine the financial capacity of the University to continue to operate. ..."*

[35] Mr Jaski was also asked specific questions regarding the evidence of Mr McKee, Murdoch's Chief Operating Officer, concerning revenue from St Ives Retirement Living.

[36] Mr Jaski produced an initial report⁸ and a supplementary report.⁹ It is apparent from his report that where he refers to Murdoch University he is referring to 'Murdoch University as an education provider' as distinct from Murdoch Consolidated.

[37] Mr Jaski's report summarised the financial performance of Murdoch University as an education provider as follows,

“7. Between 2013 and 2016, Murdoch University’s financial performance has deteriorated and profitability in 2016 is significantly lower than achieved in 2013.

8. However, the 2016 results show a reversal of the downward trend in performance over 2014 and 2015 and a return to profitability.

9. The decrease in profitability from 2013 was primarily caused by:

- a reduction in income, mainly due to lower investment income*
- reduced margins because of higher costs; particularly employee related costs.*

10. Income, including from student fees, which account for 75% of income, fell in 2014 and 2015, but increased in 2016. The increase in 2016 was largely because of an increase in average fees per student.

11. Expenses increased by around 6% between 2013 and 2016, largely due to an increase in employee related expenses.

12. Murdoch University’s net asset position increased from \$975m in 2013 to \$1.02b in 2016.

13. Overall, Murdoch University has maintained a strong balance sheet and remains in a financially secure position.

Langridge report

14. Mr Langridge analysed the financial performance of Murdoch Consolidated to assess ‘the current financial state of Murdoch University ... [and] to determine the financial capacity of the University to continue to operate’.

15. In my opinion, an analysis of Murdoch University, as opposed to Murdoch Consolidated will provide greater insight into the financial performance of Murdoch University as it removes the effects and influence of the other non-core businesses that comprise Murdoch Consolidated, such as St Ives Independent Living.

16. In any event, I am unable to reconcile some of Mr Langridge’s calculations, as described in my report. I note Mr Langridge did not include his workings for many of his calculations.

17. I disagree with some of the conclusions drawn by Mr Langridge, as noted in my report. For example, I disagree that Murdoch Consolidated working capital position will necessarily deteriorate if capital expenditure is required. This is because capital expenditure can be, and frequently is, funded by an increase in non-current liabilities (eg long-term debt).

18. In respect of Mr Langridge’s assessment of the outlook of Murdoch Consolidated, I disagree with the trends upon which Mr Langridge has based his assumptions. In my opinion, such an assessment, involving the continuation of an historic trend, without

regard to any forecasts or factors likely to influence future anticipated income or expenses is severely limited.”

[38] Mr Jaski’s report includes the following regarding Murdoch University as an education provider and MRS.

“Net result

37. After a significant deterioration in trading performance in 2014 (-84%) and 2015 (-112%), Murdoch University recorded a profit of \$39.4m in 2016. However, the 2016 results are skewed by an increase in donations from subsidiaries. For example, Murdoch Retirement Services Pty Ltd (MRS) donated \$500,000 to Murdoch University in 2015, and \$34.0m in 2016 (MRS Donations).

38. Figure 1 shows the net result as reported by Murdoch University, compared to adjusted results excluding the MRS Donations. Based on the adjusted results, Murdoch University realised a profit of \$5.4m in 2016, representing an 87% decline from its 2013 results.”

[39] As to the question of the appropriateness of considering Murdoch Consolidated rather than Murdoch University as an education provider’s financial position Mr Jaski position was as follows,

“65. I note Mr Langridge’s comments in this section, and the majority his report, address the financial performance of Murdoch Consolidated, rather than Murdoch University.

66. In my opinion, the financial performance of Murdoch University is a more appropriate measure of Mr Langridge’s instructions to assess ‘the current financial state of Murdoch University... in order to determine the financial capacity of the University to continue to operate’. This is because the financial performance of subsidiary entities distorts the performance of the University, which is subject to the current application to the Fair Work Commission.”

[40] Mr Langridge in response to Mr Jaski on this issue said as follows,

“2.2 In my opinion the Jaski Report is flawed in that it deals with an analysis of Murdoch University as a standalone entity. In my opinion the analysis should be concerned with Murdoch Consolidated for the following reasons:

a) Excluding wholly owned subsidiaries results in a distorted picture of the financial performance and financial position of Murdoch University as a whole

b) Mr Jaski’s instructions required him to analyse Murdoch University (as an education provider) which can best be done on a consolidated basis

c) There are a number of non-arms-length and inter entity transactions between Murdoch University and its subsidiaries (for example: management fees, donations, dividends, leasing fees and cost allocations) which, unless

eliminated through a consolidated view, distort the performance and financial position of Murdoch University from year to year.

2.3 The flaws that result in Mr Jaski's report and conclusions as a result of not considering Murdoch Consolidated are fundamental and pervasive.

2.4 Nothing within the Jaski Report has caused me to materially alter my conclusions and observations as set out in My First Report.”¹⁰

[41] Mr Jaski's supplementary report considered Mr Langridge's supplementary report and whilst conceding some points around calculations and an updating of his analysis Mr Jaski's overall conclusions did not change.¹¹

[42] In his supplementary report Mr Jaski considers the disagreement between him and Mr Langridge as to whether the appropriate basis on which the financial performance should be assessed is that of Murdoch Consolidated or Murdoch University as an education provider.¹² Mr Jaski says that in his experience the appropriate basis on which to undertake a financial analysis of any entity would ordinarily take into account amongst other things, the reason or context for which the final financial analysis is required.

[43] Mr Jaski then reasons as follows,

“23. In this matter, I understand that the context in which the financial analysis of Murdoch University is required is in respect of an application before the Fair Work Commission to terminate the Murdoch University Enterprise Agreement 2014, which nominally expired on 30 June 2016 (the 'Agreement').

24. I also understand that the Agreement applies to various employees of Murdoch University but does not apply to, or bind, “Subsidiary companies or related bodies corporate of the University and the employees of those companies.”

25. By incorporating subsidiaries of Murdoch University that are not education providers in Western Australia, in my view distorts the financial position of the subject entity itself ie Murdoch University.

26. I accept that there are a number of non-arm's length and inter-entity transactions which complicate the analysis of Murdoch University on a standalone basis. However, in my experience it is a common issue that is routinely overcome in financial analysis by, for example, considering the materiality of potentially non-arm's length transactions and inter-entity transactions and making appropriate adjustments.

27. Mr Langridge's comments in his Supplementary Report do not change my opinion that the most appropriate basis on which to analyse the financial performance and position of Murdoch University, in the current circumstances, is on a standalone basis.”

[44] Mr Jaski expanded on his criticism of Mr Langridge's approach to likely future performance as follows,

“88. Mr Langridge prepared a ‘high level outlook’ of Murdoch Consolidated’s financial performance, based on ‘broad assumptions that historic income and expenditure trends will continue’. As noted by Mr Langridge, future performance ‘is affected by a complex range of factors’, which, in my opinion, must be considered when attempting to model the group’s future performance. In my opinion, such an assessment, involving the continuation of an historic trend, without regard to any forecasts or factors likely to influence future anticipated income or expenses is severely limited.”¹³

[45] Mr Langridge agrees with Mr Jaski that any assessment of the future outlook without regard to forecasts or other factors likely to influence future anticipated income or expense has limitations. He recognised this limitation when making his assessment of the future outlook in his first report.

[46] Mr Jaski himself however did not in his reports attempt to model Murdoch’s future performance at all.

[47] Separately Mr Langridge’s assessment of the future outlook is queried by the Unions because the University itself in its 2017 Annual Budget makes different and more favourable assumptions about future growth in revenue and expenses. The point made by Mr Langridge, which I accept, is that the basis and intent of his future outlook calculations compared with the approach taken by the University in its Annual Budget 2017 are not contradictory. Rather the basis and intent of his assessment of the future outlook versus the University’s budgeting process are simply different.

Financial situation – “Murdoch Consolidated” or “Murdoch University as an education provider”?

[48] The financial situation of Murdoch is one of the circumstances the Commission should take into account in determining this application.

[49] The expert witnesses, Mr Langridge and Mr Jaski, disagree as to whether it is appropriate to consider the financial situation of Murdoch Consolidated or Murdoch University as an education provider. I note that the instructions to Mr Jaski, in the questions they asked him, themselves drew the distinction between Murdoch Consolidated and what Mr Jaski’s instructions asked him to report on which was “*Murdoch University (as an education provider)*”. Mr Jaski reported on Murdoch University as an education provider as he was instructed to do.

[50] Mr Jaski’s view is that the reason for which the financial analysis is required determines in large part the appropriate basis on which it should be undertaken. He says that because the financial analysis is part of a case regarding an application to terminate the Agreement and the Agreement does not apply to employees of Murdoch’s subsidiary companies, incorporating those subsidiaries which are not education providers in the financial analysis distorts the view of the financial situation.

[51] Mr Langridge’s view is that excluding subsidiaries results in a distorted picture of the financial performance and position of Murdoch as a whole. This is because there are a number of non-arm’s length and inter-entity transactions between Murdoch University and its subsidiaries (e.g. management fees, donations, dividends, leasing fees and cost allocations)

which unless eliminated through a consolidated view distort the financial performance and position of Murdoch from year to year.

[52] Neither Mr Jaski nor his instructors sought to define what ‘Murdoch University as an educator provider’ meant in terms of the various subsidiaries that, together with the University, make up Murdoch Consolidated. Criticism of this lack of definition caused Mr Jaski to make a number of errors in his original report due to his inconsistent treatment of the subsidiaries which necessitated later revision.

[53] The most material issue with respect to whether the subsidiaries should be considered in the financial analysis is the existence of MRS and how this affects Murdoch. Whether MRS is included in the financial analysis or not largely explains the differences between Mr Langridge’s and Mr Jaski’s reports.

[54] MRS has in the past contributed significantly and positively with many tens of millions of dollars in donations to Murdoch, \$49 million in 2012 and \$34 million in 2016. However MRS is also the source of a significant current liability, the value of all the St Ives Retirement Living resident loans, which is recorded in Murdoch’s 2016 Annual Report as being a total of \$199.8 million. The annual reports note that Murdoch University has provided a letter of support to MRS regarding this amount. Further the buildings that make up the retirement village are included as investment properties in both Murdoch Consolidated’s accounts and the University’s accounts and the 2013 Annual Report recorded a \$20 million increase in the fair value adjustment of this investment property.

[55] The financial interaction between Murdoch and its subsidiary MRS identified above is significant. The existence of MRS has a varying year to year real impact on the financial situation of the University. The fact that the Agreement has no application to the employees of MRS does not change this financial impact of MRS on the University.

[56] The Murdoch Act prescribes the functions of the University. These functions amongst others include providing courses of study, undertaking research, commercially developing property and generating revenue. Murdoch’s Senate is also empowered to grant leases of land and enter into business arrangements. The various subsidiaries are consistent with the legislative scheme which established Murdoch. It is quite artificial to consider the finances of ‘Murdoch as an education provider’ in isolation considering the multiple functions of the University under the Murdoch Act. The existence of Murdoch’s subsidiaries and their impact on the University both positive and negative cannot simply be ignored.

[57] I accept Mr Langridge’s view that a financial analysis based on Murdoch Consolidated’s position is more appropriate.¹⁴ Such an analysis more accurately and fully reflects the financial circumstances of Murdoch which the Commission should take account of.

[58] Whilst the future outlook analysis of Mr Langridge is limited by the approach he adopted¹⁵ I accept it does indicate the direction that Murdoch Consolidated finances will take in future without appropriate action being taken to arrest the current trends of income and expenditure.

2017 Student Enrolments

[59] The Unions submit that recruiting and retaining students is critical to Murdoch's financial success, because University revenue is linked to the fees that students pay to attend the University (either through direct payment or through a Commonwealth Supported Place) and the full picture regarding student enrolments also concerns student enrolments for 2017.

[60] The Unions point to evidence that at the census date in semester one of 25 March 2016 there were 13,002 students in Australia and at the corresponding census date a year later, being 24 March 2017, there were 13,623 students in Australia as showing Murdoch's performance is improving.¹⁶

[61] Mr McKee, Murdoch's Chief Operating Officer, agreed these figures were a complete snapshot of Murdoch's student population for the first semester of 2017 and they demonstrate the success of Murdoch's recruitment and retention strategies in Australia. His evidence however was that how this increase in headcount figures translates into Equivalent Full-Time Student Load (EFTSL) may be different because for example there may be lots of part-time students which is not necessarily positive.¹⁷

[62] Mr McKee also explained that the census date at the end of semester one is halfway through the year and final figures, in terms of student load for the year, will also be affected by intakes later in the year particularly the second semester intake. So even though student numbers look positive in semester one there could be a bad semester two intake which for example could mean the overall year's student numbers could actually decrease from the previous year.¹⁸

[63] Mr Jaski's evidence explained how student numbers at a point in time translates into income as follows,

"46. Income derived from student fees is driven by a variety of factors, including student numbers, student mix, course selection and funding arrangements.

*47. Between 2013 and 2016 the number of domestic, full-time equivalent, or Equivalent Full-Time Student Load (EFTSL), decreased from 12,073 to 10,352 (-14.3%). However, total student fees only decreased by 0.01% during the same period, due to an increase in average fees per EFTSL."*¹⁹

[64] Making a similar point Mr Langridge noted that whilst EFTSL is a driver of student fee income "*...there are many other factors which impact the revenue that is generated. These factors include courses elected, domestic and international student mix, pricing bands and government contributions and initiatives.*"

[65] The evidence as to what enrolments for 2017 will be is only partial and in any event enrolment numbers alone are not predictive of Murdoch's income with any degree of certainty.

Murdoch's future aims and objectives

[66] Murdoch, based on the evidence of Mr McKee, submits that the last ten years have seen Australian universities experience many stressors. Funding has been reduced, student demands and expectations have changed, technology has rapidly evolved, student expectations and university operating models have changed, industry demands have become greater and there are unprecedented levels of national and international competition for the higher education market. The culmination of these factors mean Murdoch is re-visiting its business model and the way it operates.

[67] Some of the areas that Murdoch has identified as requiring expenditure in order to improve its desirability and attractiveness to students are:

- (a) technology;
- (b) marketing;
- (c) campus facilities;
- (d) the recruitment of overseas students to both the Australian campus and its existing overseas campuses;
- (e) another international campus.

[68] Murdoch has also identified the following changes as being necessary:

- (a) to build on its strong research collaboration projects with industry;
- (b) to invest in the software that enables P2P interactions. It also needs to expand the campus and make it more physically conducive to such interactions. This means building physical spaces where students can engage in such tasks as meeting with study groups, discussing research etc;
- (c) to grow research collaboration;
- (d) to make significant changes to its business model and culture so it can operate more efficiently, adapt to new opportunities, and have a flexible and agile workforce;
- (e) to regenerate and reinvigorate its workforce by engaging staff who meet Murdoch's needs to deliver high quality education and research in multiple locations and to align workforce activities and ways of working with the University's strategic imperatives;
- (f) to allow employees to play to their strengths;
- (g) to be able to align its workforce to deliver on its necessarily ambitious growth and quality targets for the next five to 10 years;
- (h) to improve efficiency in academic employees;

- (i) to improve staff utilisation;
- (j) to improve productivity;
- (k) to reduce labour costs;
- (l) to have the People and Culture department engaged in strategic workforce planning, staff engagement strategies, talent acquisition, and wellness campaigns instead of spending so much time on matters arising under the Agreement;
- (m) to move to a less restrictive regime for managing performance, conduct and organisational change;
- (n) to have a remuneration structure which recognises and rewards staff who help the organisation meet its challenges;
- (o) to be better able to respond to the demands of the changing environment.

[69] Over the next five years, Murdoch has identified it will need to make significant changes to its business model and culture to be financially sustainable. This will require structural and workforce change.

[70] If Murdoch wants to meet its aims and objectives above and return to surplus on a long term sustainable basis then it submits it needs to:

- (a) reshape its workforce,
- (b) alter staff behaviour,
- (c) control staff costs,
- (d) remove other costs, reduce bureaucracy and improve workplace culture.

[71] Murdoch's view is that,

- If it is to reshape its workforce, the Agreement's clauses dealing with consultation, grievances, disputes and redundancy are likely to hinder this.
- If it is to alter the behaviour of its workforce, the Agreement's clauses dealing with misconduct and unsatisfactory performance are likely to impede this.
- If it is to effectively control staff numbers then the manning clauses such as scholarly teaching fellows, fixed term contracts and academic workload are likely to obstruct this.

[72] Murdoch submits that making the above changes will improve workforce flexibility and make it more agile. If Murdoch is able to reform and effectively alter its business model then it is confident revenue will increase.

[73] With greater revenue, Murdoch submits it will be able to:

- (a) pursue community projects such as the Murdoch University Knowledge and Health Precinct which will be a vehicle for community engagement, business and industry collaboration and innovation;
- (b) reinvest in itself and staff and better provide all the favourable outcomes that a functional and sustainable university provides.²⁰

The relationship between the Agreement and Murdoch's financial situation

The Unions' view

[74] Mr McCulloch, the NTEU's General Secretary gave extensive evidence, based on his analysis of publicly available data, as to Murdoch's financial situation in comparison with other Australian Universities.

[75] The Unions submit that Mr McCulloch's analysis highlights amongst other things that,

“a. the University's revenue growth and enrolment performance has been lower than the sector and its comparator universities;

b. the University has lost market share in Western Australia;

c. the University has outperformed its competitors in overseas fee paying student load but this has not been matched by revenue growth because the load growth has been in the less lucrative off-shore market; and

d. the University has outperformed the sector and its comparator universities in containing growth in its total costs and expenses, non-employee benefit costs, total employee benefits and total FTE employees”²¹

[76] The Unions submit that Murdoch's financial situation has been caused by a combination of external factors and poor management. Mr McCulloch's evidence identified the following causes,

“a. the introduction of the uncapped domestic demand-driven and enrolment system in 2012;

b. the introduction of the “half-cohort” of school leaver age possible university entrants which temporarily reduced the local domestic undergraduate pool for all Western Australian universities;

c. over the period from about 2010 to 2015 there was instability in the senior management ranks at the University, including proven serious misbehaviour by its most recent previous Vice-Chancellor;

d. the very substantial investment the University has and is making in its offshore programmes is generating very little revenue; and

*e. the University's failure to generate student load growth in all key market segments on a scale sufficient to increase revenue growth and maintain a balanced or surplus budget."*²²

[77] The Unions submit that the evidence does not support a conclusion that the Agreement is the cause of Murdoch's financial situation and does not support a conclusion that the Agreement prevents Murdoch from addressing these challenges.

[78] Mr McCulloch's evidence is that the Agreement provides Murdoch with competitive advantages compared to other universities in meeting these financial challenges. Mr McCulloch's evidence sought to demonstrate that the claims by Murdoch that the Agreement's provisions have contributed to its uncompetitive position cannot be sustained because Murdoch's competitors operate under broadly similar employment terms and conditions and have to deal with similar issues and similarly face the need to rapidly adapt to a changing environment. Mr McCulloch's evidence was that to the extent there is variation between the employment conditions at different universities in their agreements and Murdoch's Agreement, from a management point of view, Murdoch's is superior to that of its competitors.²³

[79] Mr McCulloch's evidence was that Murdoch will need to compete by improving its institutional reputation, attractiveness to students and achieving a new mix of teaching and research focused on discrete market segments and the unions understand the need for Murdoch to develop work force skills and flexibility to deal with the presence in the offshore market.²⁴

Murdoch's view

[80] Mr McKee's evidence was that the reason Murdoch has brought this application is to free itself of the constraints and impediments in the Agreement, enabling the University to be more agile in transforming to meet new challenges within a constantly changing, globally competitive education landscape.²⁵

[81] Murdoch is operating at a deficit and this is placing great strain on the University. It needs to make organisational and structural change so it can meet this challenge. There are clauses in the Agreement that inhibit this from occurring.²⁶

[82] It is irrelevant how the other universities' agreements or financial positions compare to Murdoch. These matters and how they compare to Murdoch's do not make it any easier for Murdoch to improve its financial position or overcome clauses in the Agreement that restrict it from achieving its strategic objectives.²⁷

[83] Murdoch is not running an argument in this case that its Agreement is worse compared to other universities.

[84] A substantial portion of Mr McCulloch's statement deals with comparing Murdoch's operating and financial position with those of other universities.

[85] Again, Murdoch is in its own unique operational and financial position.

[86] Mr McCulloch's comparative approach is flawed because:

- (a) The performance of other universities does not assist Murdoch to arrest its financial decline and turn its performance around; and
- (b) Selectively taking slices of data from other universities without looking at the whole picture is misleading.

[87] Mr McCulloch says in his statement at [75] that the key issue in these proceedings is “*what has caused this deteriorating position and what can be done to remedy it.*” He then spends a substantial proportion of his statement giving his retrospective analysis using general statistics.

[88] In reply Mr McKee says the University is in the position it is in for a variety of reasons. The terms of the Agreement have played a part but they are far from the only reason. Since joining the University in October 2014, Mr McKee says he has been focussed on trying to repair the University’s position. He is concerned about contributing factors to the extent they still apply but has been far less concerned with working out and apportioning the impact that each contributing factor has played which led to the position the University was in when he joined.

[89] The University has formed a view about how to remedy its deteriorating position. It needs to raise more revenue which is primarily achieved by attracting more students. In addition, Murdoch needs to reduce costs including labour costs.

[90] Mr McCulloch offers his view about why Murdoch is in the financial position it is. Many of his opinions do not necessarily follow from his analysis. These are unsophisticated conclusions based on high level data. They do not consider Murdoch’s inner workings and the details that sit beneath it.

[91] For example, Mr McCulloch concludes at [95] and [96] of his statement that:

- (a) Murdoch has made “*a very substantial investment*” in its offshore campuses;
- (b) These campuses are “*generating very little revenue*”;
- (c) “*There must be a serious prospect that the offshore programmes are running at a loss*”; and
- (d) “*If this is the case the offshore expansion may be a hidden contributor to the University’s deficit position in recent financial years.*”

[92] Murdoch says his analysis is incorrect. Mr McKee gives evidence that since establishing the Singapore operations, Murdoch has never lost money on it. It has always made a surplus. In 2016, Murdoch’s revenue for Singapore was \$17.6m. The estimated net profit was around \$3m.

[93] Further, Mr McCulloch’s analysis is based on the University’s standalone financial data. It does not appear to consider Murdoch’s consolidated position. Mr Langridge explains in detail in his second expert report why the consolidated position tells the true story.

[94] Murdoch accepts some responsibility for being in the position it is. It also believes the Agreement has caused some of its problems. Apportioning the blame does not assist the Commission or Murdoch.

[95] Murdoch submits it is in a difficult position and needs to evolve and transform to work its way out. It sees the Agreement as a serious impediment to its future recovery.²⁸

[96] Mr McKee's evidence was that over the last six to nine months, the Vice Chancellor has engaged in numerous University wide town hall meetings and discussions with staff. These views are being fed into a new overarching strategy plan for the University. It is anticipated the Senate will consider this strategy plan in August this year.

[97] Murdoch is considering a number of new projects. One of these is the Knowledge and Health Precinct. This will be a collaboration between Murdoch, government and commercial investors. It will be built on 44 hectares of Murdoch's land. The aim is to create a world class knowledge hub. It will take 15 to 20 years to complete.

[98] Some of the outcomes of the project are:

- (a) To create 21,000 full time jobs;
- (b) Create research opportunities (the aim is to have up to 1,000 researchers by 2031);
- (c) Connect the area to the local indigenous history and community; and
- (d) Build better transport links to and from the city and surrounding areas.

[99] Murdoch's new projects could require significant workforce change. Some of these changes are likely to be met with resistance.

[100] Mr McKee's evidence was that he is concerned that the following provisions in the Agreement could slow or inhibit these projects from being implemented:

- (a) Managing organisational change;
- (b) Dispute resolution;
- (c) Grievances; and
- (d) Redundancy.

[101] Mr McKee is concerned that these clauses will slow down the change process and Murdoch will be caught up in disputes with the NTEU and its members that will frustrate Murdoch's plan. He believes these clauses give them the power to do that.

[102] Murdoch cannot afford any delay or additional cost to its new strategy. Its financial position is dire. It cannot afford to continue on this downward trajectory. Murdoch needs to immediately reform if it is to turn its fortunes around.

[103] These reforms will bring about direct public benefits. They will lead to Murdoch returning to surplus. The surplus can be reinvested in the University's programs to assist in, amongst other things:

- (a) Improving scholarship;
- (b) Conducting world class research; and
- (c) Providing high calibre education.

[104] By terminating the Agreement, Murdoch submits it will be free to pursue its reforms which will reinvigorate the University. Employees will have the benefits and protections of the undertakings and the underlying awards until a new enterprise agreement is negotiated.²⁹

Consideration

[105] The financial circumstances of Murdoch are obviously one of the circumstances the Commission should take into account in this matter. What Murdoch intends to do to improve its financial circumstances is another circumstance the Commission should take into account.

[106] I accept as the Unions submit that Murdoch's current financial circumstances have not been caused solely by the Agreement. Rather there are a multitude of factors interacting that have caused Murdoch's current financial circumstances. These include market conditions, government decisions, corporate governance failures, poor strategic decisions, some employee resistance to change and at times poor management by Murdoch. I also accept that the constraints and limitations the Agreement imposes on Murdoch, whatever their merit, has contributed to Murdoch's current financial circumstances. Removing the clauses in the Agreement, or the parts of the clauses Murdoch identifies as problematic, will assist Murdoch make changes it wants to as part of improving its financial circumstances and not removing these provisions will make it harder for Murdoch to achieve this.

The clauses in the Agreement Murdoch says are problematic and why

[107] Clause 4—Relationship to Awards and Other Agreement of the Agreement provides that the Agreement is comprehensive and replaces in full any awards that would otherwise apply.

[108] The evidence is that the Agreement covers approximately 1661 academic staff and 1897 professional staff, a total of 3558 employees. Of these approximately 1091 are permanent employees, 2059 are casual employees and 408 are fixed term employees.³⁰

[109] Murdoch takes issue with 24 of the Agreement's 110 clauses.

[110] One of those clauses is common to both academic and professional staff, 12 clauses concern academic staff and the other 11 concern professional staff.

[111] Murdoch categorises the clauses into three tiers, one down to three, in order of decreasing concern.

Tier One

[112] These are the clauses of most concern to Murdoch and affect either staff behaviour or workplace change.

[113] The clauses that affect staff behaviour are,

- 20 and 62 Misconduct/Serious Misconduct
- 21 and 63 Unsatisfactory Performance

[114] The clauses that affect workplace change are,

- 45 and 108 Managing Organisational Change
- 47 and 110 Dispute Settlement Procedure,
- 46 and 109 Grievance Resolution
- 22 Redundancy and 64 Managing Redundancy, Transfer and Redeployment

Tier Two

[115] These clauses affect the ability to control workforce numbers,

- 16.6 Scholarly Teaching Fellows
- 16.4 and 59.4 Fixed Term Contracts
- 50.5 and 50.7 Academic Workload

Tier three

[116] These clauses add expense and/or involve inefficiency,

- 31 and 89 Annual Leave
- 48 Academic Promotions and 65 Classification and Reclassification
- 44 Academic Staff Consultation Group and 107 Professional Staff Consultation of Group
- 13.6 Union Matters - facilities
- 26 and 73 Superannuation

[117] Murdoch called a number of witnesses who gave evidence of examples which they submit demonstrate the legitimacy of their concerns about these clauses in the Agreement. However the Unions, through their own witnesses' evidence, challenged whether the particular examples did demonstrate the clause or clauses in the Agreement are problematic.

[118] Murdoch's view of these clauses and the concerns they have, plus their view of the likely effect if these clauses no longer operated as a result of the Agreement being terminated, are detailed below.

Clauses 20 and 62 Misconduct/Serious Misconduct

[119] Murdoch's concerns are that,

- (a) There are too many steps to be followed;³¹
- (b) there are too many people involved in the process, including the Academic's supervisor, the Vice Chancellor, an investigator and a review panel which is made up of the Vice Chancellor's nominee, an NTEU nominee and an independent chair;
- (c) the people involved are too senior;
- (d) the people involved are not accountable for the outcomes;
- (e) the standard for termination is too high (that is – serious misconduct only);
- (f) the inclusion of this provision in an enterprise agreement means if Murdoch breaches it then the matter could be:
 - (i) referred to the Commission for conciliation and arbitration; or
 - (ii) pursued as a breach of the enterprise agreement through a claim or injunction in the Federal Court or Federal Circuit Court.

Clause 20 involves:

1. an informal process;
2. a formal process (employee requested to provide a response);
3. determination that there is no misconduct, or referral to Vice Chancellor, or investigation;
4. a decision by Vice Chancellor on action/contemplated action to be taken (after referral, or after provision of investigation report);
5. if misconduct/serious misconduct found, the employee may seek review by a panel or advise mitigating circumstances;
6. if the employee seeks review, a panel conducts the review and provides a report to Vice Chancellor within 14 working days; and
7. the Vice Chancellor considers any review panel recommendations and makes final decision on action.

Clause 62 involves:

1. an informal process;
2. a formal process being instituted (employee requested to provide a response);
3. a finding of no misconduct, or referral to the Vice Chancellor, or investigation; and

4. a decision by the Vice Chancellor University on action to be taken (after referral, or after provision of investigation report).

[120] Murdoch submits the effect of removing these clauses will be that Murdoch will be able to deal with misconduct in a more efficient, flexible and timely manner. Senior staff will no longer unnecessarily be involved and so will be able to be more productive. Managers will be more inclined to deal with misconduct in the absence of the convoluted and complex processes which will improve workplace culture and potentially lead to a reduction in inappropriate workplace behaviours. Dismissals for other than serious misconduct will be possible where appropriate, such as in the case of multiple instances of misconduct. Because an employee who is dismissed still has the opportunity of making an unfair dismissal claim in the Commission, notwithstanding any internal review process, removing these clauses will mean Murdoch will no longer be subject to two processes concerning the same dismissal thereby reducing managers' time and effort and costs incurred in such matters.

[121] Murdoch submits that the circumstances of the employees and likely effect on them of removing these clauses would be that the provisions of the Act concerning unfair dismissal remedy applications will apply which is the same protection afforded to other national system employees in Australia.

Clauses 21 and 63 Unsatisfactory Performance

[122] Murdoch's concerns are that,

- (a) the clauses contain too many prescriptive steps;³²
- (b) the processes prescribed by the clauses involve too many people;
- (c) the people involved are too senior (for example, the Vice Chancellor); and
- (d) the inclusion of this provision in an enterprise agreement means if Murdoch breaches it then the matter could be:
 - (i) referred to the Commission for conciliation and arbitration;
 - (ii) pursued as a breach of the enterprise agreement through a claim or injunction in the Federal Court or Federal Circuit Court.

Clause 21 involves:

1. an informal process;
2. a formal process;
3. referral to the Vice Chancellor;
4. referral to the Director of Human Resources;
5. referral back to the Vice Chancellor;

6. referral to a three member Unsatisfactory Performance Review Panel; and
7. referral back to the Vice Chancellor for a final decision.

Clause 63 involves:

1. an informal process;
2. a formal process;
3. referral to Administrative Head;
4. referral to Director Human Resources; and
5. referral to the Vice Chancellor.

Under the clauses the University must:

1. engage in informal counselling before pursuing the formal process;
2. prepare a written performance plan setting out such matters as performance goals or expectations, staff development activities, adjustment of work allocation, methods of assessment, milestones and timelines;
3. provide an opportunity for the employee to improve;
4. hold regular review meetings with the employee;
5. prepare reports when referring the matter up the hierarchy;
6. provide continual opportunities for the employee to provide input into written documents prepared during the process including referral reports; and
7. prepare a final report when disciplinary action is taken.

These processes must be observed prior to Murdoch taking any disciplinary action for unsatisfactory performance – for example, issuing a written warning.

[123] Murdoch submits the effect of removing these clauses will be that Murdoch's managers will no longer be required to deal with unsatisfactory performance through a prescriptive, onerous and lengthy process which requires excessive amounts of managers' time and contributes to an adversarial workplace culture. There will be associated productivity benefits and reductions in administrative costs. Being able to deal with unsatisfactory performance in an efficient and timely manner will assist in retaining good staff and removing poor staff which will assist in improving teaching quality for the benefit of students.

[124] Murdoch submits that the circumstances of the employees and likely effect on them of removing these clauses would be that the provisions of the Act concerning unfair dismissal remedy applications will apply which is the same protection afforded to other national system employees in Australia.

Clauses 45 and 108 Managing Organisational Change

[125] These two clauses are in practically identical terms with 45 concerning academic staff and 108 professional staff. The clauses prescribe consultation processes which must be followed when managing organisational change.³³

[126] The clauses set out a two stage process for consultation:

- (a) 'formal' consultation is required when the University has developed a 'proposal' for organisational change, and
- (b) further consultation is required when the University has made a definite decision to implement organisational change.

[127] At each stage, consultation is to be no less than ten working days.

[128] There is a non-exhaustive definition of 'formal consultation' which includes:

- (a) the provision of documentation setting out the change,
- (b) the opportunity to employees to provide written responses/alternatives,
- (c) meetings, and
- (d) the ongoing provision of information over the duration of the change process.

[129] Each stage of formal consultation requires Murdoch to consult with the Unions in their own right i.e. whether or not they have been nominated as an employee's representative in the process.

[130] Murdoch's concerns are that,

- (a) Consultation commences too early because there is a requirement to consult on a 'proposal' for organisational change. The concept of a 'proposal' is ambiguous. Consulting about proposals causes staff often unnecessary stress and anxiety in circumstances where managers are not yet able to provide concrete answers to their concerns due to the high degree of uncertainty involved in a proposal.
- (b) Consultation takes too long as it often occurs under the threat of disputes or grievances being initiated under other provisions of the Agreement.
- (c) The level of consultation required is excessive.
- (d) The scope of consultation required is too broad. Many employees may be potentially affected by a 'proposal' for change. There is also a requirement to consult the Unions in their own right irrespective of whether or not they are a representative for affected employees.

[131] Murdoch submits the effect of removing these clauses will be that Murdoch's managers will not be required to consult before a definite decision is made which will reduce stress for staff and reduce the time spent on unproductive consultation. The time spent on change management consultations can be reduced and tailored to the circumstances. Managers will be free to discuss proposals informally with staff without fear of been challenged that they are not complying with the Agreement's requirements. A simplified one step consultation process will reduce the potential for unwarranted disruption to consultation processes by the notification of disputes and the associated obligation to observe the status quo.

[132] Murdoch submits that the circumstances of the employees and likely effect on them of removing these clauses would be that the model consultation provisions in the relevant modern awards would apply which requires Murdoch to consult once a definite decision to introduce major changes has been made.

Clauses 46 and 109 Dispute Settlement Procedure

[133] These clauses are in practically identical terms with 46 concerning academic staff and 109 professional staff.

[134] The clauses prescribe that,

- (a) the Unions have the ability to raise a dispute in its own right, regardless of whether or not it is representing an employee but Union membership is only approximately 25% of Murdoch's employees³⁴ (clauses 46.3 and 109.3);
- (b) a party may refer a matter to the Commission for binding arbitration without the consent of the other party (clauses 46.6 and 109.6); and
- (c) Murdoch is required to maintain the status quo whilst a dispute settlement procedure is being conducted (clauses 46.7 and 109.7).

[135] Murdoch's concerns are that,

- (a) Dispute resolution procedures in agreements are ordinarily for the benefit of employees, who may be represented in those disputes by their union.
- (b) Clauses 46 and 109 inhibit Murdoch's productivity and managerial prerogative.
- (c) Murdoch should not be required to utilise its financial and other resources dealing with disputes on matters that are of importance to the Unions but not to Murdoch employees.

[136] Murdoch submits the effect of removing these clauses will be that its managers can focus their time on legitimate disputes raised by or on behalf of employees. Arbitration by the Commission would only occur with the consent of both parties and time and resources will not be wasted on matters without merit. Invoking the status quo provision cannot then be used disingenuously by employees or the Unions to thwart or delay processes such as organisational change or performance management. This will allow Murdoch to more

efficiently and effectively implement change management and not have this frustrated by what can be a minority of disaffected employees.

[137] Murdoch submits that the circumstances of the employees and likely effect on them of removing these clauses would be that an employee party to a dispute would remain entitled under the terms of each award to refer that dispute to the Commission which would allow the Commission to exercise any methods of dispute resolution permitted by the Act that it considers appropriate to ensure the settlement of the dispute (clause 9.4).

Clauses 47 and 110 Grievance Resolution

[138] These clauses are in practically identical terms with 47 concerning academic staff and 110 professional staff.

[139] The clauses prescribe that,

(a) A 'grievance' is :

“...any type of problem, concern or complaint related to work, workload or the work environment. A grievance can be raised about any act, behaviour, omission, or situation that has occurred, but not about any matter covered by a separate review process under this Agreement.”

(b) The grievance process is initiated by the grievance being set out in writing summarising the relevant facts and the remedy the employee seeks.

(c) At first, an attempt 'should' be made with the employee's supervisor to resolve the grievance.

(d) the next step is for the grievance to be “raised with senior management”.

(e) the matter should be dealt within five working days.

(f) the employee is not precluded from making a claim to an independent body such as the Commission.

[140] Murdoch's concerns are that,

(a) The requirements contained in these clauses are better contained in a workplace policy. The inclusion of these provision in an agreement means if Murdoch breaches it then the matter could be:

(i) referred to the Commission for conciliation and arbitration;

(ii) pursued as a breach of the enterprise agreement through a claim or injunction in the Federal Court or Federal Circuit Court.

[141] Murdoch submits the effect of removing these clauses will be that the time spent in dealing with grievances will be reduced leading to increased productivity, improved workplace culture and a reduction of costs.

[142] Murdoch submits that the circumstances of the employees and likely effect on them of removing these clauses would be that an employee would retain the protections of the Act with respect to unfair dismissal remedy application and potentially the other protections in that legislation regarding arbitrary and unfair acts from an employer. Murdoch's intention in any event is to retain a grievance process by way of a policy which will be accessible by employees.

Clauses 22 Redundancy and 64 Managing Redundancy, Transfer and Redeployment

[143] Clause 22 concerns academic staff and clause 64 concerns professional staff.

[144] Both clauses involve an employee entering into a redeployment period after being notified that their role has been made redundant, with retrenchment and payment of a severance payment to occur if no alternative position can be found during that redeployment period.

[145] The differences for academic staff versus professional staff are,

- (a) academic employees are entitled to a maximum of 82 weeks' redundancy pay, whereas professional employees are entitled to a maximum of 90 weeks' redundancy pay;
- (b) academic employees are entitled to apply for voluntary separation upon being notified of redundancy, whereas professional employees are not;
- (c) academic employees are entitled to apply for review of the decision to make their role redundant, whereas professional employees are not;
- (d) the formal redeployment period for academic employees is eight weeks (called the 'transition period'), compared to 26 weeks for professional employees;
- (e) after the transition period, there is a 22 week 'entitlement period' for academic employees which they may, by agreement, work out or be paid for. There is no obligation on the University to consider redeployment options during the entitlement period. This is in contrast with the requirement relating to professional employees, who the University must attempt to redeploy during the entire 26 week redeployment period; and
- (f) professional employees may be transferred to a position at Murdoch's discretion (subject to consideration of any detriment raised by the employee) and are entitled to salary maintenance for an unlimited period of time if the role is a lower salary/classification.

[146] Murdoch's concerns are that,

- (a) The processes are unnecessarily complicated and lengthy. Clause 22 contains up to eight steps which must be followed before academic staff may be made redundant and these can take up to 30 weeks to complete. Similarly clause 64 contains up to six steps which must be followed before professional staff may be made redundant and these

can take up to 28 weeks to complete. This process will have followed the separately mandated consultation process for organisational change under other provisions of the Agreement.

- (b) The processes involve too many staff who are too senior. In addition to human resources staff the Vice Chancellor is required at several stages in the process. Where academic staff apply for a review of the redundancy decision a review panel is convened consisting of the Vice Chancellor's nominee, a nominee of the unions and an independent chair.
- (c) The inclusion of these provision in an agreement means if Murdoch breaches it then the matter could be:
 - (i) referred to the Commission for conciliation and arbitration;
 - (ii) pursued as a breach of the enterprise agreement through a claim or injunction in the Federal Court or Federal Circuit Court.
- (d) Transferring an employee whose position is made redundant to a position at a lower level requires Murdoch to indefinitely maintain their salary at their previous higher rate. This requires Murdoch to indefinitely pay for work performed at a higher rate than it is worth at significant ongoing cost to the University each year.³⁵ This provision is a perverse incentive for employees to seek redeployment into a lower role.³⁶

[147] Murdoch submits the effect of removing these clauses will be that management and human resources staff will be more productive spending less time on the overly complex and lengthy processes. Employees whose positions have been made redundant who are disgruntled will not remain in the workplace for long periods of time negatively impacting on the workplace culture. Senior staff will be more productive because they will not be unnecessarily involved in these processes. Removing salary maintenance will remove the perverse incentive to pursue redeployment to lower classification and remove the irritation of employees doing the same work being paid different rates. Removing salary maintenance will also assist Murdoch's budget.

[148] Murdoch submits that the circumstances of the employees and likely effect on them of removing these clauses would be that academic employees would retain the benefits of clause 16 and 17 of the relevant modern award which deal with redundancy. Professional staff would retain the benefits of the National Employment Standards in terms of redundancy and severance pay as provided for in the Act.

Clause 16.6 Scholarly Teaching Fellows

[149] This clause obliges Murdoch to recruit a minimum of eight new academic employees as Scholarly Teaching Fellows over the life of the Agreement. The appointments must be continuing or three-year fixed term. They must undertake work previously performed by Sessional Casual Academics or Academics employed on fixed term contracts of not more than 12 months. The Agreement mandates their work allocation prescribing fixed percentages of teaching, research/scholarship and University community service and administration.

[150] Murdoch's concerns with this clause are,

- (a) It imposes strict requirements to, engage at least eight of a particular class of employee and their appointments must be either continuing or three-year fixed term and they must undertake particular work, all of which unreasonably restrict Murdoch's managerial prerogative.
- (b) Murdoch has struggled to attract suitable people to these positions.
- (c) If Murdoch does not meet the clauses requirements the breach of the Agreement could be:
 - (i) referred to the Commission for conciliation and arbitration;
 - (ii) pursued as a breach of the enterprise agreement through a claim or injunction in the Federal Court or Federal Circuit Court.

[151] Murdoch submits the effect of removing this clause will be that it will no longer be required to employ eight Scholarly Teaching Fellows if it does not require them on the particular basis prescribed and will be able to direct any Scholarly Teaching Fellows to do work of Murdoch's choosing.

[152] Murdoch submits that the circumstances of the employees and likely effect on them of removing this clause would be very limited because Murdoch has had, and continues to have, difficulty in filling the required eight positions which means that casual employees are not, in practice, taking up the opportunity of becoming Scholarly Teaching Fellows in any great numbers.

Clauses 16.4 and 59.4 Fixed Term Contracts

[153] Clauses 16.5 concerns academic staff and 59.5 professional staff.

[154] The clauses allow for engagement of employees for a specified term or ascertainable period only through a recruitment and merit selection process, which is defined.

[155] The clauses limit the use of fixed term employment contracts by Murdoch to specified categories or circumstances, namely:

1. specified task or project;
2. research;
3. replacement employee;
4. pre-retirement contract;
5. fixed term-contract employment subsidiary to studentship;
6. recent profession practice required;
7. new organisational area;
8. disestablished organisational area;
9. unanticipated increase in enrolments;
10. substantial decrease in enrolments; and
11. contracts by agreement.

[156] A fixed term employee's employment may be converted under clause 16.5(l) and 59.5(l) to ongoing where specified criteria has been met.

[157] There is also provision for a fixed term employee to be entitled to:

- (a) long service leave in accordance with the provisions of the Agreement, where that employee has been employed on a series of fixed term contracts for a continuous period of seven years or more; and
- (b) severance pay where the employee has been employed in the categories of Specified Task or Project and Research.

[158] Murdoch's concerns with these clauses are,

- (a) it is burdened by the mandatory merit selection process involving applications and interviews each time it wishes to appoint a person to a fixed term position;
- (b) they require mandatory conversion of employment in certain circumstances;
- (c) they oblige Murdoch to review fixed term positions; and
- (d) they oblige Murdoch to offer employees a further contract in certain circumstances.

[159] Murdoch submits the effect of removing this clause will be that it will not be obliged to undertake a merit selection process unnecessarily which will reduce cost. High performing employees engaged on fixed term contracts will be converted to continuing employment were it suits the employee and the University whilst others will not be converted which will improve the efficiency of Murdoch. Murdoch could employ a staff to meet short to medium term needs without worrying about the possibility of conversion which will increase flexibility. The risk of Murdoch being required by the clause to retain underperforming staff on an ongoing basis because of conversion or because the fixed term position is renewed will be removed. Costs will be reduced with the removal of the obligation to pay fixed term employee severance pay and long service leave.

[160] Murdoch submits that the circumstances of the employees and likely effect on them of removing these clauses would be that the provisions concerning fixed term contracts in the Awards would apply. The Awards do not contain a requirement for a merit selection process to be conducted nor do they provide for conversion of fixed term employees nor is there any entitlements to severance pay for fixed term employees as exists in the Agreement.

Clauses 50.5 and 50.7 Academic Workload

[161] Clause 50.5 states:

"The University will inform Academic staff of their forecasted teaching workloads for the upcoming year by 30 November of the prior year."

[162] Clause 50.7 states:

“All academic staff will have a teaching workload within the range of 0% to 75%.”

[163] Clauses 50.13, 50.14 and 50.15 establish a two stage review process for an academic who is dissatisfied with their workload allocation. The academic may firstly refer the matter to the School Dean. If no resolution is achieved, the matter may be referred to the Deputy Vice Chancellor (Academic) for review and final determination.

[164] Murdoch’s concerns with this clause are,

- (a) it creates an administrative burden by requiring Murdoch to notify teachers of the following year’s workload by 30 November.
- (b) it prevents academics from teaching more than 75%.
- (c) the appeal process for workload allocation creates unnecessary administrative burden.

[165] Murdoch submits the effect of removing this clause will be that Murdoch will have more flexibility to control academic workloads and staff will not have expectations created by a premature forecast of their workload. The removal of the 75% limit on teaching would allow Murdoch to better allocate work to increase productivity of academic staff and to reduce costs from using casual or fixed term teaching academics. Murdoch will be able to have the better teaching academics engaged on more teaching and the better research academics spending more time researching. This will improve the experience of students and so improve retention and improve the quality of Murdoch’s research. No longer having a workload appeal process will remove unnecessary bureaucracy.

[166] Murdoch submits that the circumstances of the employees and likely effect on them of removing these clauses would be that they no longer feel they have a right to challenge their workload and in some cases employees can be allowed to work to their strengths rather than be artificially constrained for example by limiting how much teaching they do.

Clauses 31 and 89 Annual Leave

[167] Clause 31 concerns academic staff and clause 89 concerns professional staff.

[168] Clause 31.2 (e) permits Murdoch to direct an academic employee who has an annual leave balance exceeding 300 hours to take annual leave after giving them six months’ notice.

[169] Clause 89 permits Murdoch to direct a professional employee who has an annual leave balance of 40 days to take annual leave.

[170] Murdoch’s concerns with these clauses are,

- (a) Employees are allowed to accrue too much annual leave before they can be directed to take leave.

(b) The notice period of six months to direct academic employees to take leave is too long. Murdoch would like this notice period for academics to be two months.

(c) There is no option for an employee to cash out accrued annual leave.

[171] Murdoch submits the effect of removing this clause will be that it will be better able to control excessive annual leave balances which will assist in reducing its costs given that it's accrued annual leave liabilities, currently \$14 million,³⁷ and increases with all future wage increases.³⁸

[172] Murdoch submits that the circumstances of the employees and likely effect on them of removing these clauses would be employees will remain entitled to accrue annual leave balances but be subject to the respective provisions regarding being directed to take accrued annual leave provided for in the relevant modern awards.

Clauses 44 Academic Staff Consultation Group and 107 Professional Staff Consultation of Group

[173] Clause 44 prescribes the establishment of the Academic Staff Consultation Group to act as a forum for consultation on industrial and workplace relations issues and to be a source of members for other committees or panels described in the Agreement. It must meet at least quarterly. It comprises four employees nominated by the Vice Chancellor two employees nominated by the NTEU and two elected employee representatives.

[174] Clause 107 prescribes the establishment of the Professional Staff Consultation Group to provide an open forum to raise and discuss workplace relations issues. It must meet at least quarterly. It comprises the Director Human Resources, three nominees of the Director Human Resources, three employee nominees from the union being two from the NTEU and one from United Voice and three elected employee representatives.

[175] There are numerous clauses under the Agreement that establish or deal with consultative committees, including clauses 11, 14, 16.5(h), 16.5 (l), 16.5 (j), 16.7, 44, 59.5(h), 59.5(l), 59.5(j) and 59.7(a)(iv).

[176] Each of these clauses requires regular reporting to either the Academic Staff Consultative Group or the Professional Staff Consultative Group.

[177] Murdoch's concern with these clauses is that the clauses place an administrative burden on Murdoch and inhibit managerial prerogative.

[178] Murdoch submits the effect of removing these clauses will be that the administrative burden and associated costs of preparing for and attending meetings will be removed and it will also not be required to consult about minor changes.

[179] Murdoch submits that the circumstances of the employees and likely effect on them of removing these clauses would be that Murdoch will remain obliged to observe the simpler consultation requirements of the relevant modern awards concerning change.

Clauses 48 Academic Promotions and 65 Classification and Reclassification

[180] Clause 48 deals with academic promotion and provides that Murdoch will have a policy/procedure that allow eligible academic staff to apply for promotion. The clause also sets out a process for appeals which may be made by academics in relation to promotion decisions, and establishes a Promotion Appeals Committee for this purpose.

[181] The Promotion Appeals Committee is required to:

- (a) investigate an appeal lodged by an employee against a decision of the University not to promote her/him in the promotions process;
- (b) consider each ground of appeal raised by the employee;
- (c) examine the official records of the relevant Committee as they relate to the appellant's claim;
- (d) hear from the employee personally;
- (e) interview, as it might require, the Chair of the appropriate Promotions Committee, the process observer on the Committee and such other persons or obtain such other information as it might require; and
- (f) recommend, within two months of the Director Human Resources receiving the appeal, giving reasons in writing, to the Vice Chancellor that:
 - (i) the appeal be dismissed; or
 - (ii) the grounds for appeal be upheld and whether the matter should be reconsidered by the appropriate Committee or dealt with by the Vice Chancellor directly.

[182] The Promotion Appeals Committee must also consider appeals lodged pursuant to clause 49 concerning academic probation decisions following the same process set out above, except that the Committee's recommendation to the Vice Chancellor must be made within one month of the receipt of the employee's application.

[183] Murdoch's concern with the clause is that the appeals procedure contains too many prescriptive steps and involves too many people and the people required to be involved in the appeals procedure are not those accountable for outcomes.

[184] Clause 65.4 provides that if a professional staff's application for reclassification is unsuccessful they may appeal that decision on specified grounds. A Reclassification of Appeal Committee will then be formed made up of suitably experienced persons, one nominated by the Director of Human Resources and one nominated by the employee plus a chairperson agreed by the parties. If the committee determines the employee has established one or more grounds for appeal the application for reclassification will be referred to the Deputy Vice Chancellor (Professional Services) with recommendation. The Deputy Vice

Chancellor will then make a final decision. Murdoch must report annually to the Professional Staff Consultation of Committee regarding appeals for the year.

[185] Murdoch's concern with this clause is that the appeal procedure involves too many people and the people required to be involved in the appeals procedure are too senior and the reporting requirements create unnecessary administration.³⁹

[186] Murdoch submits the effect of removing both of these clauses would be a reduction in bureaucracy and time spent by managers and others administering the processes and procedures.

[187] Murdoch submits that the circumstances of the employees and likely effect on them of removing these clauses would be that employees will no longer be entitled to pursue such appeals.

Clause 13.6 Union Matters - facilities

[188] Clause 13.6 requires that Murdoch provide an office and facilities to the NTEU representatives, appropriate to the requirements of the NTEU.

[189] Murdoch's concerns with this clause are that it inhibits productivity and the requirement to provide office and facilities is unnecessary where the NTEU already has a commercial lease arrangement. It provides the NTEU with a right of entry outside the right of entry provisions of the Act.

[190] Murdoch submits the effect of removing this clause would be to allow Murdoch staff to use the office and facilities that are currently provided to the NTEU and will restore NTEU's right to enter the workplace to that provided for in the Act.

[191] Murdoch submits that the circumstances of the employees and likely effect on them of removing these clauses would be that the Unions will continue to have the various rights of entry as provided for in the Act.

Clauses 26 and 73 Superannuation

[192] Clause 26 for academic staff and clause 73 for professional staff set out their superannuation entitlements.

[193] The clauses entitle permanent employees and fixed term employees on contracts of three years or more to an employer superannuation contribution of 17% . Casual and fixed term employees on contracts of less than three years are entitled to employer superannuation contributions of 9.25%. Whilst the clause refers to the Unisuper 'flexibility quota' Murdoch has not signed the Unisuper deed under which universities agree to ensure 95% of their employees choose the Unisuper defined benefit fund as their chosen fund.

[194] Murdoch's concern with these clauses is that they impinge on employees freedom of choice and force Murdoch to contribute to a superannuation fund which may not represent best value for employees in some circumstances and there is confusion as to whether the reference to the Unisuper flexibility quota obliges Murdoch to comply with that quota although it has not signed the Unisuper deed.

[195] Murdoch submits the effect of removing these clauses would be to allow Murdoch to offer freedom of choice of superannuation fund to its employees and would remove the confusion as to whether or not Murdoch is bound to comply with the Unisuper flexibility quota.

[196] Murdoch submits that the circumstances of the employees and likely effect on them of removing these clauses would be the employees would have a right to the statutory superannuation guarantee and full choice of superannuation fund.

The Unions' views about the clauses in the Agreement that Murdoch say are problematic

[197] The Unions submit that when the evidence concerning the various clauses of the Agreement is considered, both from Murdoch's and the Unions' witnesses, the final analysis establishes that:

- (a) There is no foundation for the University's contention that these provisions prevent it from managing its staff, or from addressing the challenges facing the University and its staff.
- (b) These provisions strike an appropriate balance between the interests of the University and the interests of its academic and professional staff.
- (c) The provisions of the Agreement are unremarkable and comparable to provisions in other enterprise agreements in the university sector. If anything, the Agreement provides the University with competitive advantages. This is not a case where the Agreement contains a range of conditions which are in excess of community standards or unreasonably constrain the University from being competitive.
- (d) Termination of the Agreement will actually damage the University, by causing further damage to its reputation, its relationship with its staff, and its ability to attract and retain staff and students.

[198] In terms of the evidence called by Murdoch to support its concerns the Unions submit that the fact that these were the only case examples Murdoch could come up with, across a workforce of more than 3,500 employees over a three year period, illustrates the weakness of the University's case for termination.

[199] The Unions submit that Murdoch seeks to contend, by way of an invalid comparison with *Aurizon Operations Ltd & Ors*⁴⁰ (*Aurizon*), that the clauses complained of are a "legacy". That contention is unsustainable. In *Aurizon*, the "legacy" was a result of previous government ownership, a privatisation process, and a commitment by the Queensland government to guarantee particular provisions. In this case, these clauses are the result of progressive bargaining over a series of bargaining rounds and represent compromises between the parties, and ultimately, agreement between Murdoch and the NTEU that these clauses are appropriate for this workplace. There has been no external or third party intervening to determine what clauses are maintained at this workplace; they are a product of agreement between the parties.

Fixed term employment (clauses 16.4, 16.5, 59.4, 59.5)

[200] Although the underlying Awards do not contain a conversion clause, termination of the Agreement would leave the University worse off, by restricting the categories in which the University can engage fixed-term employees to the lesser number of categories that are contained within the Awards.

Grievances (clauses 47, 110)

[201] Mr Braithwaite gave evidence about the operation of these clauses in response to the evidence adduced by the University, and was not cross-examined. He said, among other things:

- (a) the clauses are intended to provide a structured means by which staff who feel aggrieved about something affecting them at work can have the matter dealt with where the matter does not constitute a dispute;
- (b) this allows for matters to be raised in a way that can lead to a constructive solution rather than letting matters fester or seeing workplace relationships break down;
- (c) it is unrealistic to expect that, if the grievance process under the Agreement is removed, suddenly employees will not have grievances any more. Grievances arise in any workplace, particularly in an organisation with a larger workforce such as the University. The University, including its People and Culture group, will still have to deal with employee grievances. The benefit of the Agreement is that it provides a clear and agreed process for doing so.

[202] The Unions also submit that the problem with having matters such as grievances dealt with by policy alone as Murdoch proposes is that the policy can be changed on a whim and applied at the University's discretion.

Performance management (clauses 21, 63)

[203] Mr McCulloch's evidence included that processes for the management of unsatisfactory performance exist in all enterprise agreements in the university sector. Mr McCulloch was also not cross-examined.

[204] Mr Braithwaite's evidence included that:

- (a) the process in the Agreement is reasonable and effective, is not unduly detailed or complex, and importantly incorporates procedural fairness and ensures consistent procedures apply;
- (b) giving negative feedback to an employee is inherently challenging on an interpersonal level, but is part and parcel of being a manager. If managers find it difficult, then the University should be giving them appropriate training to ensure that performance feedback is given promptly and effectively, using the process outlined in the Agreement;

- (c) the steps provided for in the Agreement are not at all unusual, and in the case of academic employees, are consistent with the principles of academic freedom and peer review.

Misconduct (clauses 20, 62)

[205] Mr McCulloch's evidence included that the provisions in the Agreement dealing with misconduct and serious misconduct are very similar to those found in most university agreements, including:

- (a) the distinction between misconduct and serious misconduct;
- (b) termination of employment being restricted to serious misconduct;
- (c) an investigator or committee tasked with investigation of allegations; and
- (d) a committee tasked with review of findings or preliminary decisions to take disciplinary action, consistent with the principle of academic peer review.

[206] Mr Braithwaite's evidence included:

- (a) the clauses enable misconduct to be dealt with formally or informally;
- (b) the different definition of serious misconduct for academic staff, which does not include conduct which causes a risk to the "reputation or financial interests" of the University, is an important element of the protection of academic freedom.

[207] The Unions submit that if the Agreement is terminated the effect for some employees will be that they are prevented from pursuing an unfair dismissal remedy application under the Act because they earn above the high income threshold of \$142,000 per annum.

Redundancy pay (clauses 22, 64)

[208] Mr McCulloch's evidence included that the entitlements provided by these clauses are common across the university sector. Those entitlements have not impeded other universities from implementing planned redundancy programs where they have determined it to be necessary.

Consultation (clauses 45, 108)

[209] Mr McCulloch's evidence includes the following:

- (a) the University is one of 28 universities (of 37 across the sector) which have a two-step process based on consultation on a proposal and implementation of a proposal;
- (b) the process is simply not as lengthy or complex as the University's witnesses seek to suggest, and properly managed, can be conducted successfully for the benefit of the University and its staff.

[210] The Unions pointed to the opinion of Dr Wong of Sonic HealthPlus which was commissioned by Murdoch. Dr Wong is the only expert to be retained by the University in relation to this issue of change management.

[211] Dr Wong provided an Independent Clinical Assessment Report to the University. The report described a medium impact change with respect to a small change process may take around four weeks and a medium impact change with respect to a large change process may take up to three months. Dr Wong did not provide any estimates of time for large impact change. The report also recommended a two-step process, being a “change proposal” and a “change decision”.

[212] Mr Scasserra agreed Dr Wong was recommending a two-stage process (“change proposal” and a “change decision”) as best practice for change management.

Consultative committees (clauses 44, 107)

[213] Mr McCulloch’s evidence included:

- (a) the overwhelming majority of universities across the sector have provisions in their enterprise agreements for consultative committees with briefs as extensive or more extensive than the University;
- (b) consultative committees are intended to act as an open forum, comprising a mix of representatives, at which particular issues under the Agreement and other workplace issues can be discussed, and are an important part of the collegial culture of the University.

[214] Mr Braithwaite’s evidence included:

- (a) the consultative committees are a collaborative means to try to ensure the Agreement is being implemented correctly that any problems can be identified and an attempt made to head them off before they arise;
- (b) in his experience, the consultative committees have worked well at the University;
- (c) they are an enlightened practice which provide for employee ‘buy in’ and commitment to decisions that are made, and enable improvements to decisions and policies that are made as a result of staff input.

[215] Ms Washington-King was not cross-examined and her evidence included:

- (a) she was an elected employee member of the Professional Staff Consultative Group;
- (b) the Committee provided a valuable opportunity for consultation for the benefit of both staff and the University on important issues and policies;
- (c) the administration of the Committee was not unduly burdensome, was not a significant diversion from their ordinary duties, and its members were experienced in human resources and employee relations.

Dispute settlement (clauses 46, 109)

[216] Mr McCulloch's evidence included:

- (a) dispute settlement clauses of this kind are common in university enterprise agreements;
- (b) 'status quo' clauses are particularly important to members because they have the effect of stopping illegitimate action which may lead to unnecessary job losses.

[217] Mr Braithwaite's evidence included:

- (a) it is important that the NTEU be able to initiate a dispute in its own right as there may be matters, for example concerning interpretation of clauses in the Agreement, which have a broad impact on staff, or matters where staff may be reluctant to initiate a dispute in their own names for fear of victimisation (whether the fear is justified or not);
- (b) in his experience, the NTEU has exercised its power to initiate a dispute responsibly and in the interests of University staff. The NTEU has internal processes to ensure any dispute that is raised has a sound foundation.

Academic workloads (clause 50)

[218] Mr McCulloch's evidence included:

- (a) clause 50 already provides the University with a significant competitive advantage compared to other universities across the sector;
- (b) the clause recognises the University's aspiration and self-identification as a research intensive university;
- (c) the University's suggestion that it could simply allocate 25% extra teaching is wrong and fails to account for the other responsibilities of academic staff;
- (d) the University's suggestion that the removal of the 75% cap would improve teaching quality is contradicted by the data on teaching quality and workload provisions across the university sector;
- (e) the University mischaracterises the requirement to provide forecast teaching workloads by 30 November as involving a commitment by the University to those forecast workloads.

[219] Mr Braithwaite's evidence included:

- (a) the 75% teaching workload cap was negotiated into the Agreement because the University agreed that workloads were reaching untenable levels, staff were unable to set aside time uninterrupted from teaching to reach research performance requirements, and the University wanted to increase its research performance to within Australia's top 20%;

- (b) teaching workloads and intrusion on research time and quality of life have been a constant source of complaints from academic staff, particularly as students increasingly become consumers and with the establishment of overseas campuses, leading to an expectation that academic staff be available to respond to student queries at any hour and on any day.

Salary maintenance (clause 64.3)

[220] Mr Braithwaite explained that salary maintenance is the quid pro quo of the University having the power under clause 64.3 to compulsorily transfer an employee to a lower position at its discretion, to ensure that the employee is not financially disadvantaged.

Union matters (clause 13.3, 13.6)

[221] The evidence of Mr McCulloch and Mr Braithwaite included:

- (a) The NTEU office at the University is subject to a lease under which the NTEU pays commercial rent.
- (b) The NTEU has received many comments from University staff about the desirability of these facilities which enables NTEU members and non-members easy access to NTEU officers and staff for advice and assistance.
- (c) It is important that access to the office be protected in the Agreement from any arbitrary decision by the University to exclude the NTEU. This is particularly important given the hostility displayed by the University towards the NTEU in the current bargaining process.
- (d) The right to paid union leave is common in enterprise agreements and covers such things as training in occupational health and safety, dispute resolution, negotiation and cultural awareness, to assist trainees in their representative role. It is of great value to employees who undertake it.

Scholarly Teaching Fellows (clause 16.6)

[222] Mr McCulloch explained that Scholarly Teaching Fellows or similarly named positions were features of most enterprise agreements in the last round of bargaining in the university sector and represented a comprehensive initiative to provide access to a specified number of fixed-term contracts for existing casual academic employees with significant prior teaching experience and/or the recent or imminent acquisition of a PhD. Moreover, the target of eight positions at the University in clause 16.6 of the Agreement was the second lowest of any university.

[223] Mr Braithwaite explained the importance of opportunities for casual academic staff to access more secure employment to better enable them to develop their academic careers and make a contribution to the teaching, research and outreach work of the University.

Superannuation (clauses 26, 73)

[224] To the extent that the University's complaints are based on the reference to UniSuper in clause 26.2 or 73.2, it is without foundation. Those clauses simply enable the University to allow an adjustment to the employer contribution rate at the request of an employee, provided it is in compliance with superannuation legislation, the UniSuper flexibility quota "and other relevant arrangements with external superannuation providers". It does not mandate contributions to UniSuper. Indeed the University's own proposed superannuation clause in bargaining retains such a mechanism for variation of employer contributions at the request of an employee.

Annual leave (clauses 31.2, 89.1)

[225] This evidence of Mr McCulloch and Mr Braithwaite highlighted, among other things:

- (a) the Agreement contains several mechanisms which enables the University to manage the accrual of annual leave;
- (b) the University's accrued leave liability is not caused by the Agreement, but is rather a function of employees not having an opportunity to take their leave because of their workload requirements, and University managers not properly managing staff leave and workloads;

[226] Insofar as the University wants the option of cashing out leave, termination of the Agreement will not achieve this because such a mechanism is not available in the underlying Awards.

Academic promotion and classification/reclassification (clauses 48, 65)

[227] Mr McCulloch gave evidence concerning clause 48 as follows:

- (a) it is principally an academic peer review process;
- (b) the principal criterion for assessing a promotion application is knowledge of the broad academic cultural and intellectual underpinnings of academic work;
- (c) in that context that is why clause 48.2 of the Agreement specifies "A promotion appeals committee will be appointed...to reflect a broad balance of the academic interests across the University...and...will be appointed for a term not exceeding three years."

[228] Mr Curtis gave evidence concerning clause 48 as follows:

- (a) without the opportunity to appeal promotion decisions, those decisions and the reasons behind them can be kept relatively secret;
- (b) it is important that the University is transparent in this decision making; and

- (c) the appeals process is an important check on this power of the University that could otherwise be exercised arbitrarily against employees.

[229] Ms Washington-King gave evidence concerning clause 65 as follows:

- (a) it is very important for staff to have the opportunity to apply for reclassification and appeal reclassification decisions;
- (b) without this appeal process, it would be too easy for the University to simply refuse requests for reclassification even where they have merit;
- (c) without an appeal process, employees are likely to feel that they have no proper say and are left out of the process.

[230] In short the Unions submit there is nothing about the Agreement or its operation that would justify its termination.

The conflicting evidence and views about the clauses in the Agreement

[231] The fundamental difference in view, between Murdoch and the Unions, as to whether the clauses in the Agreement are problematic or not is reflected in the evidence given by Murdoch's witnesses and the witnesses for the Unions.

[232] These witnesses disagreed on many things about these clauses. They commonly disagreed about the correct interpretation of the clauses and about how the clauses can operate in practice. They disagree about whether any difficulties Murdoch has experienced in the workplace occurred because of the clauses, or for reasons unrelated to the clauses and indeed whether what has happened should even be characterised as difficulties at all. The disagreements of some witnesses as to events in the workplace were often based on conflicting subjective opinions about what had occurred and why things had occurred.

[233] Many of these disagreements are manifestations of the fact Murdoch as an employer and some of its employees, and/or the Unions, on some occasions had different interests in the particular circumstances of the moment and these interests were in conflict. These different perspectives explain why clauses Murdoch views as involving unwarranted constraints on it managing the workplace may be viewed by some employees as merely including necessary protections to shield them from poor management.

[234] It is not the Commission's role in this matter to be the arbiter of the merits or lack of merit of the individual clauses particularly when the clauses are the product of an Agreement the parties freely negotiated. That is not to say however that clauses previously agreed are beyond criticism today and must be retained in future agreements.

[235] Whilst reasonable minds may differ in their view of these clauses Murdoch's views of these clauses about which they complain are not extreme or irrational. Murdoch's views of these clauses in the Agreement are not views no reasonable manager could hold.

[236] I accept Murdoch's characterisation of the clauses they view as problematic, which was as follows:

Clauses that affect Murdoch's ability to moderate staff behaviour

- 20 and 62 Misconduct/Serious Misconduct
- 21 and 63 Unsatisfactory Performance

Clauses that affect Murdoch's ability to make workplace change

- 45 and 108 Managing Organisational Change,
- 47 and 110 Dispute Settlement Procedure,
- 46 and 109 Grievance Resolution,
- 22 Redundancy and 64 Managing Redundancy, Transfer and Redeployment.

Clauses that affect Murdoch's control of workforce numbers

- 16.6 Scholarly Teaching Fellows,
- 16.4 and 59.4 Fixed Term Contracts,
- 50.5 and 50.7 Academic Workload.

Clauses that cause red tape and expense

- 31 and 89 Annual Leave,
- 48 Academic Promotions and 65 Classification and Reclassification,
- 44 Academic Staff Consultation Group and 107 Professional Staff Consultation of Group,
- 13.6 Union Matters - facilities,
- 26 and 73 Superannuation.

Consideration of the "problematic" provisions

[237] The awards that would otherwise apply if the Agreement was not in place are the *Higher Education Industry-Academic Staff Award 2010* [MA000006] (the Academic Award) and the *Higher Education Industry-General Staff-Award 2010* [MA000007] (the General Staff Award) (collectively, the Awards).

[238] The Awards "...provide a fair and relevant minimum safety net of terms and conditions..."⁴¹

[239] The Academic Award comprises 27 clauses with 2 schedules and is 33 pages long, whilst the General Staff Award comprises 34 clauses with 8 schedules and 1 appendix and is 94 pages long.

[240] Combined the awards have 61 clauses, 10 schedules and 1 appendix and total 127 pages.

[241] By comparison the Agreement has 110 clauses, 6 schedules and totals 188 pages.

[242] This comparison demonstrates that the Agreement has significantly more prescription than the Awards taken together.

[243] While I accept clauses similar to those Murdoch complains about are found in other universities agreements, when the detail of these impugned clauses are considered it is a reasonable assessment that they do impose significant inefficiencies and costs upon Murdoch and, in some circumstances, impose significant constraints on how Murdoch operates and manages its employees. Quite a number of these clauses are overly prescriptive and unwieldy and I accept cause practical difficulties in the workplace.

[244] Murdoch is operating in a changing environment. The Agreement was negotiated in 2014. The circumstances Murdoch was in then were in some ways different to those Murdoch finds itself in today. A new agreement will operate for a number of years into the future.

[245] Murdoch's current financial circumstances and the need to make changes to respond to these magnify the problematic nature of the clauses in the Agreement which Murdoch has challenged. Considered together these clauses are not supportive of Murdoch operating as a flexible and efficient enterprise.

[246] I agree as the Unions submit that it is likely any new agreement the parties negotiate will contain some clauses that deal with the same issues as the clauses Murdoch has challenged. Terminating the Agreement would not determine the content of any clauses but as the Unions argue would favour Murdoch in future negotiations and so is likely to assist achieve a new agreement which has clauses that are less problematic for Murdoch as it acts to improve its financial circumstances.

The bargaining

[247] The Agreement has a nominal expiry date of 30 June 2016. Clause 1–Title and Period of Operation of the Agreement says the parties agree to commence negotiations for a new agreement at least three months prior to this date. Consequently the parties were obliged to commence negotiations before the end of March 2016.

[248] On 1 April 2016 the NTEU sent its log of claims for a new agreement to Murdoch. The log of claims was for,

1. Salary increases and Expiry Date

That the Agreement operate seven days from the date of its approval and have a nominal expiry date of 31 December 2020.

That the salary rates of all staff employed by the University be increased by 15% (flat) by October 2020.

2. Improved Job Security

That the Agreement provide:

- (a) That redundancy apply only in circumstances where the work and duties of the position nominated for redundancy are no longer required.

- (b) A right to renewal for fixed-term contract staff where the work or work of a similar nature exists.
- (c) A right to conversion to ongoing employment for casual staff.
- (d) A provision that staff employed on three or more contracts over five years be deemed to have met the merit selection criteria for the purposes of fixed term contract conversion.
- (e) That the Agreement provide that retrenchment for redundancy be a genuine last resort for all staff.

3. Superannuation

That the agreement provide for a 17% employer superannuation contribution for all employees.

4. Research-only staff conditions

That the Agreement provide for:

- (a) A right to conversion to continuing employment for contract research staff who meet defined criteria.
- (b) Where the life of the research grant is 12 or more months the minimum contract period of employment for the employees associated with that grant will be the life of the grant.
- (c) Rights to redeployment for long term contract research staff, on the same basis as continuing staff.

5. Domestic violence leave

That the Agreement provide for:

- (a) Dedicated paid leave of up to 20 days for staff to deal with matters arising as a result of domestic violence.
- (b) Access to flexible working arrangements for staff affected by domestic violence.

6. Union resources

That the Agreement provide for 50% centrally funded time release for the NTEU Branch President.

7. Academic Workloads

That the Agreement provide for a peer review appeal process for all academic workloads.

8. Performance Management

That the agreement provide that student evaluations will not be used for the evaluation of staff in performance management processes.

That the unsatisfactory performance procedures ensure a right of review is available to all staff prior to the implementation of any disciplinary action.

9. Misconduct

That the agreement provide that disciplinary actions not be harsh or unreasonable.

10. Career Development Fund

That the agreement provide for a career development fund for all professional and general staff.

11. Intellectual Freedom

That the agreement provide a right to Intellectual Freedom for all staff.

11. Other Matters

All other matters whether typographical or otherwise to make current the previous agreement.

[249] The first bargaining meeting was on 6 April 2016 when protocols for future meetings were agreed.

[250] Murdoch issued a Notice of Employee Representational Rights on 14 April 2016.

[251] On 26 April 2016 Murdoch in conjunction with the three other Western Australian universities issued a joint public statement regarding their approach to negotiations for new agreements in 2016.

[252] The first substantive bargaining meeting was held on 18 May 2016.

[253] Throughout the bargaining to date the NTEU has been the only union bargaining representative. Neither the CPSU nor United Voice have been appointed as bargaining representatives and neither have participated in bargaining meetings.⁴²

[254] On 31 May 2016 Murdoch served its log of claims which in detail were as follows,

1. Leave Matters

1.1. Excessive Leave

Murdoch seeks the inclusion of a provision to enable staff to apply to cash out excessive annual leave, with some restrictions on the circumstances in which it can occur.

1.2. Public Holidays and Limited Service Period

Murdoch seeks the capacity to direct staff to take leave during any limited service period in order to improve work life balance for employees and enable the University to better manage leave liabilities.

1.3. Annual Leave flexibilities

Examples of what is proposed here include enabling staff to take half the period on double pay or double the period on half pay.

1.4. Long Service Leave flexibilities

The current professional staff Long Service Leave (LSL) clause provides for LSL to be taken in periods of not less than one week. The University seeks to allow LSL to be taken in periods of one day, subject to approval.

1.5. Bereavement Leave

Bereavement Leave is not specifically mentioned in the current Agreement, but is an entitlement under the National Employment Standards. Murdoch seeks to include the entitlement in the agreement for the sake of clarity.

1.6. Professional Staff Study Leave

Murdoch seeks to clarify that the Study Leave entitlement is pro-rata for part-time Staff.

2. Student Employment Matters

2.1. Graduate Teaching Assistants

Murdoch will introduce a new category of staff to provide employment for Higher Degree by Research candidates during their studies. It is the intention of Murdoch University to prepare our students for future employment and academic careers.

2.2. Scholarly Teaching Fellows

Enable Scholarly Teaching Fellows to be re-appointed to a second or subsequent Scholarly Teaching Fellow contract type.

2.3. Undergraduate Student Employment

Murdoch will seek a separate student casual rate in order to encourage the employment of students at the University to assist our graduates increase job readiness and improve employability.

3. Performance and Culture

3.1. Scope of the Agreement

The agreement to cover all Academic Staff employed in Level A to E positions, and all Professional Staff employed in HEW Levels 1 to 10, with the exception of staff involved in purely commercial activities.

3.2. Dispute Settlement Procedure

Murdoch seeks to simplify the Dispute Settlement Procedure clause to enable efficient and effective resolution of disputes, without unnecessary steps that prolong and complicate resolution.

3.3. Unsatisfactory Performance

Introduce a contemporary and fair unsatisfactory performance clause which sets out the principles of dealing with unsatisfactory performance, with detail regulated by policy.

3.4. Annualised hours for professional staff

Professional staff areas would benefit from the 'Hours' clause being amended such that the University would be able to offer annualised hours. This would mean staff in areas with 'peak times' and 'slow times' could work varying hours during a year whilst receiving the same salary.

3.5. Misconduct

Introduce a contemporary and fair misconduct clause which sets out the principles of dealing with misconduct, with detail regulated by policy.

3.6. Academic Probation

Murdoch is seeking to clarify the provisions relating to Academic Probation to ensure the University can extend probationary periods where recommended by the Probation Review Committee, rather than terminate employment.

4. Flexibility

4.1. Term of Agreement

The term of the agreement to be between two and four years.

4.2. Work practices

Flexible work practices can deliver benefits to both the University and its staff. They can lead to greater job satisfaction and help attract and retain skilled and valuable staff. Murdoch seeks to have individual flexibility agreements included in its enterprise agreement, in accordance with the model flexibility clause developed by the Fair Work Commission.

4.3. Managing Organisational Change

Introduction of contemporary change management practices consistent with those in operation in other parts of the Australian workforce. This will provide for genuine consultation with staff where a definite decision has been made to implement organisational change, and to provide clarity about the rationale.

4.4. Redundancy

Introduce new redundancy provisions that provide agility and quick decision-making whilst maintaining the current severance entitlements for staff of the University.

4.5. Academic Workloads

We seek to change the current workload clause to make it less prescriptive, whilst maintaining fair and equitable allocations together with a review process.

4.6. Superannuation

Murdoch wishes to maintain current entitlements to promote employment within our sector, with added flexibility to enable staff to access the new super products being developed.

4.7. Limitation on use of fixed term employment

Murdoch seeks to consolidate and simplify the limitation on use of fixed term employment to reflect contemporary business practices.

4.8. Professional staff mobility and career paths

We seek to remove this from the agreement and develop a new policy as it is not an industrial matter and should instead be reflected in policy. The University remains committed to supporting and developing its staff.

4.9. Union Resources

Contemporary agreements should contain matters related to the employment relationship, and not matters related to facilities or provision of services to a union.

Murdoch seeks to cover provision of facilities to the NTEU in a separate commercial agreement.

4.10. Salary Increases

Salary increases to reflect the economic climate and the financial position of the University.

4.11. Hours–Flexible Working Hours

Murdoch University would be seeking to introduce the capacity to open the span of hours for some categories of Professional Staff.

5. Clarification and Drafting Improvements

5.1. Clarify shift payments to Casuals

There is currently an ambiguity about whether casual professional staff are entitled to the shift penalty on the casual loading portion of their wage. The University will seek to remedy this ambiguity.

5.2. Clarify payments to external tutors

The current Agreement does not mention how the University determines the rate of pay for casual external tutors. The University seeks to include this in a new agreement.

5.3. Shift Workers definition

There has consistently been confusion over how to determine if a particular employee is a shift worker for the purposes of the agreement. This is to be alleviated by including a definition of ‘shift worker’.

5.4. Professional staff classifications descriptors

The Professional Staff classification descriptors contained in the current Agreement do not reflect contemporary practice. The University seeks to include new classification methods in order to ensure fair and equitable classification of professional staff positions.

5.5. Indigenous Employment

Indigenous employment targets are included in the Murdoch University Reconciliation Action Plan. The Reconciliation Action Plan is approved and actively monitored by the University Senate, which is the highest level of governance within the University. As such, we consider it unnecessary to include these targets in the agreement.

5.6. Corrections, updates, fixing of typographical errors

The University seeks to make several corrections, update various clauses and fix typographical and cross-referencing errors in the current Agreement.

[255] On 27 April 2016 the NTEU published an Enterprise Bargaining Update. In response Murdoch jointly with Curtin University and Edith Cowan University applied for bargaining orders which were heard and determined by the Commission.⁴³

[256] The Commission as currently constituted decided this matter as follows,

“[127] I have found that the Enterprise Bargaining Update issued on 27 April 2016 to the extent that it indicated the universities would be pursuing the removal of disciplinary procedures, restrictions on fixed term labour and union run health and safety training in enterprise bargaining was misleading.

[128] I have found that the NTEU in issuing this Enterprise Bargaining Update had, on 27 April 2016, not met the good faith bargaining requirements specifically section 228(1)(e) of the Act.

[129] Consequently the statutory prerequisite for the Commission to make a bargaining order in section 230(3)(a)(1) of the Act has been established as has the statutory prerequisite in section 230(3)(b).

[130] Once the statutory prerequisites for a bargaining order have been established as is the case here section 230(1) of the Act involves the exercise of a double discretion.

[131] As noted by Vice President Hatcher in Transport Workers’ Union of Australia v Hunter Operations Pty Ltd:

“[64] Under s.230(1), where an application for a bargaining order has been made and the requirements of s.230 are met in relation to a proposed agreement, the Commission “may make” a bargaining order if it is “satisfied that it is reasonable in all the circumstances to make the order”. This effectively involves the exercise of a double discretion. The assessment of what is reasonable in all the circumstances requires a broad evaluative judgment that is in the nature of a discretionary decision. Even if the Commission is satisfied that it is reasonable in all the circumstances to make a bargaining order, the use of the word “may” in connection with the power to make the order indicates that the Commission retains a residual discretion as to whether to make an order or not. (References omitted and underlining added)

[132] In my view it would not be reasonable in the circumstances to make any order because the NTEU by publishing its 9 May 2016 Enterprise Bargaining Update has properly responded to the concerns the universities have rightly raised and from that date onwards the NTEU as required was meeting the good faith bargaining requirements.

[133] Separately the reasons for this decision are able to be provided to the employees of the universities, if the universities wish, to explain the concerns the universities had properly raised with the NTEU.

[134] Finally the evidence is that in the very near future the three universities will be providing the details of their claims to the various bargaining representatives,

including the NTEU, and this will, assumedly, negate any past misrepresentation of the Vice Chancellors' respective bargaining positions.

[135] My decision then is I will not exercise my discretion to make a bargaining order under section 230 of the Act. Accordingly, these applications are hereby dismissed.”
(Reference omitted)

[257] The NTEU appealed this decision but permission to appeal was refused and the appeal was dismissed by a Full Bench of the Commission.⁴⁴

[258] From May onwards the parties met regularly through to the end of November 2016.

[259] A further 23 meetings were held during this period. These meetings in 2016 commonly lasted between one and three hours.

[260] Applications were made by the NTEU in September 2016 for a protected action ballot order which was granted by the Commission.

[261] On 12 September 2016, in response to the publication of an NTEU You-Tube video clip, Murdoch filed an application in the Federal Court of Australia alleging the NTEU and its officials being Ms Gooding and Mr Cousner had breached section 345 (1) of the Act by knowingly or recklessly making false or misleading representations about Murdoch's exercise of a workplace right. Those proceedings remain on the foot.

[262] On 23 November 2016 Murdoch sent the NTEU a letter outlining what it considered to be its best offer for a new agreement. The letter referred to the University facing unprecedented financial challenges and comprised a salary increase of 1% in November 2017, 1% in November 2018 and a final 1% in November 2019 as part of a package which included acceptance of the universities draft clauses which were attached. The NTEU sought some clarification on exactly what Murdoch's position was on some items and this was provided the following morning.⁴⁵

[263] On 25 November 2016 the NTEU wrote to Murdoch advising of their members resolution that Murdoch's offer was rejected.

[264] Also on 25 November 2016 the NTEU gave notice to Murdoch that protected industrial action was to take place on 1 and 7 December 2016.

[265] On 30 November 2016 another bargaining meeting was held. At this meeting the parties discussed the fact that Murdoch had put its offer which had been rejected by the NTEU. Whilst there is some debate between the witnesses as to exactly what was said there is no doubt that they discussed either that they were at an impasse or the situation might bring them to be at an impasse.⁴⁶

[266] On 2 December 2016 Murdoch made an application under section 240 of the Act for the Commission's assistance to deal with a bargaining dispute.

[267] On 7 December 2016 Members of the NTEU took protected industrial action.

[268] On 8 December 2016 Murdoch filed this application under section 225 of the Act for the Commission to terminate the Agreement.

[269] In December 2016 the NTEU proceeded with a campaign against Murdoch's position including a social media campaign against Murdoch encouraging members of the public to email the Vice Chancellor, organising protests on Murdoch's property on 14 December 2016, encouraging members of other unions around Australia and internationally to post negative social media comment about Murdoch's approach and delivering bags of coal to the Vice Chancellor and other managers around Christmas time.

[270] On 16 December 2016 the parties attended a section 240 conference convened by the Commission. At the conference the parties agreed to have two further bargaining meetings.

[271] On 24 January 2017 and 31 January 2017 the parties held further bargaining meetings.

[272] On 8 February 2017 Murdoch discontinued the section 240 application.

[273] On 27 April 2017 the NTEU provided Murdoch a document detailing a settlement offer.⁴⁷ This offer involved salary increases of 1.25% in January 2018 and January 2019 and 2% in January 2020 and January 2021 and it included specific detail on a series of the proposed agreement's clauses but noted that it was not all of the matters that are contentious between the parties.

[274] On 28 April 2017 the parties attended a further bargaining meeting.

[275] On 16 May 2017 the NTEU provided a further position on misconduct and unsatisfactory performance clauses to correct some errors in the previous documentation they had provided.

[276] On 31 May 2017 Murdoch responded to the NTEU's further position and attached a number of new claims including the removal of consultation committees, the half cohort provision, early career development fellowships, appeal processes for reclassification, camping allowance and re-drafting of the motor vehicle allowance to align with ATO rates.

[277] Murdoch submits that as it communicated to the NTEU in the letter on 31 May 2017⁴⁸, in addition to the new claims mentioned in the preceding paragraph, at the end of all that has occurred since negotiations began in April 2016 the parties remain apart on,

1. salaries,
2. superannuation,
3. scholarly teaching fellows,
4. academic workloads,
5. fixed term employment conversion,
6. redundancy,
7. intellectual freedom,
8. misconduct and serious misconduct,
9. unsatisfactory performance and
10. change management.

[278] In contrast to Murdoch's submission the NTEU submits they have bargained in good faith and the bargaining is not deadlocked. They say bargaining is progressing and the evidence does not demonstrate there is little prospect of reaching an agreement.

[279] The Unions submit that the parties have made significant progress in bargaining on the items of key significance to the University including clauses dealing with,

1. unsatisfactory performance,
2. misconduct/serious misconduct,
3. change management,
4. dispute process.⁴⁹

Consideration - bargaining

[280] Both parties argue that any of the difficulties in bargaining has been caused by the other. Murdoch submits that the NTEU has wanted to retain all key clauses in the proposed agreement and in fact build on them further and is resistant to meeting Murdoch's particular needs because it has an overriding interest in maintaining standards across the tertiary industry. The Unions submit that it is Murdoch that has been inflexible and has only accepted two of the claims made by the NTEU and it is Murdoch that has adopted an aggressive approach and it is seeking wholesale change to significant employee entitlements.

[281] The NTEU point to the fact that they have reached agreement with the University of Western Australia (UWA) on the terms of a new agreement as demonstrating they are not resistant to making an agreement and so bargaining should continue without the Agreement being terminated.

[282] In my view what has occurred with UWA is of no relevance to the situation here. There is no suggestion UWA was seeking changes similar to those Murdoch has been pursuing in bargaining nor that it is in a similar financial circumstance to that of Murdoch.

[283] When considering the history of bargaining in this matter it is relevant to bear in mind the context is that Murdoch has not been seeking to reduce the salaries or monetary allowances in the Agreement nor has it sought to reduce entitlements such as leave, overtime payments or severance payments. Rather Murdoch has offered a limited increase in salaries for all employees and has sought to change the clauses it views as interfering with or limiting how it manages the workplace and its employees or that involve cost and inefficiencies.

[284] Murdoch can be expected at all times to be trying to improve its performance, to increase its productivity and efficiency and to make changes to achieve these ends. Such changes may impact on employees and in some cases have negative consequences for them but that is not to say that such change, facilitated by amended clauses in an agreement as Murdoch has been negotiating for, would be inappropriate and should not occur. This is not a case where the changes Murdoch would like to see in the Agreement's provisions, if they were agreed to, would be oppressive for employees. Murdoch wishes to retain many of the clauses it is concerned about in a new agreement however Murdoch wants such clauses to be worded quite differently from the existing problematic clauses.

[285] The NTEU has shown some willingness to agree to changes that would meet Murdoch's demand for greater freedom to implement change in the workplace and to manage

its employees and avoid costs and inefficiency. But this has been limited. The NTEU view the salary increases offered by Murdoch as far too low and they are not willing to give up the benefits they see for their members in the current provisions which Murdoch wants to change. Murdoch's financial situation is such that it has not sought to "buy" the changes it seeks in the Agreement by offering large salary increases. While there has been some movement on both sides the parties are not at all close to reaching agreement.

[286] The negotiations have been lengthy, involving approximately 27 meetings. In addition at times the parties have applied pressure to each other by pursuing industrial action, social media campaigns, applications to this Commission and applications to the courts. Notwithstanding all of this only limited progress has been made and the fact is the parties remain well apart on multiple fundamental issues of importance to them.

[287] If the Agreement is not terminated there will be no change in the context for bargaining and so no reason to believe the parties will be any more motivated to shift their positions than they have been to date. Considering all of this my conclusion is there is no reason to believe the parties are likely to settle an agreement in the foreseeable future.

Murdoch's undertakings

The undertakings given

[288] Mr McKee provided an undertaking on behalf of Murdoch that it will maintain some of the terms and conditions prescribed in the agreement for a period of six months.⁵⁰

[289] The terms and conditions undertaking is in the following terms,

"1. The Applicant seeks to avoid employees experiencing an immediate reduction in their take home pay following any termination of the Murdoch University Enterprise Agreement 2014 (Agreement).

2. The Applicant hereby undertakes that, notwithstanding any order of the Fair Work Commission to terminate the Agreement pursuant to section 226 of the Fair Work Act 2009 (Cth), the Applicant will, where applicable, continue to provide the benefit of the terms of the Agreement set out below to all employees to whom the Agreement applies, including any new employees (Employees):

(a) rates of pay contained in Schedules 1, 2 and 3;

(b) Aboriginal and Torres Strait Islander employment in clause 8;

(c) ability to access personal leave for employees who are experiencing domestic or family violence, in accordance with clause 9;

(d) Indigenous Language Allowance contained in clauses 29 and 87;

(e) superannuation in accordance with clauses 26 and 73;

(f) hours of work in accordance with clauses 76.1, 76.6, 76.7 and 76.8;

- (g) overtime pay and conditions in accordance with clause 78;*
- (h) shift allowances and additional leave entitlements in accordance with clause 77;*
- (i) higher duties and special allowance in accordance with clause 82.1;*
- (j) temporary special allowance in accordance with clause 83;*
- (k) annual leave loading in accordance with clauses 31.4 and 90;*
- (l) paid long service leave in accordance with clauses 32 and 91;*
- (m) paid Aboriginal and Torres Strait Islander Leave in accordance with clauses 34 and 93;*
- (n) paid personal leave in accordance with clauses 35 and 95;*
- (o) parental leave in accordance with clauses 42 and 103;*
- (p) notice of termination, or payment in lieu, in accordance with clauses 19.3(c) and 59.9;*
- (q) payments contained in clauses 22.2, 64.2 and 64.4(d) of the Agreement with respect to termination of employment for redundancy;*
- (r) severance payments for fixed term contract employees, in accordance with clauses 16.5(r) and 59.5(r);*
- (s) workloads and working hours in clause 66.*

3. Unless extended in whole or in part at the complete discretion of the Applicant, the Undertakings will cease to apply on the earliest of the following:

- (a) the date on which a new enterprise agreement or a workplace determination made by the Commission which applies to the employees covered by the Agreement, commences operating; or*
- (b) the date on which an employee who is covered by the Agreement and the Applicant agree in writing that the Undertakings do not apply to that employee; or*
- (c) the date six months from the date on which the Undertakings commence applying to the employees to whom the Agreement applies.*

4. The payments made pursuant to these Undertakings are intended to satisfy all entitlements the Employees may have to wages, allowances and any other monetary amounts otherwise payable under the Higher Education Industry Academic Staff Award 2010 and the Higher Education Industry General Staff Award 2010 (Awards) and/or the National Employment Standards (NES). The Applicant will 'set-off' or

'absorb' any payment or benefit provided by the Awards or the NES against any payment or benefit to which an employee is entitled by virtue of these Undertakings.

5. The Applicant further undertakes that all employment contracts which have been entered into pursuant to the Agreement and which are operating and in term as at the date on which any order terminating the Agreement takes effect, will continue to operate and have effect in accordance with their terms, notwithstanding any termination of the Agreement."

[290] Mr McKee's evidence was that it was expected that the period of the undertaking will allow Murdoch and the NTEU sufficient time to negotiate a new agreement. His evidence was that he believed the existence of the existing Agreement was impeding negotiations of a replacement. He believed the employees bargaining representatives felt unable to agree to proposals to remove existing entitlements from the Agreement. He anticipated that termination of the Agreement would make it easier for Murdoch to negotiate a fairer agreement for both the employees and Murdoch that will assist it meet its financial challenges and develop a sustainable business model.

[291] Mr McKee's evidence was that if after termination a new agreement is not reached and six months later salary levels were to revert to the modern award it would be very challenging for Murdoch to remain competitive and to retain staff. For this reason he said there is a strong incentive for Murdoch to ensure take-home pay is not affected and terms and conditions are commensurate with those offered by its competitors, the four other universities in Western Australia.⁵¹

[292] The Chancellor of Murdoch, Mr Flanagan, gave evidence as follows,

*"Murdoch's application to terminate the Agreement is nothing to do with cutting wages or the remuneration of employees. It is about removing obstacles that prevent Murdoch from being flexible enough to evolve and improve."*⁵²

[293] With respect to submissions from the Unions that Murdoch's application will have the effect of restricting or infringing academic freedom Mr Flanagan's evidence was that academic freedom is the cornerstone of any university and he as the Chancellor wants to foster and promote this.

[294] His evidence was that to remove any doubt about this Murdoch is prepared to give an undertaking that in the event the Agreement is terminated Murdoch will continue to provide the benefits set out in clause 54 of the Agreement until a new agreement is approved and comes into force. The undertaking is in the following terms,

"1. I, David Flannagan, Chancellor of Murdoch University, am authorised to provide this undertaking on behalf of Murdoch University in respect of the above proceedings.

2. Notwithstanding any order of the Fair Work Commission to terminate the Murdoch University Enterprise Agreement 2014 (Agreement) pursuant to section 226 of the Fair Work Act 2009 (Cth), the Applicant undertakes that it will continue to provide the benefit of academic freedom as set out in clause 54 of the Agreement until a new enterprise agreement is approved and comes into force.

3. *Clause 54 provides:*

54.1 Without derogating from or limiting the employment and other legal obligations of employees, including the obligations to comply with reasonable and lawful directions and requests, the Applicant is committed to the principles of promoting and protecting academic freedom.

54.2 The principles of academic freedom include

(a) the rights of all academic employees to:

(i) participate in public debates and express opinions about issues and ideas related to their discipline area or areas of professional expertise, and about higher education issues more generally;

(ii) make comment outside their discipline or areas of professional expertise as long as they clearly do so on their own behalf and do not claim to represent the University or present their comments in such a way as might be reasonably linked to the University;

(iii) express unpopular or controversial views, but this does not mean the right to harass, bully, vilify, defame or intimidate;

(b) pursue critical and open inquiry and to freely discuss, teach, assess, develop curricula, publish and research subject to the laws and customs of the jurisdiction in which they are operating.”

The Unions’ view of the undertakings

[295] With respect to these undertakings the Unions submit that,

- With regard to redundancy the undertaking is only to the ‘payments’ not the process provided in the clauses.
- The benefit of clauses concerning fixed term engagement, scholarly teaching fellows, casual engagement and early career development fellowships, are not included in the undertaking, other than for severance payments for fixed term contract employees.
- The benefits on termination under clause 61 are not included.
- Matters concerning the Unions including accredited union representatives and union recognition are not included.
- The undertaking does not preserve accrued rights under the Agreement for example for employees who are engaged in any of the processes under the Agreement when it is terminated.

- The undertaking is a unilateral promise by the University and nothing prevents Murdoch withdrawing it or not honouring it. The employees are wholly dependent upon the University making good on its undertakings.
- If a new agreement has not been approved within six months of termination of the Agreement the terms and conditions undertaking ends and this may not be long enough for the parties to negotiate a new agreement.
- It is uncertain how Murdoch's reference in the terms and conditions undertaking to 'set off' and 'absorption' could be legally effective.

The legislation

[296] The sections of the Act relevant to this matter are set out below.

[297] The object of the Act is contained in section 3, which relevantly provides,

“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:

(a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations;

...

(f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; ...”

[298] The object of the part of the Act concerning enterprise agreements, Part 2-4, is provided at section 171(a):

“The objects of this Part are:

(a) to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits; ...”

[299] Part 2-4 of the Act includes sections 225 and 226.

[300] Section 225 of the Act provides that an employer covered by an enterprise agreement may apply to the Commission for the termination of the enterprise agreement if the enterprise agreement has passed its nominal expiry date.

[301] There is no doubt Murdoch was able to and has made an application under section 225.

[302] Section 226 of the Act prescribes when the Commission must terminate an enterprise agreement as follows,

“If an application for the termination of an enterprise agreement is made under section 225, the FWC must terminate the agreement if:

(a) the FWC is satisfied that it is not contrary to the public interest to do so; and

(b) the FWC considers that it is appropriate to terminate the agreement taking into account all the circumstances including:

(i) the views of the employees, each employer, and each employee organisation (if any), covered by the agreement; and

(ii) the circumstances of those employees, employers and organisations including the likely effect that the termination will have on each of them.”

Is it contrary to the public interest to terminate the Agreement?

[303] It is useful to first consider what the appropriate principles are for the Commission to apply when considering the public interest.

[304] In the *Aurizon* decision⁵³ a Full Bench of the Commission considered the public interest consideration within section 226 and endorsed the approach of a previous Full Bench in the *Kellogg Brown & Root v Esso Australia Pty Ltd*⁵⁴ (*Kellogg Brown & Root*) decision as follows,

“[129] Section 226(a) requires a consideration of whether termination of the agreements is not contrary to the public interest. It seems to us that a consideration of the public interest will involve something that is distinct from the interests of the persons and bodies covered by the agreements. This distinction seems to be reflected in the structure of s. 226. The question of how the public interest is to be assessed was considered by a Full Bench of the Australian Industrial Relations Commission in Re Kellogg Brown and Root, Bass Strait (Esso) Onshore/Offshore Facilities Certified Agreement 2000. The decision in Kellogg Brown concerned an application to terminate a certified agreement pursuant to s. 170MH of the WR Act. The Full Bench observed:

“The absence of any reference to the interests of the negotiating parties in s.170MH(3) is significant. It follows that the views of persons bound by the agreement may be relevant to the exercise of the discretion if they shed light upon the effect of termination on the public interest, but they should not be given any independent weight. To do so would be to import into the application of the section something which on its proper construction it does not include.

The notion of public interest refers to matters that might affect the public as a whole such as the achievement or otherwise of the various objects of the Act, employment levels, inflation, and the maintenance of proper industrial

standards. An example of something in the last category may be a case in which there was no applicable award and the termination of the agreement would lead to an absence of award coverage for the employees. While the content of the notion of public interest cannot be precisely defined, it is distinct in nature from the interests of the parties. And although the public interest and the interests of the parties may be simultaneously affected, that fact does not lessen the distinction between them.”

[130] After considering the decision in Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia, the Full Bench in Kellogg Brown said:

“It is clear from this passage that the ascertainment of the public interest may involve balancing countervailing public interests. That the Commission should take all of the circumstances into account is made clear by Dawson J in Re Australian Insurance Employees Union; Ex parte Academy Insurance Pty Ltd [(1988) 78 ALR 466 at 467]. These authorities provide useful general guidance in the application of the test in s. 170MH(3). They illustrate the types of interests which can be properly described as public interests and confirm the breadth of circumstances which may be relevant to the ascertainment of those interests.

It should be emphasized that the Commission's consideration of the public interest for the purpose of s. 170MH(3) is directed to the consequences of terminating the agreement. In a given case, some consequences will be clearly predictable, others will be less so. For the most part the Commission should be guided by the likely foreseeable consequences of termination rather than speculation about possible consequences.” (References omitted)

[305] With respect to achieving the objects of the Act, the Full Bench in *Aurizon* decided that,

“[148] As we have already indicated, s. 3 of the Act should be read as a whole. Paragraph 3(f) is not given a particular precedence over, nor does it override or qualify, any other parts of s. 3. Each of the paragraphs can be read harmoniously. Each describes a means by which the Act's object is to be achieved. Read together, the section describes the various means by which the object of the Act is to be achieved. There is in our view no conflict or inconsistency between the various paragraphs in s. 3 of the Act.

*[149] Further there is not, in our view, any conflict or inconstancy between s. 3 (or any of its paragraphs) and s. 171 of the Act. Section 171 contains the particular objects of Part 2–4 of the Act. Its terms do not conflict with or qualify s. 3 of the Act and can be read harmoniously with s. 3 of the Act. Section 171 is relevant to the construction and application of s. 226 of the Act, but in our view, it does not operate on s. 266 in the manner suggested in *Tahmoor Coal*. On our reading of ss. 3 and 171, there is nothing in those provisions, when read harmoniously, that would suggest that the emphasis on promoting productivity (in s.3(a)) is primarily to be achieved through collective bargaining in good faith (in s. 3(f) and s. 171) rather than by other means, such as termination of an expired agreement. Moreover, such a construction assumes some incompatibility with terminating an enterprise agreement that has passed its*

nominal expiry date and collective bargaining. In our view the two are not incompatible.

[150] When read harmoniously with s. 3, s. 171 does not qualify or restrict the exercise of the power of termination under s. 226 of the Act in the manner suggested in Tahmoor Coal. Indeed the object in s. 171 (a) is directed to providing:

... a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at an enterprise level, for enterprise agreements that deliver productivity benefits.

[151] Section 226 of the Act is part of the simple, flexible and fair framework, established by Part 2–4 to which the objects in s. 171 relate. There is nothing inherently inconsistent with the termination of an enterprise agreement that has passed its nominal expiry date and collective bargaining in good faith. There is nothing incompatible with the termination of such an agreement and the continuation of collective bargaining that has commenced in good faith at an enterprise level for an enterprise agreement that delivers productivity benefits. The framework that is established by Part 2–4 provides for applications and orders to be made for the termination of an enterprise agreement that has passed its nominal expiry date. It is not too difficult to suppose that such an agreement in particular circumstances might no longer deliver productivity benefits, or that such an agreement has never done so. It is not too difficult to suppose that the termination of such an agreement might better support good faith bargaining for an agreement that delivers productivity benefits at the enterprise level.”

[306] This Full Bench decision in *Aurizon* was reviewed on appeal by a Full Court of the Federal Court of Australia⁵⁵ which considered the Full Bench’s view of the statutory environment informing the Commission’s task under section 226 and found it to be unexceptionable.

[307] Indeed the Full Court of the Federal Court while rejecting the appellant’s first ground decided that,

“25 Thirdly, and relatedly, the period after the nominal expiry date of an enterprise agreement is likely to be the very time that the parties concerned are engaged in serious, if not disputatious, collective bargaining. There is, of course, no suggestion in the FW Act that the relevant employer and its employees would not commence to bargain before, even well before, that date (as happened in the present case), but, if they do so and conclude the terms of a new agreement, the existing agreement will cease to apply immediately it passes its nominal expiry date (s 58(2)(d)(ii)). Alternatively, if there is no new agreement until after the existing agreement has passed its nominal expiry date, the existing agreement will cease to apply when the new one comes into operation (s 58(2)(e)). In the context of an ongoing, single-enterprise, business, the most obvious situation in which recourse might be had to s 226 of the FW Act would be where an existing agreement had passed its nominal expiry date (a jurisdictional fact under the section) but where no new agreement had been made. This is the very situation in which collective bargaining is likely to be proceeding; and it is the only time in which industrial action associated with such bargaining might be – subject to compliance with other statutory requirements –

protected under Div 2 of Pt 3-3 of the FW Act. The proposition that, as a matter of statutory policy, there should be a predisposition towards regarding it as contrary to the public interest to terminate an enterprise agreement during a period when collective bargaining is taking place must, in the circumstances, be regarded as a most unlikely one.”

[308] So it is that the Commission’s consideration of the public interest concerns something distinct from the interests of Murdoch, Murdoch’s employees and the Unions covered by the Agreement.

[309] The public interest refers to matters that might affect the public as a whole and examples are, achieving or not the objects of the Act, employment levels, inflation or the maintenance of proper industrial standards.

[310] Ascertaining the public interest may involve balancing countervailing public interests. The Commission should take all of the circumstances into account. Some consequences of terminating the Agreement will be clearly predictable others will be less so. For the most part the Commission should be guided by the likely foreseeable consequences of termination rather than speculation about possible consequences.

[311] There is no predisposition toward regarding it as contrary to the public interest to terminate an agreement when bargaining is taking place. The termination of an agreement might better support good faith bargaining for an agreement that delivers productivity benefits at the enterprise level.

[312] Equally however there is no predisposition toward regarding terminating an agreement as in the public interest.⁵⁶

[313] Finally the Commission should not have regard, when considering the public interest, for what one party or the other is seeking in a new agreement because it does not necessarily follow that that will be the outcome of future negotiations.⁵⁷

Economic effects

The Unions’ economic evidence

[314] The Unions commissioned Dr Denniss to provide an expert report on the benefit to the state economy and the impact on national economic prosperity if the Agreement was terminated.

[315] Dr Denniss is an Economist with more than 20 years professional experience. He is the Chief Economist at the Australia Institute and was the Institute’s Executive Director between 2008 and 2015. Prior this he was an Associate Professor at the Crawford School of Economics and Government at The Australian National University. He was a Lecturer in the Department of Economics at the University of Newcastle. Dr Denniss has a Bachelor of Commerce (Hons) from the University of Newcastle and a PhD (Economics) from the University of Sydney.

[316] Dr Denniss explained the questions he was asked and his answers to these, which in summary were as follows,

“2. I have been asked by Maurice Blackburn Lawyers to provide an expert report answering the following questions:

1. If the Murdoch University Enterprise Agreement 2014 (“Agreement”) were terminated, would this or would this not:

(a) benefit the State economy of Western Australia; and

(b) improve national economic prosperity;

as submitted at paragraphs 7 and 28(c) of the Applicant’s Outline of Submissions filed by Murdoch University and dated 7 March 2017, and if so, or if not, for what reason(s)?

2. If other enterprise agreements at other Australian universities were also terminated, would this or would this not:

(a) benefit the State economies in which those universities are located; and

(b) improve national economic prosperity; and if so or if not, for what reason(s)?

...

Summary

9. My answers to the questions I have been asked are, in summary:

Question 1:

If the Murdoch University Enterprise Agreement 2014 (“Agreement”) were terminated, would this or would this not:

(a) benefit the State economy of Western Australia; and

(b) improve national economic prosperity;

as submitted at paragraphs 7 and 28(c) of the Applicant’s Outline of Submissions filed by Murdoch University and dated 7 March 2017, and if so, or if not, for what reason(s)?

Answer:

I (a) No. In my opinion the impact of the termination of the Agreement would be so small that they would be unnoticeable on WA’s Gross State Product. That said, in my opinion the net impact of the termination of the Agreement on the state economy would be negative due to the impact of further reductions in wage growth and consumer sentiment on the already weak WA economy.

1 (b) No. In my opinion the impact of the termination of the Agreement would be so small that they would be unnoticeable on Australia's Gross Domestic Product. That said, in my opinion the net impact of the termination of the Agreement on the national economy would be negative due to the impact of further reductions in wage growth and consumer sentiment.

Strong wage growth is central to the Commonwealth Government's plan for economic growth and budget repair.

Question 2:

If other enterprise agreements at other Australian universities were also terminated, would this or would this not:

(a) benefit the State economies in which those universities are located; and

(b) improve national economic prosperity; and if so or if not, for what reason(s)?

Answer:

2 (a) No. In my opinion the impact of the termination of other agreements would be so small that they would be unnoticeable on WA's Gross State Product. That said, in my opinion the net impact of the termination of multiple agreements on the state economy would have an even larger adverse impact on the WA state economy due to the impact of further reductions in wage growth and consumer sentiment on the already weak WA economy.

2 (b) No. In my opinion the impact of the termination of other agreements would be so small that they would be unnoticeable on Australia's Gross Domestic Product. That said, in my opinion the net impact of the termination of multiple agreements on the national economy would have an even larger negative impact on the national economy than the termination of a single agreement due to the greater likelihood of significantly reducing wage growth and consumer sentiment. Strong wage growth is central to the Commonwealth Government's plan for economic growth and budget repair.

...

10. My reasons for these answers are as follows.

*11. In relation to **Question 1(a)** it is important to note that the Gross State Product of WA was \$239 billion in 2015-16 and the entire wage bill for Murdoch University is around \$200 million (less than 1,000th of Gross State Product).*

12. If Murdoch University were to double in size as a result of the termination of the Agreement (a highly unlikely outcome) the impact on Gross State Product would only be noticeable if Gross State product was estimated to the first decimal place.

13. In my opinion the termination of the Agreement has no potential to make a significant impact on Gross State Product and, to the extent that it has a minor impact, that impact would be negative.

14. While the potential for any significant boost to the WA economy is trivial in my opinion, any reduction in the wages or conditions of Murdoch University staff would lead to a reduction in consumer demand, consumer confidence and possibly reduced wage and condition outcomes in other organisations. All of which would have a small, but adverse, impact on the broader state economy.” (Underlining added)

[317] There are some concerns with Dr Denniss’s report.

[318] Dr Denniss when considering the impact of terminating the Agreement⁵⁸ has assumed the outcome is a reduction in wages and conditions of Murdoch staff. Dr Denniss was not asked by his instructors to consider the fact Murdoch has given an undertaking to maintain the financial benefits for employees in the Agreement for at least six months after termination. Nor is it apparent Dr Denniss considered that any reduction in wages would be limited to the difference between the salaries in the Agreement and those in the respective Awards. Finally Dr Denniss was not instructed to have regard for the possibility the parties will, after termination of the Agreement, settle upon a new agreement which, given Murdoch is not pursuing any reduction in employees monetary benefits and has offered a salary increase, will probably not involve a reduction in wages and monetary conditions.

[319] The reality in my view is that there is a possibility, but not a certainty, that there will be a reduction in wages and conditions if the Agreement is terminated but if this does occur it is most unlikely to be ongoing.

[320] Separately the second question Dr Denniss was asked assumes other Australian universities apply to terminate their agreements and are successful (assumedly after Murdoch has done so) which is a highly speculative scenario. Dr Denniss in his report answered this second question assuming the most extreme possible outcome from this scenario. His answer considers what the impact would be “...*if all of Australia’s universities were to terminate their enterprise agreements...*”⁵⁹ and goes on to consider the impact of “...*the widespread cancellation of enterprise agreements in a high-profile industry...*”⁶⁰ (Underlining added)

[321] There simply is no evidence before the Commission which suggests this scenario of all of Australia’s universities being successful in applications to terminate their enterprise agreements is a likely foreseeable consequence if Murdoch’s Agreement is terminated.

Murdoch’s economic evidence

[322] Murdoch commissioned an expert report from Mr Nicolaou in reply to Dr Denniss’s report. Mr Nicolaou graduated from UWA with a Bachelor of Economics (First Class Honours) and later with a Master of Business Administration. He worked in the Department of Treasury as a Policy Analyst between 1998 and 2003. He then worked at the Chamber of Commerce and Industry of Western Australia as the Senior Economist, then Chief Economist and finally Chief Officer, Member Services and Advocacy. Since 2015 he has been the Executive Director (WA and NT) at ACIL Allen Consulting.

[323] Mr Nicolaou was asked to answer the following questions,

“1) Please respond to Dr Denniss’ report by answering the following questions. Please include the reasons for your opinion.

a) Do you agree or disagree with Dr Denniss’ opinion that the termination of the Agreement would result in a net negative impact on the State economy?

b) Do you agree or disagree with Dr Denniss’ opinion that the termination of the Agreement would result in a net negative impact on the national economy?

c) Are there any other opinions expressed by Dr Denniss that you agree or disagree with?

2) Please identify any public benefits that could flow from the termination of the agreement. Please exclude from your consideration the benefits that could flow to Murdoch University, its employees and the NTEU.”

[324] Mr Nicolaou answered as follows,

“1) a) I do not agree with Dr Denniss’ opinion. In short, I do not believe there is compelling evidence that the termination of the Agreement will result in either a net positive or net negative impact on the Western Australian economy in the short term. There is potential for net positive or net negative impacts on the Western Australian economy in the long term, however these are also likely small and difficult to directly observe. I will describe these qualitatively in my report.

1) b) I do not agree with Dr Denniss’ opinion. In short, I do not believe there is compelling evidence that the termination of the agreement will result in either a net positive or net negative impact on the national economy in the short term. There is potential for net positive or net negative impacts on the national economy in the long term, however these are also likely small and difficult to directly observe. I will describe these qualitatively in my report.

1) c) Many of the opinions expressed by Dr Denniss in his report are economic concepts that are not relevant to the situation at hand. I also disagree with the evidence presented by Dr Denniss in Paragraph 15 through Paragraph 20 of his report. Dr Denniss states that there is a causal link between low wages growth and high unemployment; that periods of low wages growth lead to higher unemployment. This is misleading. The report Dr Denniss cites makes the opposite claim. Dr Denniss has also not fully considered the findings of the report he has cited as the central evidence to this claim.

Established economic literature, which I will cite in the body of this report, finds that outcomes in the labour market (ie the supply of and demand for labour) determine prices (i.e. wages), not the other way around as Dr Denniss has expressed in his report.

In addition, even if this effect was to arise, it is so small in the scheme of Western Australia’s \$239 billion economy as to be trivial.

I also wish to address Dr Denniss' expressed view regarding the impact of a potential termination of the Agreement on the Federal Budget, and his view that the operating environment of the university sector in Western Australia has not changed since the Agreement was struck in 2014.

...

2) Based on the materials provided by MinterEllison, my experience in business, and my professional judgement as an economist, improving the quality of Murdoch's offering to students has the long term potential of improving the human capital of Western Australia. In addition, an improvement in the flexibility and sustainability of Murdoch also has the potential to improve its research outputs, which has additional benefits. These are potential benefits that may take years or decades to manifest, but which could be missed if action is not taken now given the competitive pressures placed on the higher education sector.

...

17. Dr Denniss is making a judgement that the termination of the Agreement by Murdoch would result in negative downside impacts on the Western Australian economy. In my review of the material provided to me by MinterEllison regarding the matter I believe there are long term benefits to the State as a result of more competitive and sustainable Murdoch University.

18. Dr Denniss states in Paragraph 24 and 25 of his report that the termination of the Agreement would be likely to have a significant detrimental impact on the confidence of public and private sector employees elsewhere in the State economy. He goes on to say that given the current state of the WA economy, such an additional negative shock to consumer confidence, and wage expectations of employees across the State, is likely to have a larger impact than if the economy was growing rapidly.

19. I disagree with this assessment. For this to occur, it implies the termination of an expired Agreement that covers 3,558 employees in Western Australia's 1,441,800 strong labour force would garner a disproportionate influence on the expectations of Western Australian households than issues such as family finances, political events, the Chinese economy, the state of the housing market, and other issues. These are of significantly larger scope, and more front of mind for households, than the 5 technical nature of enterprise bargaining negotiations for an entity which employs 0.2 per cent of Western Australia's workforce."

Conclusion on the economic effect

[325] There are some deficiencies in Dr Denniss's approach, as discussed above.

[326] Mr Nicolaou's opinion on the public benefits in terms of human capital, student needs and research being improved if the Agreement is terminated I accept is based on the assumption those benefits result in part from the Agreement's termination, which is supported by Mr McKee's evidence, amongst other witnesses for Murdoch. I accept considering all the evidence that this view that terminating the Agreement will have some positive public interest benefit is reasonable.

[327] There is some doubt as to Dr Denniss's analysis of the immediate short-term impact of terminating the Agreement. Mr Nicolaou contests the validity of his approach generally and his conclusions about wage growth and his conclusions as to the impact on consumer confidence and confidence of public and other private sector employees. I accept that as Mr Nicolaou argues the influence on Western Australian households and the labour force of the termination of Murdoch's Agreement would pale into insignificance compared to the other matters Mr Nicolaou identifies as being front of mind for those households and employees and that each of these would be of far, far greater concern to them.

[328] What both experts do agree on is that any positive or negative consequences of terminating the Agreement will be very small in terms of the impact on the Western Australian or Australian economy and hence the impact on the public interest will be minimal.

[329] To the extent that there is conflict between the two expert reports I am persuaded that the long term positive benefits of terminating the Agreement identified by Mr Nicolaou will ultimately be greater than any short term negative consequences Dr Denniss identified. This is so because the long-term positive benefits Mr Nicolaou points to will accrue year-on-year ongoing into the future for the benefit of both the state and national economies and so at some point will cumulatively outweigh any negative impacts which are operative only in the short term as first round effects from what is only the possibility of a reduction in wages and conditions.⁶¹

[330] In conclusion on balance I find the evidence is that there would be a small positive, but not significant, impact for the state and national economies and so a small benefit, but not significant, to the public interest if the Agreement was terminated.

Undermining the public benefits of the University

[331] The Unions argue that Murdoch provides a significant benefit to the Australian public through education, robust intellectual debate, cultural transmission of ideas and sound scholarship.

[332] Staff are critical in ensuring that Murdoch continues to provide these public benefits and the Agreement enable staff to do so because it provides equitable and transparent rules regulating their terms and conditions of employment.

[333] The Unions submit that removing these equitable and transparent rules which govern the relationship between Murdoch and its staff negatively impacts that public benefit Murdoch provides.

[334] Against this Murdoch submits that because termination of the Agreement will assist Murdoch in its financial recovery and in meeting its current and future challenges this mean Murdoch is better placed to serve the public interest.

[335] In addition Murdoch has undertaken to maintain a number of the key terms and conditions of employment in the Agreement for a minimum period of six months and in terms of the academic freedom clause until a new agreement is made.

[336] At the expiry of the six-month period for the terms and conditions undertaking employees will be covered by the appropriate safety net of the two modern awards. Some other matters not the subject of award provisions Murdoch will in all likelihood continue with in workplace policies, albeit in a more simplified and flexible manner.

[337] Considering the above I am not satisfied that termination of the Agreement will have a negative impact on Murdoch as a University providing public benefits by way of education, robust intellectual debate, cultural transmission of ideas or scholarship.

Undermining academic freedom

[338] The Unions submit that the Agreement enshrines and commits the parties to the principles of academic freedom (clause 54), protects against consultancies that threaten intellectual freedom (clause 56) and defines and regulates misconduct in a way that preserves academic freedom (clause 20).

[339] Specifically, clause 20 does not define “misconduct” or “serious misconduct” for academic staff to include conduct that may cause an imminent and serious risk to the reputation, viability or profitability of the University.⁶²

[340] The termination of the Agreement would remove these provisions.

[341] The Unions submit the loss of these provisions would be particularly detrimental in the area of dismissal. Academic staff would become exposed to an allegation of “misconduct” and possibly “serious misconduct” if they engaged in conduct which caused a serious and imminent risk to the reputation, viability or profitability of the employer’s business.

[342] Such an allegation might be made, for example, if an academic staff member went public with concerns about falsification of data, marking or plagiarism. The threat of dismissal would have a chilling effect on academic freedom, and on the University’s public role of advancing and disseminating knowledge.

[343] Chancellor Flanagan has provided an undertaking that Murdoch will continue to provide the benefit of academic freedom as set out in clause 54 of the Agreement until a new enterprise agreement comes into force.

[344] However the Unions point out that the University’s commitment to the principles of academic freedom in the undertaking are expressly qualified by the words: “*Without derogating from or limiting the employment and other legal obligations of employees...*”.

[345] In those circumstances, if an academic exercises his or her academic freedom in accordance with the principles in clause 54 of the Agreement, but in doing so engages in conduct that may cause a serious and imminent risk to the reputation, viability or profitability of the University there is a risk the academic may be guilty of misconduct at common law. If the Agreement was not terminated in these same circumstances the academic would be protected from allegations of misconduct and serious misconduct and dismissal from employment.

[346] In response Murdoch says this submission ignores the fact that the unfair dismissal scheme of the Act will continue and applications will, as they always have been, be able to be

made under section 394 of the Act. If a dismissal is unfair then reinstatement is the primary remedy and this provides an appropriate check and balance for unfair actions by Murdoch.

[347] Murdoch says there is no evidence that academics need further protection beyond that which exists in the unfair dismissal regime. There was no evidence that removal of the disciplinary provisions from the Agreement will affect the approach of academics and their willingness to express views that fall within the definition of academic freedom.

[348] Murdoch submits the evidence of Mr McCulloch was that the inclusion of the disciplinary provisions in the Agreement follows a decision from the 1950s in Tasmania which was unrelated to protection of academic freedom. This was also the view of Emeritus Professor Jackson in his report commissioned by the Unions.⁶³ Importantly the introduction of disciplinary provisions in agreements in the tertiary sector for academics predated the unfair dismissal regime introduced in the Federal legislation around 1993.

[349] It is correct that if the Agreement is terminated the provisions in the Agreement that concern misconduct and serious misconduct for academics will no longer apply. If an academic employee is dismissed after the Agreement has been terminated they will have the legal right to challenge that dismissal either in this Commission or in the courts. The fact that Chancellor Flanagan on behalf of the University has given an ongoing undertaking to provide the benefits of the Agreement's clause 54 in terms of academic freedom would, depending upon the circumstances of the case, obviously be relevant in such proceedings.

[350] Employees of Murdoch have in the past made applications to this Commission for an unfair dismissal remedy.

[351] The scenario the Unions say demonstrates terminating the Agreement will undermine academic freedom would involve a number of necessary elements.⁶⁴

[352] An academic considering exercising academic freedom must be going to engage in conduct which arguably will cause a "*serious and imminent risk to the reputation, viability or profitability of the employer's business*".

[353] Clearly the vast majority of instances of academics exercising academic freedom will be innocuous and will not pose such risks.

[354] The academic must also hold the view that the absence of previously applicable provisions in the Agreement has, in the particular circumstances, increased the risk of a threat to their employment from Murdoch.

[355] Then the academic must decide not to exercise their academic freedom to speak publicly because of their perception of the increased risk of a threat to their employment.

[356] Even in this situation the academic has the protection of pursuing Murdoch in this Commission or the courts if necessary.

[357] The likelihood of circumstances arising where all of these requisite elements exist is more in the realm of speculation about a possible consequence of termination of the Agreement than a case of a likely foreseeable consequence.⁶⁵

[358] It must also be remembered that the public interest is not the same as the interests of individual academics.

[359] Further the evidence of Mr McCulloch⁶⁶ is that there are a number of universities that have quite different agreement provisions concerning termination for misconduct or serious misconduct. The agreements for each of these universities do not exclude termination of employment for conduct that may cause an imminent or serious risk to the reputation, viability or profitability of the University. For example James Cook University in its academic agreement defines serious misconduct as being per the definition in the *Fair Work Regulations 2009*, the University of Wollongong similarly recognises this definition⁶⁷, as does the University of Tasmania.⁶⁸

[360] The University of the Sunshine Coast expressly defines serious misconduct to include conduct that causes serious and imminent risk to the reputation, viability or profitability of the University.⁶⁹ Similarly the Queensland University of Technology in its academic agreement expressly defines serious misconduct to include wilful conduct in bad faith which is reasonably likely to significantly damage the university's reputation.⁷⁰

[361] These universities agreements have lesser protections in terms of dismissal for their academics than Murdoch has in its Agreement; however there is no suggestion that the academics at these universities have had their academic freedom undermined.

[362] This demonstrates that a provision in an agreement which excludes termination because of conduct that may cause an imminent and serious risk to the reputation, viability or profitability of a University is not a necessary precondition to protect academic freedom.

[363] If the Agreement is terminated there will still be protection for academic freedom at Murdoch in terms of the undertaking provided by the Chancellor and the supporting protections from unfair dismissal which the Act and the courts provide. I do not accept the impact on academic freedom of terminating the Agreement would mean termination would be contrary to the public interest.

Other Agreement terms that confer a public benefit

Unions' submissions

[364] The Unions submit that termination of the Agreement would result in the loss of employment conditions that they submit confer a broader public benefit. These conditions it is submitted assist Australians at risk of exclusion, in particular, Aboriginal and Torres Strait Islander people, parents with newborn children, and victims of family and domestic violence.

[365] It is submitted the terms and conditions undertaking given by Murdoch is not a satisfactory answer. The public interest is not served when socially inclusive conditions of employment are able to be removed from a workplace.

[366] As the Unions acknowledge Murdoch in bargaining withdrew its claim to remove the Aboriginal and Torres Strait Islander employment target, neither party has made a claim to disturb the paid parental leave provisions and Murdoch has agreed to the NTEU's claim for family and domestic violence leave.

[367] The Agreement includes conditions to help increase employment opportunities for Aboriginal and Torres Strait Islander people in the university sector and beyond, and promote reconciliation with Aboriginal and Torres Strait Islander people.

[368] These are a target for increasing the employment of Aboriginal and Torres Strait Islander people at the University (clause 8.4), the funding of scholarships, traineeships and trainee employment from the rent paid by the NTEU to the University (clause 13.6), an Indigenous Language Allowance for academic and professional staff (clauses 29, 87), leave for Aboriginal and Torres Strait Islander staff to attend ceremonial obligations (clauses 34, 93), and Aboriginal and Torres Strait Islander representation on the Promotions Committee for academic staff (clause 48.1).

[369] The Unions submit that removing these benefits will damage efforts to improve employment opportunities for Aboriginal and Torres Strait Islander people and damage reconciliation within the Australian community.

[370] The Agreement contains beneficial parental leave conditions (clauses 42 and 103) including:

- (a) up to 52 weeks' unpaid parental leave for employees with less than 12 months' service;
- (b) up to 26 weeks' paid parental leave at full pay, or 52 weeks' at half pay, for employees' with 12 months' service; and
- (c) up to five days' paid partner leave.

[371] If the Agreement were terminated, employees would only be entitled to the less beneficial provisions of the Act and *Paid Parental Leave Act 2010*, and it is submitted that removing the benefit of the parental leave conditions of the Agreement from parents, children and the Australian economy, and exacerbating gender inequality.

[372] The Agreement entitles employees experiencing domestic or family violence to access their personal leave for reasons including attending medical or counselling appointments, moving into emergency accommodation or seeking more permanent safe housing; attending court hearings and police appointments, accessing legal advice, and organising alternative care and education for their children (clause 9).

[373] The Unions submit that terminating the Agreement would remove this entitlement and undermine the community's efforts to address family violence.

Murdoch's submissions

[374] Murdoch submits firstly that the connection between these benefits and the public interest for the purpose of section 226 is questionable. The Full Bench in *Kellogg Brown & Root*⁷¹ held that:

“it may be safely assumed that termination of a certified agreement carrying with it the loss of significant benefits, is not itself contrary to the public interest. That is evident from the terms of s.170MH(3).”

[375] In any event, Murdoch recognises that these conditions confer important benefits on employees. Murdoch takes no issue with these provisions and they are the subject of undertakings provided by Murdoch which will apply for a period of six months in the event that the Agreement is terminated.

[376] An analysis of the consequences of the termination of the Agreement after the six month period necessarily requires the making of assumptions and speculation as to the outcomes of the bargaining.

[377] However, to the extent it is relevant, the evidence before the Commission is:

- (a) both parties intend to continue bargaining following termination; and
- (b) at the end of the six month period, in the unlikely event an agreement has not been reached, no decisions have been made by Murdoch about the conditions that would apply thereafter. However, Murdoch's stated intention is to apply competitive terms and conditions above award conditions, following the expiry of the six month undertaking.

[378] Accordingly Murdoch submits that this issue is without foundation and has no bearing on an assessment of the public interest.

Consideration - Other terms of the Agreement and the public interest

[379] As the Full Bench explained in *Kellogg Brown & Root*⁷², the notion of the public interest refers to matters that might affect the public as a whole and is distinct in nature from the interests of the parties. Although the public interest and the interests of the parties may be simultaneously affected that does not lessen the distinction between them.

[380] In this case the fact a single employer has these particular conditions of employment in its Agreement does provide a benefit for some but not all of its employees and a benefit to a limited number of other persons, but is not a matter that affects the public as a whole. Rather it is the fact that employers across Australia commonly have such employment conditions in their workplaces which could be said to benefit the public as a whole.

[381] Consequently even if these conditions at some point in the future ceased to apply to employees at Murdoch that will not affect the public as a whole and so will not be contrary to the public interest.

[382] In any event these particular employment conditions will all be preserved for at least six months after the termination of the Agreement because of Murdoch's terms and conditions undertaking. Therefore the concerns the Unions have raised about public interest can only arise after this time. However what the situation will be with respect to these employment conditions beyond that six month period is unknown. Perhaps during the six months a new agreement will be negotiated and approved which includes these conditions? Perhaps before this six month period ends Murdoch may agree to extend the undertaking for a further period of time? There are also other possible scenarios some of which would be consistent with the Unions' concerns.

[383] The Unions' submissions are based upon speculation about a possible consequence of termination of the Agreement rather than upon a likely foreseeable consequence of termination. Consequently the Unions' submissions with respect to these other terms of the Agreement do not demonstrate that terminating the Agreement is contrary to the public interest.

Legal tactic to undermine conditions and union representation

[384] The Unions submit there is evidence Murdoch sees terminating the Agreement as a way of bypassing the Unions which weighs against a conclusion that it is not contrary to the public interest to terminate the Agreement.

[385] The evidence the Unions refer to is that on 3 October 2016 the Provost, Professor Taggart, responded to an email from an academic staff member which foreshadowed an intention to seek advice from the NTEU about her teaching allocation with the statement: "*Why we must change the EA and NTEU control over operational matters*".

[386] The Unions also submit the application followed an aggressive approach by Murdoch to bargaining, and Murdoch engaged what the Unions characterised as "*...an American union-busting law firm...*" to commence Federal Court proceedings against the NTEU and two of its individual officers involved in bargaining and that Murdoch's own evidence suggests its agenda includes reducing the capacity of the NTEU to participate in processes currently provided for in the Agreement.

[387] The Unions submit this shows the application is a legal tactic to force its staff to give up important conditions in bargaining by weakening their bargaining position and to undermine their rights to be represented by a union in the workplace and so is contrary to the public interest.

[388] In response Murdoch submits that as a matter of fairness, this proposition should have been put to those individuals involved in the decision to bring the termination application such as Mr McKee but was never put to any of Murdoch's witnesses.

[389] Murdoch denies this allegation. It is submitted any assertion these proceedings are designed to undermine employees' rights to be represented by the Unions has no basis.

[390] The application to terminate the Agreement is a legitimate and appropriate exercise by Murdoch of legal rights which are available to it. Murdoch seeks to transform its operations, return to surplus and deliver benefits to the public and the economy.

[391] Considering the evidence the Unions rely upon I note the comment of the Provost is unexplained and in isolation certainly does not support a conclusion that termination of the Agreement would be contrary to the public interest.

[392] What the Unions refer to as other evidence in support of their submissions is little more than self-serving characterisations of Murdoch's approach to bargaining, the fact Murdoch chose to exercise its legal rights in the courts as it is entitled to and its choice of law firm.

[393] As Murdoch rightly complains this accusation against Murdoch was never raised with any of its witnesses.

[394] I do not accept that this application which Murdoch is entitled to make under the Act has been made to undermine union representation and therefore to terminate the Agreement would be contrary to the public interest.

[395] In conclusion, having considered the numerous arguments raised by the Unions with respect to public interest, I am satisfied that it is not contrary to the public interest to terminate the Agreement.

The views of the employees, Murdoch and the Unions, their respective circumstances and the likely effects termination will have on them

[396] The Full Bench in *Aurizon* explained what the Commission needs to take into account in its considerations as follows,

“[167] All of the circumstances also need to be taken into account in considering whether termination of the agreements is appropriate. In particular the views of employers and employees covered by the agreement, their circumstances, and the impact of termination need to be taken into account. The requirement in s. 226(b) to take into account all of the circumstances including those set out in s. 226(b)(i) and (ii) is a requirement to take the matters into account and to give them due weight in assessing whether it is appropriate to terminate an enterprise agreement. In assessing appropriateness by taking into account all of the circumstances, we approached the task by reference to the construction of s. 226 and the contextual matters that bear upon that construction dealt with earlier as well as giving specific consideration to the matters identified in s. 226(b)(i) and (ii).” (Reference omitted)

The employees views, circumstances and the likely effect of terminating the Agreement

[397] Murdoch has not presented any evidence to the Commission as to the views of their employees.

[398] The Unions called a number of Murdoch employees covered by the Agreement who gave evidence as to their circumstances, their views and the likely effect on them of terminating the Agreement. These employees do not support termination of the Agreement and say they would be negatively impacted by its termination.

[399] The Unions summarised that evidence as to the circumstances of and likely effect on the employees as including the following:

- (a) uncertainty and possible loss of the existing level of contributions to superannuation;
- (b) uncertainty and possible loss of existing pay levels;
- (c) reduction in existing redundancy entitlements;

- (d) loss of the academic freedom provisions in the Agreement, meaning that academic freedom would not be protected with the force of an enterprise agreement;
- (e) the University would be free to set academic workloads whenever it wished to and at whatever level it chose;
- (f) loss of paid parental leave benefits;
- (g) loss of promotion and reclassification appeals;
- (h) loss of grievance procedures;
- (i) loss of the benefits concerning Aboriginal and Torres Strait Islander people and culture, meaning that these benefits would no longer be enforceable under an enterprise agreement;
- (j) loss of the research program; and
- (k) loss of the NTEU's rights and benefits.

[400] The evidence as to these employees views of terminating the Agreement and other likely effects include:

- (a) the reputation of the University and its employees would be tarnished;
- (b) there would be uncertainty over employment conditions which would influence people's choice to stay or start at the University;
- (c) the best staff that can be employed elsewhere will leave, including the most prolific researchers;
- (d) the potential impact on employment security;
- (e) protections for employees that are in the Agreement, including important checks and balances between the University and its employees will be lost;
- (f) the security provided by the Agreement and its provision for mutual obligations for workers and the University, would be lost;
- (g) without the certainty of the Agreement, work practices will change all the time and staff will simply be at the direction of the University;
- (h) people will not be able to support their families and lives;
- (i) Murdoch will be a less attractive place for Aboriginal and Torres Strait Islander people to seek employment and other opportunities;
- (j) there will be a negative impact on Aboriginal and Torres Strait Islander employment at the University and consequently the broader Aboriginal and

Torres Strait Islander community and the cause of reconciliation within the Australian community

- (k) there is concern over the removal of matters such as performance management, misconduct and grievance into policy.

Consideration

[401] The evidence of the views of these employees covered by the Agreement, their circumstances and the likely effects if the Agreement was terminated indicate these employees strongly oppose termination of the Agreement.

[402] The employees are understandably concerned that terminating the Agreement will mean terms and conditions of the Agreement beneficial to them will no longer apply and this will have a direct financial cost to them and their families. The employees also hold concerns as to the negative effect termination of the Agreement will have on their workplace, how they are treated by Murdoch and what changes Murdoch may make and how this affects them. Some of the employees who gave evidence are concerned that one of the effects will be that some staff will leave Murdoch to seek employment elsewhere which will be to the detriment of the University and the remaining employees.

[403] These concerns are all legitimate concerns.

[404] It is however apparent from their evidence that their concerns about the financial effect on them of termination has not taken into account the fact the terms and conditions undertaking Murdoch has given will apply for at least the first six months after the Agreement is terminated. This undertaking preserves the beneficial monetary clauses for employees for this period. For example the undertaking preserves the Agreement's rates of pay and monetary allowances, rates of superannuation payment, hours of work, overtime, leave entitlements, and redundancy payments. Consequently during this first six months after termination of the Agreement the effect on employees would be quite limited.

[405] The employees concerns as to the loss of the financially beneficial clauses in the Agreement will only be a reality if a replacement agreement is not negotiated and approved within six months of termination and if that occurs Murdoch does not provide any further undertaking. Only then would the employees' wages and conditions fall to be only those prescribed in the Awards. Whilst this is a possible effect it is in my view an unlikely outcome if the Agreement was terminated.

[406] In any event it must be recognised that under the Act modern awards are required to meet the particular objectives prescribed in section 134,

“134 The modern awards objective

What is the modern awards objective?

(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

- (a) relative living standards and the needs of the low paid; and*
 - (b) the need to encourage collective bargaining; and*
 - (c) the need to promote social inclusion through increased workforce participation; and*
 - (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and*
 - (da) the need to provide additional remuneration for:*
 - (i) employees working overtime; or*
 - (ii) employees working unsocial, irregular or unpredictable hours; or*
 - (iii) employees working on weekends or public holidays; or*
 - (iv) employees working shifts; and*
 - (e) the principle of equal remuneration for work of equal or comparable value; and*
 - (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and*
 - (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and*
 - (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.*
- This is the modern awards objective.*

When does the modern awards objective apply?

- (2) The modern awards objective applies to the performance or exercise of the FWC's modern award powers, which are:*
- (a) the FWC's functions or powers under this Part; and*
 - (b) the FWC's functions or powers under Part 2-6, so far as they relate to modern award minimum wages.*

Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284)."

[407] So whilst the employees concerns about possible reductions in financial benefits are understandable the context is that the Awards which, absent any undertaking from Murdoch

beyond the first six months, will apply to them are each a safety net of relevant and enforceable minimum terms and conditions, as the Full Bench has previously held.⁷³

[408] The evidence of some of the employee witnesses was also that they believe Murdoch has damaged its own interests by making this application because it is now viewed negatively by some parties outside the University. Some of these employees say their relationship with their employer, Murdoch, has in their minds been damaged by Murdoch's decision to make this application.

[409] The evidence of Mr Cousner⁷⁴ includes responses to the NTEU from some other NTEU members expressing similar concerns to those expressed by the employee witnesses.

[410] I note the evidence from the recent protected action ballot is that of the approximately 3,500 employees covered by the Agreement 506 employees are NTEU members.⁷⁵

[411] It cannot be assumed that the views of the employee witnesses are representative of the views of the balance of Murdoch's employees.⁷⁶ The views of the silent majority of employees covered by the Agreement are not known.

Murdoch's view, the circumstances and the likely effect of terminating the Agreement

[412] Murdoch's view is that it is appropriate to terminate the Agreement because it does not strike an appropriate balance between the rights of Murdoch and its employees, it is inflexible and inhibits productivity, it's procedural obligations are time consuming and costly and it restricts Murdoch from changing and evolving to overcome its financial restraints and to meet future challenges.

[413] The circumstances of Murdoch have been considered in detail above in regard to the University's past, current and forecast financial situation, it's past and current operating environment, the future challenges it faces as well as its intentions for the future.

[414] Murdoch submits that terminating the Agreement will remove clauses that would otherwise hinder changes it needs to make to its operations, impede its management of employees and obstruct the efficient use of the University's employees.

[415] Murdoch believes terminating the Agreement will likely have the effect of assisting it evolve and reconfigure its business to meet its challenges and if this occurs it is likely to return to surplus and operate in a financially sustainable way. This will have the likely effect of enabling Murdoch to deliver better student education which will make for better graduates for the benefit of business and the economy. This is likely to enable Murdoch to improve collaboration with industry, undertake better research which benefits the community and to develop projects that benefit the public one example being the Knowledge and Health Precinct.

[416] Murdoch submits that terminating the Agreement will assist future bargaining because future negotiations will not be based on the existing terms and conditions and instead the parties will have an opportunity to reset bargaining on a 'clean slate'.

[417] Murdoch submits it is seeking an agreement that is fair both to the employees and to Murdoch and which enables Murdoch and its staff to embrace future challenges and opportunities in an agile and flexible manner.

Consideration

[418] Mr Langridge's evidence on the financial position of Murdoch, which I accept, was detailed earlier in this decision. It shows that Murdoch has experienced declining surpluses and a deteriorating net asset position between 2013 and 2016 with deficits recorded in 2015 and 2016. If Murdoch continues to experience pressure on student fee income then it is likely deficits will continue unless Murdoch can effectively manage its costs. Employee costs are a major driver of total costs and from 2013 to 2016 the rate of increase in employee cost was 10%, exceeding the rate of increase in student fee income of 2%.

[419] Whilst recognising the shortcomings in the high level outlook for the next four years Mr Langridge adopted, and that it was based on broad assumptions that historic income and expenditure trends will continue in this period it does demonstrate that if Murdoch does not take action and adopt strategies to arrest the current trends of income and expenditure it will face significant challenges in funding future capital expenditure and experience continued deterioration of its net asset position.

[420] I accept there is a financial imperative for Murdoch to make changes in its operations.

[421] Murdoch has identified changes it believes it needs to make to its business model and its culture to be financially sustainable. Some of these changes involve reshaping its workforce, altering staff behaviour, controlling staff costs and removing unnecessary bureaucratic costs.

[422] I do accept as the Unions argue that the Agreement is not the sole cause of Murdoch's financial situation however I also accept the provisions in the Agreement have had some negative impact on Murdoch's financial situation as have the changed market, government decisions, poor strategic decisions, lax corporate governance, poor management and other external factors.

[423] It is entirely appropriate that a university in a poor financial situation look into all aspects of its business for improvement. There is no reason why the employment arrangements, particularly when these were negotiated some years ago, should not now be reviewed as part of striving for improvement.

[424] Importantly for this application Murdoch's argument is about the future and is that the clauses it impugns in the Agreement will hinder or obstruct it making the changes it needs to in order to improve its financial situation.

[425] Murdoch's view of these clauses is rejected by the Unions however Murdoch's view is not unreasonable. Individually and collectively these clauses in the Agreement do impose significant procedural burdens and some costs on Murdoch and some clauses expressly impose constraints on how Murdoch operates and how it manages its employees.

[426] If the Agreement is terminated there are some Award provisions that will then apply which are less flexible for Murdoch than the Agreement's clause but these are few.

Acknowledging this I am persuaded that overall if the Agreement is terminated Murdoch will have fewer constraints on how it manages its employees and its operations. Consequently, all other things being equal, Murdoch will then be able to more easily make changes it wants to and to implement these more quickly than has been the case in the past. Whilst this alone will not guarantee an improvement in Murdoch's financial circumstances this will support Murdoch in its endeavours to improve.

[427] Any ongoing improvement in Murdoch's financial circumstances, if achieved, will potentially be beneficial for its employees and a range of other direct and indirect stakeholders.

[428] The likely effect on future bargaining will be considered later in this decision.

The Unions' view, circumstances and the likely effect of terminating the Agreement

[429] The Unions oppose termination of the Agreement and their view is that there is nothing about the operation of the Agreement or the course of bargaining that makes it appropriate to terminate the Agreement.

[430] The Unions submit that there is no foundation for the University's contention that the provisions in the Agreement about which Murdoch complains prevent it from managing its staff, or from addressing the challenges facing the University and its staff.

[431] These provisions strike an appropriate balance between the interests of the University and the interests of its academic and professional staff.

[432] The provisions of the Agreement are unremarkable and comparable to provisions in other enterprise agreements in the university sector. If anything, the Agreement provides the University with competitive advantages. This is not a case where the agreement contains a range of conditions which are in excess of community standards or unreasonably constrain the University from being competitive.

[433] In terms of the likely effect of termination of the Agreement the Unions submit this will actually damage the University, by causing further damage to its reputation, its relationship with its staff, and its ability to attract and retain staff and students.

[434] The University has chosen to burden the Commission with a selective wilderness of individual cases which it contends have arisen under various provisions of the Agreement. At the hearing, the University abandoned several of these case examples. The remaining examples did not withstand scrutiny. The Unions submit the evidence demonstrates that the examples simply do not support a conclusion that the Agreement is either a cause of the University's present challenges, or that its termination is necessary to enable the University to meet those challenges.

[435] The fact that these were the only case examples that the University could come up with, across a workforce of more than 3,500 employees and a three year period, illustrates the weakness of the University's case for termination.

[436] The Unions view is that termination of the Agreement would shift the balance in bargaining in favour of Murdoch which, given the context set out immediately above, is

inappropriate. Termination is not necessary to break a ‘deadlock’. Indeed, it may be that termination of the Agreement would make the re-negotiation more difficult because of the deterioration of the relationship between the University and its staff precipitated by this application.

[437] The reality is that, contrary to the University’s case, termination of the Agreement will make it harder to reach an agreement. Given the recalcitrance of the University to date, it is likely that termination will simply embolden the University to dig in further and continue to demand acceptance of its clauses without compromise.

[438] By contrast, dismissing the application for termination, and not disturbing the Agreement, will mean that parties can constructively bargain in relation to the limited number of unresolved matters between them. There is no evidence that the NTEU will not make further compromises in bargaining, but the employees’ position will not be weakened. Indeed, the parties would be able to apply to this Commission for any assistance required in order to reach an agreement on the remaining issues. If necessary, that step would be far more conducive to reaching an agreement than if the Agreement were terminated.

[439] In summary, the course of bargaining also does not provide any justification for the termination of the Agreement.

[440] If the Agreement is terminated this would undermine the rights of members to be represented by the Unions in the workplace, and the capacity of the Unions to provide that representation. It would undermine the ongoing bargaining process.

[441] It would see the Unions, and their members and all University academic and professional staff disadvantaged by an application that is, in reality, a legal tactic being pursued by the Murdoch in bargaining.

Consideration

[442] The Unions oppose the termination of the Agreement. In terms of their circumstances and the likely effect on them if the Agreement is terminated it is not apparent that there would be any significant effect on the Unions themselves other than for the removal of those clauses conferring benefits directly on the Unions from the Agreement however these changes are not significant. The Unions will continue to have all the rights conferred upon them by the Act as representative of their members employed at Murdoch. They will also have rights as representatives of their members as provided for in the respective awards.

[443] The likely effect on future bargaining will be considered later in this decision.

Is it appropriate to terminate the Agreement?

[444] The Full Bench decision in *Construction, Forestry, Mining and Energy Union v Peabody Energy Australia PCI Mine Management Pty Ltd*⁷⁷ explained the discretionary nature of the decision the Commission is required to make under section 226 as follows,

“[17] In identifying that s.226 required the exercise of a discretion, the Full Bench in *AWX Pty Ltd* referred to the following passage in the High Court decision in *Coal and*

Allied Operations Pty Ltd v Australian Industrial Relations Commission (footnotes omitted):

“[19] “Discretion” is a notion that “signifies a number of different legal concepts”. In general terms, it refers to a decision-making process in which “no one [consideration] and no combination of [considerations] is necessarily determinative of the result.” Rather, the decision-maker is allowed some latitude as to the choice of the decision to be made. The latitude may be considerable as, for example, where the relevant considerations are confined only by the subject matter and object of the legislation which confers the discretion. On the other hand, it may be quite narrow where, for example, the decision-maker is required to make a particular decision if he or she forms a particular opinion or value judgment.”

[18] Section 226 involves the exercise of a “narrow” discretion of the type described in the last sentence of the above passage. Notwithstanding this, it remains the case that the evaluative assessments required by s.226(a) and (b) allow a degree of latitude on the part of the decision-maker as to the conclusions to be reached. For the reasons explained in Coal and Allied Operations, this means it is necessary in an appeal from a decision made under s.226 to demonstrate error in the decision-making process. The types of errors that might be demonstrated are those identified in House v The King.” (References omitted)

The likely effect on bargaining if the Agreement is terminated

[445] The parties’ bargaining has been ongoing for a year and limited progress has been made. The parties are apart on multiple matters that are fundamental issues to them.

[446] Murdoch has sought to change provisions it believes impacts its efficiency and ability to implement change in the workplace and to manage its employees and its operations. In the negotiations Murdoch is not proposing to reduce monetary benefits and has offered a limited wage increase. The NTEU have agreed to some changes to the Agreement but are resistant to change other provisions they view as beneficial to their members and are seeking wage increases significantly above what Murdoch has offered.

[447] Both parties in the negotiations are entitled to hold to their respective positions and it is not for the Commission to endorse one approach over the other.

[448] The Unions submit termination of the Agreement will shift the balance in bargaining in favour of Murdoch which given they say Murdoch’s approach to bargaining has been inflexible would be inappropriate. They submit that termination is not necessary to break a supposed ‘deadlock’.

[449] The Unions submit termination of the Agreement would make renegotiation more difficult because of the deterioration of the parties relationship, will shift the bargaining balance in Murdoch’s favour and so embolden Murdoch to demand acceptance of its clauses. Dismissing this application and not disturbing the Agreement will mean the parties can continue to constructively bargain. Not terminating the Agreement would mean that employees’ position will not be weakened.

[450] Implicit in the Unions' submission that terminating the Agreement will shift the bargaining balance in Murdoch's favour is that bargaining since April 2016 has occurred in circumstances where the bargaining balance is favourable to the employees and their representatives.

[451] The context for the negotiations to date has been that the provisions of the expired Agreement remain in operation unless both parties agree to changes.

[452] This is important in this instance because the specific changes Murdoch is bargaining to achieve is to remove or redraft numerous clauses in the Agreement it views as problematic. If bargaining does not result in an agreement the problematic clauses continue to apply unchanged into the future, indefinitely.

[453] In this situation the current context for negotiations has not been neutral, it has favoured the NTEU where they do not agree to change these clauses.

[454] As the Unions submit, if the Agreement is terminated this will change the bargaining dynamics. This is because the context for bargaining will be different. The starting point then would be that the provisions of the expired Agreement are not operative and will not be in a new agreement unless both parties agree to this. The focus for negotiations will likely then be on why provisions from the terminated Agreement should be retained and why different provisions should be included in a new agreement.

[455] In *Aurizon* the Full Bench considered the impact of terminating the Agreement on future bargaining as follows,

"[158] As we have earlier indicated, there is nothing inherently inconsistent with the termination of an enterprise agreement that has passed its nominal expiry date and the continuation of collective bargaining in good faith for an agreement. Neither the Unions nor Aurizon have suggested that bargaining will stop if the agreements are terminated. Neither have suggested that they will not pursue new agreements or that they will cease bargaining if the agreements are terminated.

[159] While we accept that a termination of the agreements will disturb the current bargaining positions, we do not accept, as the Unions submit, that this is counter to the object of a fair framework for collective bargaining and facilitating good faith bargaining. Collective bargaining will remain available to the bargaining parties. The bargaining parties in their bargaining will continue to be required to meet the good faith bargaining requirements. The disturbance of the bargaining position does not result in the disappearance of collective bargaining or the rules by which the bargaining parties must abide.

*[160] Moreover the Unions and employees will have available to them the full arsenal of tools under the Act to exert legitimate industrial pressure on Aurizon to bargain and to reach agreement. It is therefore not correct that the termination of the agreements results in little or no incentive on Aurizon to bargain."*⁷⁸

[456] If the Agreement is terminated there will be some immediate benefits for Murdoch and there will be some negative consequences for the Unions and the employees as has been

considered in detail above. If a replacement agreement is negotiated and approved within six months these negative consequences will be significantly reduced.

[457] The parties in this instance are well apart in their positions. The bargaining has been heavily focused on the detail of the clauses to be included in a new agreement. Terminating the Agreement will change the context for bargaining, more to Murdoch's favour than has been the case to date, which has favoured the NTEU's unwillingness to change existing clauses.

[458] If the Agreement is terminated bargaining can continue and the employees will have the right to take protected action if they wish. The content of a new agreement will not be determined by termination of the Agreement but will be in the hands of the negotiating parties.

[459] The evidence is the parties all want to put in place a new agreement. If the Agreement is terminated there will be benefits for each party in successfully negotiating a replacement agreement.

[460] The most likely outcome if the Agreement is terminated is that at some point the parties do negotiate a replacement agreement which can be put to the employees for approval.

[461] In my judgement in all the circumstances if the Agreement is terminated this will promote further bargaining and there is more likelihood the parties will successfully complete negotiations for a new agreement.

[462] Taking all of these circumstances into account I am satisfied that it is appropriate to terminate the Agreement.

Conclusion

[463] As explained above I am satisfied that in the particular's circumstances of this case it is not contrary to the public interest to terminate the Agreement.

[464] Having taken into account all of the circumstances including the views of the employees, the employer, the Unions, covered by the Agreement and the circumstances of those employees, the employer and the Unions and the likely effect the termination will have on each of them I consider that it is appropriate to terminate the Agreement.

[465] Consequently under section 226 of the Act the Commission must terminate the Agreement. An order [PR595664] terminating the Agreement will be issued and pursuant to section 227 of the Act the termination of the Agreement will operate on and from 26 September 2017.

COMMISSIONER

Appearances:

S. Wood QC and A. Manos of Counsel for the Applicant.
R. Attiwill SC and J. Kirkwood of Counsel for the Unions.

Hearing details:

2017.

Perth:

July 4, 5, 6, 7, 10, 11, 12, 13, 14, 17 and 21.

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¹ Exhibit A4, vol. 2, tab 78, p. 1014 at [17].

² Ibid., vol. 2, tab 69, pp. 897- 924.

³ Ibid., vol. 2, tab 71, pp. 927-958 plus Exhibit A23 and Exhibit A6.

⁴ Graph not reproduced in decision.

⁵ Transcript at PN1591-PN1608.

⁶ Exhibit A4, vol. 2, tab 69, pp. 913-914.

⁷ Ibid., vol. 2, tab 71, p. 933 and Exhibit A6 at [2.17]-[2.19].

⁸ Ibid., vol. 5, tab 178, pp. 2893-2943.

⁹ Exhibit R64.

¹⁰ Exhibit A4, vol.2, tab 71, p. 933.

¹¹ Exhibit R64 at [19].

¹² Ibid., at [20]-[27].

¹³ Exhibit A4, vol. 5, tab 178, p. 2910.

¹⁴ Transcript at PN1647.

¹⁵ Exhibit A4, vol. 2, tab 71, p. 947 at [4.98].

¹⁶ Ibid., vol. 3, tab 95, p. 1566 -1567.

¹⁷ Transcript at PN665-PN672.

¹⁸ Ibid., at PN1308.

¹⁹ Exhibit A4, vol. 5, tab 178, p. 2903.

²⁰ Applicant's closing submission at [115]-[125].

²¹ NTEU's closing submission at [53].

²² Ibid., at [30].

²³ Exhibit A4, vol. 6, tab 183, pp. 2982-2983 at [177]-[179].

²⁴ Ibid., vol. 6, tab 183, pp. 2968 and 2970 [85] and [99].

²⁵ Ibid., vol. 2, tab 82, p. 1078 at [14].

²⁶ Ibid., vol. 2, tab 82, p. 1078 at [17].

²⁷ Ibid., vol. 2, tab 82, p. 1078 at [18].

²⁸ Ibid., vol. 2, tab 82, pp.1098-1100.

²⁹ Ibid., vol. 2, tab 82, pp. 1109-1112.

³⁰ Ibid., vol. 4, tab 106, p. 2019 at [39].

³¹ Exhibit A5, tab 3.

³² Ibid.

³³ Ibid.

³⁴ Exhibit A4, vol. 4, tab 106, p. 2036 at [151].

³⁵ Ibid., vol. 4, tab 106, p.2037 at [160] and Transcript at PN3976.

³⁶ Transcript at PN8047-PN8053.

³⁷ Exhibit A4, vol. 2, tab 82, p. 1091 at [77].

³⁸ Neither Award contains the ability to cash out annual leave so this will not be available if the Agreement is terminated.

³⁹ Exhibit A5, tab 2 at clause 65.4.

⁴⁰ [2015] FWCFB 540.

⁴¹ Section 134 of the *Fair Work Act 2009*.

⁴² Exhibit A4, vol. 4, tab 106, p. 2020 at [42].

⁴³ [2016] FWC 3508.

⁴⁴ [2016] FWCFB 6470.

⁴⁵ Transcript at PN6611.

⁴⁶ Ibid., at PN6656-PN6776 and Exhibit A4, vol. 4, tab 106, p. 2043 at [198].

⁴⁷ Exhibit R5.

⁴⁸ Exhibit A4, vol. 4, tab. 134, pp. 2473-2479.

⁴⁹ Compare exhibits R5 and R8 to *ibid*.

⁵⁰ Exhibit A4, vol. 3, tab. 78, p. 1041 at [173].

⁵¹ Ibid., vol. 3, tab. 78, p. 1042 at [177].

⁵² Ibid., vol. 3, tab. 37, p. 734 at [40].

⁵³ [2015] FWCFB 540.

⁵⁴ (2005) 139 IR 34.

⁵⁵ [2015] FCAFC 126 at [22].

⁵⁶ [2016] FWCFB 4620 at [42].

⁵⁷ *Kellogg Brown & Root v Esso Australia Pty Ltd* (2005) 139 IR 34 at [47] and [48].

⁵⁸ Exhibit A4, vol. 5, tab. 164, p. 2712 at [14].

⁵⁹ Ibid., vol. 5, tab. 164, p. 2713 at [22] and [26].

⁶⁰ Ibid., vol. 5, tab. 164, p. 2714 at [27].

⁶¹ Transcript at PN1882-PN1885.

⁶² See clauses 20.2 and 20.3 of the Agreement.

⁶³ Exhibit A4, vol. 5, tab. 173, p 2847 at [53].

⁶⁴ Unions' closing submission at [108],[109] and [112].

⁶⁵ *Kellogg Brown & Root v Esso Australia Pty Ltd* (2005) 139 IR 34 at [27].

⁶⁶ Exhibit A4, vol. 5, tab. 228, pp. 3127-3144.

⁶⁷ Subclause 41.2 of the *University of Wollongong (Academic Staff) Enterprise Agreement 2015* [AE415561].

⁶⁸ Clause 5– Definitions of the *University of Tasmania Staff Agreement 2013 – 2016* [AE407077].

⁶⁹ Clause 1.8–Sefinitions of the *University of the Sunshine Coast Enterprise Agreement (EA) 2014 – 2018* [AE419671].

⁷⁰ Clause 6.16 (g) of the *Queensland University of Technology Enterprise Agreement (Academic Staff) 2014 – 2017* [AE409056].

⁷¹ (2005) 139 IR 34 at [46].

⁷² Ibid., at [23].

⁷³ *AMWU v Griffin Coal Mining Company Pty Ltd* [2016] FWCFB 4620 at [61].

⁷⁴ Exhibit A4, vol. 5, tab. 157, pp. 2630-2637.

⁷⁵ Ibid., vol. 4, tab 106, pp. 2020 and 2022 at [42] and [55].

⁷⁶ Transcript at PN8763-PN8770.

⁷⁷ [2016] FWCFB 3591.

⁷⁸ This view was endorsed in *AMWU v Griffin Coal Mining Company Pty Ltd* [2016] FWCFB 4620 at [69].