



DECISION

Fair Work Act 2009
s.229—Bargaining order

Curtin University
(B2016/522)

Edith Cowan University
(B2016/523)

Murdoch University
(B2016/524)

COMMISSIONER WILLIAMS

PERTH, 2 JUNE 2016

Applications for a bargaining order.

[1] Curtin University (Curtin), Edith Cowan University (ECU) and Murdoch University (Murdoch) (collectively, the universities), have applied to the Commission under section 229 of the *Fair Work Act 2009* (Act) for a good faith bargaining order. The respondent to whom the orders would be directed is the National Tertiary Education Industry Union (NTEU).

Introduction

[2] On 27 April 2016, the NTEU published an Enterprise Bargaining Update which responded to a joint statement that had been issued to employees the day before by the Vice Chancellors of the three universities and the Vice Chancellor of the University of Western Australia (Joint Statement). The Enterprise Bargaining Update was published on the NTEU website and on Facebook.

[3] The universities submit that some of the assertions in the Enterprise Bargaining Update made by the NTEU are false and/or misleading. This it is submitted is capricious or unfair conduct that undermines collective bargaining and so amounts to a breach of the good faith bargaining requirements set out in section 228 of the Act and the Commission should issue orders requiring the NTEU to delete the Enterprise Bargaining Update from its website and publish a retraction of the incorrect statements therein.

The legislation

[4] Relevant sections of the legislation are set out below.

“Subdivision A—Bargaining orders

228 Bargaining representatives must meet the good faith bargaining requirements

(1) The following are the good faith bargaining requirements that a bargaining representative for a proposed enterprise agreement must meet:

(a) attending, and participating in, meetings at reasonable times;

(b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;

(c) responding to proposals made by other bargaining representatives for the agreement in a timely manner;

(d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;

(e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining;

(f) recognising and bargaining with the other bargaining representatives for the agreement.

(2) The good faith bargaining requirements do not require:

(a) a bargaining representative to make concessions during bargaining for the agreement; or

(b) a bargaining representative to reach agreement on the terms that are to be included in the agreement.

Note: See also section 255A (limitations relating to greenfields agreements).

229 Applications for bargaining orders

Persons who may apply for a bargaining order

(1) A bargaining representative for a proposed enterprise agreement may apply to the FWC for an order (a bargaining order) under section 230 in relation to the agreement.

Note: See also section 255A (limitations relating to greenfields agreements).

Multi-enterprise agreements

(2) An application for a bargaining order must not be made in relation to a proposed multi-enterprise agreement unless a low-paid authorisation is in operation in relation to the agreement.

Timing of applications

(3) The application may only be made at whichever of the following times applies:

(a) if one or more enterprise agreements apply to an employee, or employees, who will be covered by the proposed enterprise agreement:

(i) not more than 90 days before the nominal expiry date of the enterprise agreement, or the latest nominal expiry date of those enterprise agreements (as the case may be); or

(ii) after an employer that will be covered by the proposed enterprise agreement has requested under subsection 181(1) that employees approve the agreement, but before the agreement is so approved;

(b) otherwise—at any time.

Note: An employer cannot request employees to approve the agreement under subsection 181(1) until 21 days after the last notice of employee representational rights is given.

Prerequisites for making an application

(4) The bargaining representative may only apply for the bargaining order if the bargaining representative:

(a) has concerns that:

(i) one or more of the bargaining representatives for the agreement have not met, or are not meeting, the good faith bargaining requirements; or

(ii) the bargaining process is not proceeding efficiently or fairly because there are multiple bargaining representatives for the agreement; and

(b) has given a written notice setting out those concerns to the relevant bargaining representatives; and

(c) has given the relevant bargaining representatives a reasonable time within which to respond to those concerns; and

(d) considers that the relevant bargaining representatives have not responded appropriately to those concerns.

Non-compliance with notice requirements may be permitted

(5) The FWC may consider the application even if it does not comply with paragraph (4)(b) or (c) if the FWC is satisfied that it is appropriate in all the circumstances to do so.

230 When the FWC may make a bargaining order

Bargaining orders

(1) The FWC may make a bargaining order under this section in relation to a proposed enterprise agreement if:

(a) an application for the order has been made; and

(b) the requirements of this section are met in relation to the agreement; and

(c) the FWC is satisfied that it is reasonable in all the circumstances to make the order.

Note: See also section 255A (limitations relating to greenfields agreements).

Agreement to bargain or certain instruments in operation

(2) The FWC must be satisfied in all cases that one of the following applies:

(a) the employer or employers have agreed to bargain, or have initiated bargaining, for the agreement;

(b) a majority support determination in relation to the agreement is in operation;

(c) a scope order in relation to the agreement is in operation;

(d) all of the employers are specified in a low-paid authorisation that is in operation in relation to the agreement.

Good faith bargaining requirements not met

(3) The FWC must in all cases be satisfied:

(a) that:

(i) one or more of the relevant bargaining representatives for the agreement have not met, or are not meeting, the good faith bargaining requirements; or

(ii) the bargaining process is not proceeding efficiently or fairly because there are multiple bargaining representatives for the agreement; and

(b) that the applicant has complied with the requirements of subsection 229(4) (which deals with notifying relevant bargaining representatives of concerns), unless subsection 229(5) permitted the applicant to make the application without complying with those requirements.

Bargaining order must be in accordance with section 231

(4) The bargaining order must be in accordance with section 231 (which deals with what a bargaining order must specify)."

Relevant terms of the Agreements

[5] The following agreements apply respectively to the universities:

- *The Curtin University Academic, Professional and General Staff Enterprise Agreement 2012 – 2016 [AE899165] (the Curtin Agreement).*
- *The Edith Cowan and University Academic and Professional Staff Union Collective Agreement 2013 [AE402843] (the Edith Cowan Agreement).*
- *The Murdoch University Enterprise Agreement 2014 [AE407853] (the Murdoch Agreement) (collectively, the Agreements).*

[6] Relevantly the Agreements include the following terms.

The Curtin Agreement

"Clause 7 Renegotiation of this Agreement

Negotiations for an agreement to replace this Agreement will commence no later than three months prior to the nominal expiry date."

The Edith Cowan Agreement

"Clause 3 Operation and Negotiation of the Agreement

...

3.2 Negotiations shall reopen at least three (3) months prior to the nominal expiry date of this Agreement."

The Murdoch Agreement

"Clause 1 Title and Period of Operation

...The parties agree to commence negotiations for a new agreement at least three months prior to the nominal expiry date of this agreement.

[7] Each of the Agreements also contains a term specifying the nominal expiry date as 30 June 2016.

[8] On 26 April 2016, the Vice Chancellors for each of universities and the University of Western Australia issued the Joint Statement which explained that they were approaching bargaining guided by a set of common principles seeking enterprise agreements which were contemporary, simple and fair.

Relevant publications

17 March 2015

[9] On this date the Australian Higher Education Industrial Association (AHEIA) made a submission to the Productivity Commission Workplace Relations Framework Review which was subsequently published on the Productivity Commission's website.

[10] To provide proper context the Australian Government had requested the Productivity Commission undertake an inquiry into the workplace relations framework. As the Terms of Reference for that review explain,

“The Australian Government’s objectives in commissioning this Inquiry are to examine the current operation of the Fair Work Laws and identify future options to improve the laws bearing in mind the need to ensure workers are protected and the need for business to be able to grow, prosper and employ.”

[11] The Terms of Reference also explain the scope of the enquiry as follows,

“The workplace relations framework encompasses the Fair Work Act 2009, including the institutions and instruments that operate under the Act; and the Independent Contractors Act 2006. The review will make recommendations about how the laws can be improved to maximise outcomes for Australian employers, employees and the economy, bearing in mind the need to ensure workers are protected, the need for business to be able to grow, prosper and employ, and the need to reduce unnecessary and excessive regulation.”

[12] The AHEIA submission includes,

“2. Content of Awards and new Enterprise Agreements

2.1 Disciplinary Procedures to be a “non-permitted matter”

Arguably the most significant factor that impacts negatively upon the flexibility and operational efficiency of the University Workplace relations environment is the complexity of content within the enterprise agreements and their interrelationship with the dispute settling, unfair dismissal, and general protections provisions of the Act.

This complexity has arisen as a by product of previous awards of the federal tribunal, and it is very difficult for universities to negotiate the subject matter out of their agreements.

...

These difficulties could be overcome by making disciplinary procedures a 'non-permitted matter'. This would avoid pre-dismissal disputes over disciplinary processes being taken to the commission, preserve the integrity of the commission's unfair dismissal jurisdiction, and avoid multiplicity of proceedings, overlapping confusion between the commission's unfair dismissal jurisdictions, the general protections provisions and the dispute settling jurisdiction.

2.2 Restrictions on modes of employment to be a "non-permitted matter"

Universities are highly constrained in their employment decisions by significant restrictions on the availability of fixed term employment as a mode of employment.

...

The restrictions have subsequently proved very difficult for universities to remove through the bargaining process, despite regular attempts to do so. The difficulty is obviously further compounded by the existence of such restrictions on the safety net awards applying in the sector.

Much greater flexibility would exist for universities if such restrictions were removed as matters permitted for inclusion in agreements and awards, with universities thus able to gain access to wider choice of forms of employment consistent with their changing needs.

...

2.4 Matters pertaining to the relationship between an employer and an employee to be a "non-permitted matter"

The delivery of productivity benefits is a stated key objective of the Act (per section 171). However section 172 permits the subject matter of agreements to extend to matters pertaining to the relationship between employers and employee organisations, and these do not deliver productivity benefits.

Such matters include union claims for the provision of time for training and conferences for union members and delegates, for the provision of offices and ancillary services, and for the provision of salaries of employee representatives, which do very little, if anything, to increase employee productivity.

It would be preferable and consistent with the objects of the act, if the subject matter of agreements was confined to the terms and conditions of employment and to matters directly pertaining to the employment relationship."

21 April 2016

[13] On this date the NTEU published a document headed “Enterprise Bargaining Update” which began as follows,

“Bargaining Underway

Bargaining to renew enterprise agreements is now underway at Curtin, Murdoch and Edith Cowan Universities.”

[14] The document continued on to detail arrangements for future meetings that would be held with the respective universities and related issues.

26 April 2016

[15] On this date the universities plus the University of Western Australia (UWA) issued a statement headed,

“Joint Statement – embracing future opportunities”

[16] Relevantly the last third of the documents reads as follows,

“WA universities are negotiating new enterprise agreements this year. Appropriately each university will engage with its people directly about their own agreement, with the core belief, shared by us all, that our people have the right to industrial agreements offering protections consistent with the expectations of the broader communities we serve.

Our desire is for agreements that are: simple, contemporary and fair. We are jointly committed to a common set of principles for change that will support the jobs and careers in our changing sector and our collective future as universities.

Simple agreements will be written in plain language that is easy for everyone to understand and apply, only containing content that is needed.

Contemporary agreements will ensure our people enjoy conditions that are fitting of a modern Australian organisation and that enable us to evolve as changing circumstances demand. They will protect core academic values while providing flexibility to create a workforce that enables the expansion of our sector to embrace the opportunities that the future presents.

Fair agreements will contain terms and conditions that are consistent with the standards of the communities we serve and in line of the broader economy and the expectations of the taxpayers, students and our other stakeholders.

We accept with enthusiasm the opportunity to work with you to jointly build a platform for our future mutual success.

Simple. Contemporary. Fair. Embracing future challenges and opportunities. That is our shared commitment.”

27 April 2016

[17] On this date the NTEU published a document headed “Enterprise Bargaining Update” which began follows,

“Fair, Contemporary, Simple?”

Dear staff member

You will have received a joint statement yesterday signed by the Vice Chancellors of the four WA public universities “embracing future opportunities”.

The statement refers to the negotiation of enterprise agreements this year, and the desire of Vice-Chancellors for agreements that are “simple, contemporary and fair.”

[18] The document includes the following statements (the disputed statements) which have triggered these applications:

“NTEU also believes that enterprise agreement should be easily understood. What the Vice-Chancellors have already signalled is that they see simple as being the removal of current rights to fair disciplinary procedures from enterprise agreements, the elimination of all restrictions on the use of fixed-term labour and getting rid of union-run health and safety training. While this would result in simple agreements it would certainly not result in fair ones.

The universities have indicated that they intend to bargain as one and that they see consistency of conditions of employment across the whole sector as important. Consistency and fairness is why NTEU has negotiated single agreements to cover all staff at ECU, Murdoch and Curtin. It is to ensure the conditions staff work under are equitable, and why a single agreement will be recommended at UWA.

...

While NTEU has lodged claims at ECU, Murdoch and Curtin in preparation for bargaining, and despite releasing a statement today the Vice-Chancellors at those Universities have indicated they will not be in a position to provide their own claims until late May, some two months after they were required to commence negotiations.”

9 May 2016

[19] On this date the NTEU published another document headed “Enterprise Bargaining Update” which began follows,

“Fair Work is Secure Work

AHEIA Seeks Retraction

In a letter to NTEU WA State Secretary Gabe Gooding, Australian Higher Education Industry Association Executive Director Stuart Andrews says statements made by NTEU in its last bargaining update misrepresents the Vice-Chancellors' bargaining position.

The Statements refer to signals given by the VCs that they see "simple" enterprise agreements as including the removal of a number of workplace rights.

Mr Andrews gave NTEU until 5:00pm last Friday to retract the statements.

NTEU has not and does not intend to offer any retraction.

The Facts

Despite preliminary meetings at Edith Cowan, Curtin and Murdoch Universities, Management or at all three have advised NTEU that they will not present their negotiating position until the end of May or early June at the earliest.

This is despite a requirement in the current enterprise agreements to have commenced negotiations no later than the end of March.

By contrast, NTEU claims have all been with management since 1 April.

An Attack on Workplace Rights

The VCs at the three Universities have confirmed that they support AHEIA's submissions on industrial relations reform to the Liberal Government's Productivity Commission.

AHEIA's submission, best described as a fundamental attack on workplace rights, included:

- o Prohibiting all restrictions on the use of fixed term labour from enterprise agreements*
- o Removing disciplinary procedures from enterprise agreements*
- ...*
- o Prohibiting all union rights from enterprise agreements, including the right of staff to attend union meetings in work time and union – based health and safety training*
- ...*

Back to the AHEIA's Position

In his letter to the NTEU, AHEIA's Mr Andrews says the NTEU has misrepresented the Vice-Chancellor's bargaining position.

There is a simple answer for Vice-Chancellors: Start negotiating and show staff that you do not support AHEIA's attack on workplace rights.

NTEU's Position

Like the Vice-Chancellors, NTEU seeks enterprise agreements that are simple, contemporary and fair.

Fair agreements that value and reward the contribution of staff and provide secure employment over increasing casualisation and fixed term contracts.

Does NTEU stand by its Comments?

In the absence of specific negotiation claims by University management, NTEU stands by the position that the simplification of enterprise agreements University management has signalled they want will result in the undermining of workplace rights.

NTEU will continue to report the progress, or lack of progress, of negotiations to members."

Submissions

The universities

Bargaining commences

[20] It is not disputed that Curtin and ECU had both confirmed in writing their agreement to commence bargaining by 31 March 2016. Indeed, Curtin issued its Notice of employee representational rights on that date. ECU did so on 11 April 2016. In the case of Murdoch, it had made a number of attempts to contact the NTEU to commence negotiations prior to 31 March 2016. Although bargaining had not commenced for Murdoch, it had taken steps to meet its obligations to commence negotiations by this date. Bargaining at Murdoch commenced shortly thereafter, with the Notice of employee representational rights being issued on 14 April 2016.

[21] In the period 1 to 25 April 2016, the NTEU provided a log of claims to each of the universities. Bargaining meetings were held at each of the universities to discuss the claims of the NTEU (and the other bargaining representatives), and the universities have been properly engaged in bargaining with the NTEU and other bargaining representatives.

NTEU immediately "poisons the bargaining well"

[22] On 27 April 2016, the NTEU published an Enterprise Bargaining Update. It is this communication which is central to these applications. Having received no detail about claims to be made by the universities so early in the bargaining process, the NTEU told employees a number of things about the bargaining position of the universities and UWA which it did not know, and which it simply guessed about.

[23] The NTEU's conduct is unfair and undermines collective bargaining for the new agreements. This kind of inaccurate communication, particularly if it persists throughout negotiations, will undoubtedly throw the process completely off track. It is precisely the kind of behaviour that the good faith bargaining provisions were introduced to eliminate from the bargaining process.

The Enterprise Bargaining Update was not a proper update at all

[24] It is submitted many assertions made in the Enterprise Bargaining Update are false and/or misleading, specifically:

- (a) The Enterprise Bargaining Update was not a reaction to anything that had happened in negotiations, such as the trading of claims or the exploration of bargaining positions. The NTEU simply latched on to the universities' bargaining principles of having agreements that are "Simple, Contemporary, Fair" and quite literally "filled in the content with guesswork" as to what specific agreement content this would entail. This conduct can be immediately separated from "spin" or comments made "in the rough and tumble of bargaining" which might put a negative slant on facts which are accurately communicated. The NTEU assertions emphasised above were constructed in order to promote an antagonistic view by employees towards the universities.
- (b) The Enterprise Bargaining Update wrongly asserted that the universities had contravened obligations to commence bargaining by 31 March 2016. As set out above, this assertion is false.
- (c) The Enterprise Bargaining Update asserted that the universities and UWA had made claims in bargaining for removal of current rights to fair disciplinary procedures from enterprise agreements, the elimination of restrictions on the use of fixed-term labour and removal of union-run health and safety training. The Commission will note the specificity of these assertions. These assertions were made by the NTEU despite the fact that no claims to this effect (or at all) had been made in bargaining by any of these universities.
- (d) The Enterprise Bargaining Update asserted that the universities and UWA would bargain together. This is false. No such proposal has been put forward at any time. On the contrary, each of the universities is engaged in its own bargaining process. UWA has not yet started to bargaining, but the evidence shows that its intention is to have its own bargaining process.
- (e) The Enterprise Bargaining Update criticised the universities for not having met their obligations under the current enterprise agreements by failing to provide a log of claims. This is not a breach of the current agreements; nor is there any legislative obligation to use such a document for bargaining purposes.
- (f) The Enterprise Bargaining Update asserted that the universities had failed to commence negotiations. As at the date of the Enterprise Bargaining Update being published, that was demonstrably inaccurate as bargaining meetings had been scheduled and held at each of the universities.

[25] These are the matters about which the universities complain. The NTEU's conduct is unfair and undermines collective bargaining. It has already thrown the bargaining off track. The future problem is that should this kind of behaviour continue, it will be nigh on impossible to conduct sensible negotiations. It is for these reasons that the universities seek the intervention of the Commission.

Unfair conduct that undermines bargaining: legal principles

[26] Whether conduct is capricious or unfair under section 228(1)(e) of the Act must be considered in all the circumstances of the case. The legal principles surrounding misleading and deceptive conduct establish that conduct is misleading or deceptive if it leads persons to believe things that are incorrect or false.

[27] These principles can be applied to misrepresentations in the bargaining context. It is an accepted principle that misrepresentations may be capricious or unfair conduct which undermines freedom of association or collective bargaining.

[28] It has previously been held that:

- (a) a union bargaining representative has an obligation to accurately and fairly report to its members on the progress of bargaining - this is encompassed by the good faith bargaining obligations;
- (b) the obligation set out in (a) is a significant obligation, given that members and unions generally have trust and confidence in the integrity of officials and employees of unions who are representing them in bargaining for an enterprise agreement;
- (c) it is not necessary for conduct to be intentionally misleading, or to constitute misrepresentations, in order for a finding to be made that it is capricious or unfair;
- (d) the Commission's discretion to make a bargaining order, on the basis that a bargaining representative has unfairly undermined collective bargaining, may be triggered by a misrepresentation including:
 - (i) misrepresentations in relation to the negotiations;
 - (ii) misrepresentations as to the position of another party in those negotiations;
 - (iii) misrepresentations as to the proposed agreement or its effect on existing entitlements;"
 - (iv) publication of incorrect statements about the rights and obligations of other participants in the bargaining process.

NTEU unfair conduct: inaccurate and/or misleading statements

[29] For the reasons set out above, the statements made in the Enterprise Bargaining Update were false and misleading. The NTEU has falsely asserted that:

- (a) the universities failed to commence bargaining by 31 March 2016;
- (b) the universities have breached their obligations under the Agreements;
- (c) the universities and UWA have put forward particular claims in bargaining which have not been put;
- (d) by its public refusal to retract the statements in the Enterprise Bargaining Update, the NTEU has represented that these statements were and remain accurate.

[30] The fact that the statements were made cannot be denied: they are recorded in correspondence and publications of the NTEU. That they were (and are) incorrect and misleading is clear, based on the evidence.

[31] The NTEU has manifestly failed to report on what actually happened in bargaining. Its conduct in providing instead an inaccurate and misleading picture of the universities' bargaining positions undermines the trust between bargaining parties and the integrity of the bargaining process which is necessary for a proper collective bargaining process as envisaged by the Act, and in particular section 228(1)(e). The evidence from the universities is that these statements are of significant concern and have undermined the position of the universities in bargaining and in having direct communications with their employees.

[32] The particular difficulty for employers in unilaterally seeking to address misrepresentations made by a union to its members has been recognised in previous cases.

[33] The universities have commenced bargaining and are currently canvassing the views of their staff in relation to the claims for a new agreement. Negotiations are at an early stage. Inflammatory and incorrect statements of the sort made by the NTEU undermine that process and lead to difficulties for the universities, who will need to continue to seek to correct the misleading impressions created by these statements. There is no place for this type of conduct in a good faith bargaining framework.

[34] Although UWA has not yet commenced bargaining, should the statements be allowed to stand without any retraction, it will commence bargaining in circumstances where these false misrepresentations have been made and not retracted. That will lead to the same concerns and difficulties in relation to its bargaining process.

[35] It is necessary for the proper conduct of the bargaining process that the false statements be retracted in accordance with the relief sought by Curtin, ECU and Murdoch in these proceedings.

Commission intervention needed early to deter the NTEU's unfair conduct - reasonable for orders to be made

[36] Ultimately, the universities (via AHEIA) notified the NTEU of the inaccuracy of its comments and provided a reasonable opportunity for it to respond, not once, but twice. The NTEU has continued to refuse to correct its false and misleading statements.

[37] Importantly, intervention of the Commission now, early in the negotiation process, is likely to have a deterrent effect on the NTEU engaging in such conduct again. The Commission will have helped the bargaining representatives to put the bargaining back on track. The universities have every aspiration that, if this is done, bargaining will proceed fairly and efficiently in the interests of all bargaining representatives.

[38] Having regard to the above matters, the universities submit that it is reasonable in all the circumstances that the orders sought be made.

The NTEU

[39] The NTEU opposes the applications and contends that they should be dismissed.

[40] Firstly, the NTEU contends that on the basis of the evidence before it the Commission should not be satisfied that the NTEU is not meeting the good faith bargaining requirements.

[41] Secondly, the NTEU contends that there are jurisdictional issues arising with parts of the applications.

[42] Thirdly, in the event that the Commission is satisfied that the NTEU is not meeting the good faith bargaining requirements it should not exercise its discretion to make the orders sought.

The factual background

[43] Following the publication of the Productivity Commission submission the NTEU wrote to the respective Vice Chancellors of the universities asking if the Productivity Commission submission reflected their views.

[44] By letter dated 30 October 2015 Professor Andrew Taggart, Acting Vice Chancellor responded to the NTEU on behalf of Murdoch stating, inter alia, that they had been involved in the consultation process regarding the Productivity Commission submission and;

“I do not consider it appropriate to make comment on each element of the submissions made by AHEIA. Suffice to say, both written submissions are reflective of the views held by universities across the country and that change is needed to the way in which industrial matters are regulated under the Fair Work Act 2009 and institutional enterprise agreements. Murdoch University broadly supports the AHEIA submissions.”

[45] By letter dated 4 November 2015, Ms Jenny Robertson, Director Human Resources Services responded to the NTEU on behalf of the Vice Chancellor of ECU stating, inter alia,

that ECU was involved in the consultation process for the Productivity Commission submission and;

“ECU does not consider it appropriate to make comment on each element of the submissions made by AHEIA. Both written submissions are reflective of the views held by universities across the country that fundamental changes are needed in the way in which industrial matters are regulated under the Fair Work Act 2009 and institutional enterprise agreements. ECU supports the AHEIA submissions, including the call to remove time-consuming and resource intensive inflexibilities to termination of employment that are contained in university enterprise agreements.”

[46] By letter dated 5 November 2015, Mr Ian Callahan, Chief Operating Officer responded on behalf of the Vice Chancellor of Curtin stating, inter alia, that Curtin was consulted as part of the Productivity Commission submission and:

“A much simpler and more adaptive industrial environment would be a significant plus in allowing universities to compete more effectively, retain jobs within universities and provide both academic and professional university staff with multiple career paths. It is on this basis that Curtin is broadly supportive of the submission by the AHEIA.”

[47] On or about 1 April 2016 the NTEU provided their log of claims to the universities.

[48] Between 31 March 2016 and 14 April 2016 the universities began issuing Notices of employee representational rights to their employees (Murdoch issued its notices on 14 April 2016, ECU issued its notices on 11 April 2016 and Curtin issued its notices on 31 March 2016). The universities have not provided a log of claims to the NTEU, nor have they responded to the NTEU’s log of claims, and have indicated that they will not be in a position to do so until the end of May or early June at the earliest.

[49] In the interests of balance the NTEU had provided links to the AHEIA’s correspondence and the NTEU’s response on their website.

Should the Commission be satisfied that the NTEU is not meeting the good faith bargaining requirements?

[50] The universities claim that the NTEU has made the following false or misleading statements to its members:

- (a) each of the three universities failed to commence bargaining by 31 March 2016 (statement one);
- (b) each of the three universities has breached their obligations under the Agreements (statement two);
- (c) each of the three universities have put forward claims in bargaining which have not been put (statement three); and
- (d) by public refusal to retract the statements in the Enterprise Bargaining Update the NTEU has represented that these statement were and remain accurate statements (statement four).

[51] The NTEU accepts that if a bargaining representative has made a false or misleading statement this may in some circumstances constitute conduct that is inconsistent with the good faith bargaining requirements. However, it will of course depend on the particular circumstances in which a statement is made and its impact on bargaining.

[52] With regards to alleged statement one (the assertion that the universities failed to commence bargaining by 31 March 2016) the NTEU contends that it has not made a statement that each of the universities have failed to commence bargaining by 31 March 2016 as claimed.

[53] The closest the NTEU has come to making the alleged statement is the following extract from the 27 April Enterprise Bargaining Update:

“While the NTEU has lodged claims at ECU, Murdoch and Curtin in preparation for bargaining, and despite releasing a statement today the Vice-Chancellors at those Universities have indicated they will not be in a position to provide their own claims until late May, some two months after they were required to commence negotiations.”
(Underlining added)

[54] It is submitted the above statement falls short of the NTEU making a statement that the universities have failed to commence bargaining by 31 March 2016. The above statement says nothing at all about whether the universities commenced bargaining by 31 March 2016 or not.

[55] Murdoch and ECU did not send out Notices of employee representational rights until after 31 March 2016 (Murdoch sent out its notice on 14 April 2016¹⁹ and ECU sent out its notice on 11 April 2016). Thus it is plain that Murdoch and ECU did not commence bargaining by 31 March 2016.

[56] Turning to Curtin, whilst it sent out its Notices of employee representational rights on 31 March 2016 it still failed to “commence bargaining” by 31 March 2016 as it was not until 29 April 2016 that Curtin met with the NTEU and the other bargaining representatives and in any event at this meeting informed the NTEU that Curtin would not be able to present any positions on bargaining until 7 June 2016. Thus, it is arguable that Curtin failed to commence bargaining by 31 March 2016.

[57] With regards to alleged statement two (the assertion that each of the universities has breached their obligations under the Agreements) the NTEU contends that it has not made a statement that each of the universities have breached their obligations under the Agreements as claimed. The closest the NTEU has come to making the alleged statement is the following paragraph in the NTEU’s 6 May 2016 letter that states:

“Curtin, ECU and Murdoch were required under the terms of the existing collective agreements to commence bargaining no later than 31 March 2016. NTEU was ready to commence bargaining at that time, and after the employers failed to initiate bargaining prior to the due date, submitted Logs of Claims to the employers on 1 April 2016.

All three universities have indicated that they will not be ready to provide claims prior to the end of May or early June at the earliest despite their clear legal obligation to commence in March. In that circumstance the NTEU is entitled to infer the employers' positions from their public statements."

[58] The above statement does not say that the universities have breached the Agreements. The word "breach" is not used and an allegation to that effect is not expressly made.

[59] To the extent that it can be implied or inferred from the above paragraph that the NTEU has asserted that the universities have breached obligations under the Agreements this is not false or misleading as it is factually correct.

[60] For the reasons outlined above the NTEU's position is that the universities had not complied with their obligation to commence bargaining by 31 March 2016. Thus, if the statement was made it was not false or misleading and thus it cannot constitute conduct that is unfair and undermines collective bargaining.

[61] With regards to alleged statement three (the assertion that each of the universities have put forward claims in bargaining which have not been put) the NTEU contends that it has not made a statement that each of the universities have put forward claims which have not been put.

[62] The closest the NTEU has come to making the alleged statement is the following extract from the 27 April Enterprise Bargaining Update:

"What the Vice-Chancellors have already signalled is that they see simple as being the removal or current rights to fair disciplinary procedures from enterprise agreements, the elimination of all restrictions on the use of fixed term labour and getting rid of union run health and safety training."

[63] The above statement does not constitute the NTEU making a statement that the universities have put forward claims in bargaining which have not been put.

[64] Nowhere in the above paragraph or anywhere else in the 27 April Enterprise Bargaining Update, is there an assertion, implied or otherwise, that the removal of current rights to fair disciplinary procedures, the elimination of all restrictions on the use of fixed-term labour and getting rid of union-run health and safety training was a formal position put forward by the universities in bargaining.

[65] The 27 April Enterprise Bargaining Update and subsequent correspondence from the NTEU makes it patently clear that to the disappointment of the NTEU the universities have not put any formal positions in bargaining. For example the 27 April Enterprise Bargaining Update also provides:

"While the NTEU has lodged claims at ECU, Murdoch and Curtin in preparation for bargaining, and despite releasing a statement today the Vice-Chancellors at those Universities have indicated that they will not be in a position to provide their own claims until late May, some two months after they were required to commence negotiations." (Underlining added)

[66] Further, the universities' failure to outline its positions in bargaining is well understood by members. It is also the subject of three applications for bargaining orders that have been made by the NTEU.

[67] It is submitted alleged statement three is entirely misconceived. It fails at the first hurdle. As the statement was never made it cannot be a false or misleading statement that constitutes conduct that is unfair and undermines collective bargaining.

[68] The NTEU contends that even if contrary to the above submissions the Commission was to find that the statement was made, that it was false or misleading and that it has misled NTEU member it fails at the final hurdle.

[69] If the universities do seek to remove current rights to fair disciplinary procedures, restrictions on the use of fixed-term labour and union-run health and safety training then there is no prejudice to the universities in the NTEU communicating this view to members.

[70] Despite the NTEU requesting in correspondence on 19 May 2016 that the universities explain whether or not they seek the removal of the above conditions the universities have declined to do so.

[71] In the event that the universities do seek to remove the above current conditions it simply cannot be said that the statement has affected collective bargaining in any way at all let alone that it has had the serious consequence of undermining collective bargaining.

[72] In the event that the universities do not seek to remove the above current conditions they could have explained this to the NTEU. The NTEU would have communicated this to its members and this would have disposed of this issue. Thus, it cannot be said that the statement has undermined collective bargaining given that the NTEU has sought to clarify the universities' position to no avail.

[73] Lastly with regards to alleged statement four (by public refusal to retract the statements in the Enterprise Bargaining Update the NTEU has represented that these statement were and remain accurate statements) the NTEU contends this is not a false or misleading statement per se but an assertion that the NTEU did not do what was asked of them by the universities. .

Jurisdictional impediments to making the proposed orders?

[74] Section 229(4)(b) of the Act provides that prior to making an application pursuant to section 229 a bargaining representative must have provided written notice to the other bargaining representative setting out the bargaining representative's concerns that the good faith bargaining requirements are not being met. The only exception to this requirement is if pursuant to section 229(5) of the Act the Commission is satisfied that in the circumstances it is appropriate to wave compliance with section 229(4). The requirement in section 229(4)(b) is a jurisdictional pre-requisite.

[75] Nowhere in the letters from the AHEIA to the NTEU dated 28 April 2016 and 9 May 2016 (which constitute the section 229(4)(b) notices) is the NTEU put on notice about a concern about alleged statement one.

[76] The NTEU submits that section 229(4)(b) of the Act has not been complied with in relation to alleged statement one. Further, the NTEU submits that in the circumstances where a bargaining representative simply neglected to include an allegation in section 229(4)(b) notices that were sent there is no reasonable basis to waive compliance with the notice requirements. Accordingly, insofar as the applications relate to alleged statement one the jurisdictional pre-requisites have not been met. The applications are invalid insofar as they relate to this alleged statement. For this reason, the Commission should dismiss the applications insofar as they relate to alleged statement one.

[77] In addition proposed order 6.2 would require the NTEU to publish a notice that relates to not only the proposed enterprise agreements between the NTEU and each of the universities but also in relation to UWA. Bargaining has not commenced at UWA. Thus, pursuant to section 230(2) of the Act the Commission does not have jurisdiction to make an order that would relate to UWA. Accordingly, the Commission should refuse to entertain proposed order 6.2 and dismiss the applications insofar as they relate to that proposed order.

Should the Commission make the orders sought by the universities?

[78] In the event that the Commission is satisfied that the NTEU is not meeting the good faith bargaining requirements the NTEU contends that the Commission should exercise its discretion by declining to make the orders sought. Pursuant to section 230(1)(c) of the Act it is not “*reasonable in all the circumstances*” to make the orders sought. The NTEU makes the following submissions.

[79] Firstly, there has been no attempt by the universities to attempt to remedy the alleged false or misleading statements. The universities ask the Commission to intervene when despite having the ability to communicate with their own employees they have not taken any steps to “*correct the record*”. This is a fundamental deficiency with the universities’ applications and relief should be refused for this reason alone.

[80] Secondly, the NTEU has already published the universities’ perspective on the instant controversy on its website. Thus, there is no need for the Commission to intervene to correct the record. NTEU members already have the universities’ point of view and being professional and well-educated individuals that have had all of the information put before them in an unaltered form; they have been able to make up their own minds on the matter. This has the effect of nullifying any unfairness and the relief sought will add nothing in the circumstances. There is simply no need for the Commission to intervene.

[81] Thirdly, there is not a “*pattern of deliberate improper communications*” as referred to by Vice President Watson in *National Union of Workers v Patties Foods Ltd*¹. In contrast there is a single Enterprise Bargaining Update that the universities complain about. A single communication that has been sent to members at a very early stage of bargaining. The Commission should decline to intervene on the basis of one communication, particularly when bargaining is at a very early stage.

[82] Fourthly, there is no utility in making the proposed orders. All of the relief is directed towards the allegation that the NTEU has made a false or misleading statement that the universities have made certain claims in bargaining when they have not made any such claims. The universities have steadfastly refused to clarify whether they intend to make those claims or not. If the universities will make the particular claims then there has been no

unfairness at all as there is no real prejudice which arises from the alleged statement. If the universities will not make the particular claims then this will become apparent very soon when the claims are articulated: on 1 June 2016 for Murdoch, on 2 June 2016 for ECU and on 7 June 2016 for Curtin. If this is the case the intervention of the Commission is unnecessary as the members will know the positions of each of the universities in a matter of weeks.

[83] By reason of the matters set out above the NTEU contends that the universities' applications should be dismissed.

[84] In the event that the Commission finds that the NTEU is not meeting the good faith bargaining requirements the NTEU contends that the Commission should not make any orders for the reasons outlined above.

Consideration

Section 229 (4) requirements

[85] I am satisfied on the evidence that each of the universities did have concerns that the NTEU had not met the good faith bargaining requirements set out in section 228 of the Act.

[86] I am also satisfied that a written notice setting out those concerns was sent to the NTEU on behalf of the universities. This was done by letter on 28 April 2016.

[87] That letter referred to the Enterprise Bargaining Update of 27 April 2016 and the NTEU statement therein that:

“NTEU also believes that enterprise agreement should be easily understood. What the Vice-Chancellors have already signalled is that they see simple as being the removal of current rights to fair disciplinary procedures from enterprise agreements, the elimination of all restrictions on the use of fixed-term labour and getting rid of union-run health and safety training. While this would result in simple agreements it would certainly not result in fair ones.”

[88] The letter stated the universities were concerned the statement misrepresents their bargaining positions. The statements do not it is said reflect any position that has been put in bargaining to date.

[89] The letter asked the NTEU to by no later than 2 May 2016,

“Inform your members to whom the “Enterprise Bargaining” update was sent that in fact no substantive bargaining over terms and conditions has occurred;”

and retract the statements that have been made which are referred to above and provide a commitment that the NTEU will not misrepresent the negotiating positions of the universities in future.

[90] I am satisfied that the NTEU has had a reasonable time within which to respond to those concerns. I am also satisfied that the universities consider that the NTEU has not responded appropriately to the concerns they have raised.

[91] In the circumstances for the purposes of section 230(3) of the Act I am satisfied that the universities have complied with the requirements of subsection 229(4) with respect to the concerns identified in the letter of 28 April 2016.

[92] The evidence is that the NTEU responded to that letter in writing but did not agree to meet the requests of the universities.

[93] As a consequence the universities' representatives again wrote to the NTEU on 9 May 2016 pressing the original concerns but also raising a new concern that the NTEU was publishing statements to the effect that the universities were in breach of their obligations to commence bargaining because they have not yet presented logs of claims to the union. The universities' correspondence requested a satisfactory response by the following day.

[94] No response was forthcoming from the NTEU nor have they otherwise directly met the requests from the universities.

[95] Whilst a one day time frame to respond to concerns raised in some instances will not be sufficient in this instance because there had been a previous concern brought to the NTEU's attention and because the new concern raised in the universities' letter of 9 May 2016 was a single simple matter I am satisfied there was a reasonable time within which the NTEU could respond to this new concern if they had wished to.

[96] Consequently for the purposes of section 230(3) of the Act I am also satisfied that the universities have complied with the requirements of section 229(4) with respect to the additional concern identified in their second letter dated 9 May 2016.

Capricious or unfair conduct?

[97] The universities argue that the NTEU has made four specific false and misleading statements in its 27 April Enterprise Bargaining Update.²

[98] I now turn to consider these complaints.

Did the NTEU incorrectly state, or lead members to believe, that each of Curtin, ECU and Murdoch failed to commence bargaining by 31 March 2016?

[99] The words in the Enterprise Bargaining Update the universities say are relevant to this question are these:

“While NTEU has lodged claims at ECU, Murdoch and Curtin in preparation for bargaining, and despite releasing a statement today the Vice-Chancellors at those Universities have indicated they will not be in a position to provide their own claims until late May, some two months after they were required to commence negotiations.”

[100] The facts as at 27 April 2016 were that the NTEU had lodged claims at the universities. The universities had indicated they would not provide their claims for some weeks.

[101] The only possibly contentious element of this NTEU statement are the words “...*some two months after they were required to commence negotiations*” where the “*they*” was a reference to Curtin, ECU and Murdoch.

[102] The relevant facts are that the Agreements did indeed require negotiations to have commenced or reopen at least by, or no later than, 31 March 2016. The Agreements impose this obligation on the universities but also imposes that same obligation on the NTEU. The Agreement clauses do not single out one or other of the parties, it is an obligation they each have.

[103] Obviously the NTEU’s statement was intended to be critical of the universities but it was not an incorrect statement as to the requirement on the universities to commence negotiations. As explained further below negotiations as at 27 April 2016 had not commenced.

[104] This NTEU statement was not false or misleading.

Did the NTEU state, or lead members to believe, each of Curtin, ECU and Murdoch had breached their obligations under the Agreements?

[105] The same statement of the NTEU above, from the universities’ view, should also be interpreted as meaning the universities have respectively breached their obligations under the Agreements because they have not given the NTEU their respective claims.

[106] This view is difficult to understand given the statement does not say the universities were required to provide claims. The statement does not make reference to the Agreements let alone that they have been breached. It does include a complaint about the slowness of the universities to provide their claims to the NTEU. The statement does not go so far as alleging a breach of the Agreements.

[107] If I am wrong on this then the next question is whether the allegation of a breach of the Agreements was made on a reasonable basis or no basis at all?

[108] It is apparent the universities and the NTEU all view meeting the Act’s requirements to commence bargaining as also meeting the Agreements requirements for them to commence negotiations at least 3 months before the Agreements’ nominal expiry date. I very much doubt that is a correct interpretation of the ordinary meaning of the words used in the Agreements.

[109] “*Negotiations*” is the word used in the Agreements, not bargaining. As at 27 April 2016 neither Curtin nor Murdoch had met with the NTEU. ECU had met with the NTEU on 22 April 2016. Only procedural matters were discussed including that discussions of the NTEU log of claims would occur at the next meeting on 20 May 2016. Negotiations are mutual discussions aimed at reaching some agreement. Simply giving one party a list of claims or providing a notice of employee representational rights does not mean negotiations have commenced.

[110] As a consequence arguably none of the universities nor the NTEU have complied with the Agreements’ terms. This would be a reasonable basis for asserting the universities, as well as the NTEU, have breached their obligation under the Agreements. The universities and the NTEU all have explanations for the fact negotiations were not commenced before 31 March

2016 but that does not change the simple fact they were all obliged to commence negotiations by a particular date in my view they have not done this.

[111] My primary view as explained above however is that the NTEU have not stated or lead members to believe that the universities have breached the Agreements.

Did the NTEU state, or lead members to believe, each of Curtin, ECU, Murdoch and UWA have put forward particular claims in bargaining which have not been put?

[112] The statement in the Enterprise Bargaining Update of 27 April 2006 on which the universities rely is set out below:

“NTEU also believes that enterprise agreement should be easily understood. What the Vice-Chancellors have already signalled is that they see simple as being the removal of current rights to fair disciplinary procedures from enterprise agreements, the elimination of all restrictions on the use of fixed-term labour and getting rid of union-run health and safety training. While this would result in simple agreements it would certainly not result in fair ones.”

[113] The statement does not say the universities have made claims in bargaining to remove disciplinary procedures, restrictions on fixed term labour and union run health and safety training. However what was meant by the words *“What the Vice-Chancellors have already signalled...”* was not explained. On the evidence before the Commission there is no doubt the NTEU in saying this was referring to the submissions made on behalf of the universities to the Productivity Commission in March 2015, which the universities had subsequently confirmed they generally support. The NTEU had then linked parts of those submissions to the reference in the Joint Statement from the previous day that Vice Chancellors desired,

“Simple agreements will be written in plain language that is easy for everyone to understand and apply, only containing content that is needed.” (Emphasis added)

[114] The absence in the Enterprise Bargaining Update of this full context, that the desire to remove disciplinary procedures, restrictions on fixed term labour and union run health and safety training from agreements had only been expressed by the AHEIA in a submission to the Productivity Commission, would have led a reader in my view to wrongly understand that the Vice Chancellor’s had previously indicated they would be pursuing these issues in enterprise bargaining. The fact the Enterprise Bargaining Update further on noted that the universities will not be providing their own claims until late May 2016 would not have corrected this misunderstanding.

[115] In addition reading the AHEIA submission to the Productivity Commission demonstrates the universities in fact viewed it as very difficult for them to negotiate these particular issues out of their Agreements. That observation if anything would have suggested that the universities were unlikely to be pursuing the three issues the NTEU mentioned during enterprise bargaining at all. This aspect of the universities’ view on these issues was not mentioned by the NTEU in its Enterprise Bargaining Update.

[116] In these circumstances 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.

[117] The act of issuing this misleading Enterprise Bargaining Update to its members was unfair conduct by the NTEU. This unfair conduct did undermine collective bargaining.

[118] Consequently I am satisfied 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.

Did NTEU by its public refusal to retract the statements in the Enterprise Bargaining Update represent that these statements were and remain accurate?

[119] The universities' submission is that the NTEU's public refusal to retract the statements made in the 27 April Enterprise Bargaining Update as demanded by the AHEIA in its letters to the NTEU amounts to a further failure to meet the good faith bargaining requirements because it amounts to publicly asserting again that the NTEU's statements were accurate.

[120] I accept that publicly refusing to retract statements that are misleading may, dependent on the circumstances, be seen as a further and separate failure to meet the good faith bargaining requirements.

[121] In this case the circumstances were that following receipt of the AHEIA demands to retract the statements made in the 27 April Enterprise Bargaining Update the NTEU published another Enterprise Bargaining Update dated 9 May 2016. That update explained that AHEIA had written to the NTEU saying it had misrepresented the Vice Chancellors' bargaining position and demanded the NTEU retract the statements. This latest Enterprise Bargaining Update said the NTEU has not and does not intend to offer a retraction. The Enterprise Bargaining Update then set out what were referred to as the facts including that the three universities have confirmed they support the AHEIA's submissions on industrial relations reform to the Productivity Commission. The Enterprise Bargaining Update then detailed a list of issues dealt with in the submissions including the three issues mentioned by the NTEU in the 27 April Enterprise Bargaining Update namely the prohibition of restrictions on fixed term labour in enterprise agreements, removing disciplinary procedures from agreements and prohibiting agreements providing for union based health and safety training. The 9 May Enterprise Bargaining Update continued on referring to the content of another AHEIA document "*Australian Higher Education Workforce of the Future Report*". Towards the end of this Enterprise Bargaining update it reads,

"Does NTEU stand by its comments?

In the absence of specific negotiation claims by university management, NTEU stands by the position that the simplification of enterprise agreements University management have signalled they want will result in the undermining of workplace rights."

[122] At the end of this Enterprise Bargaining Update readers are advised that information including the AHEIA's position can be found at the NTEU's website.

[123] In summary then, in response to the AHEIA demand for a retraction the NTEU has provided a further communication to its members which advises them of the universities' complaint that their bargaining position has been misrepresented, explains the three issues mentioned in the 27 April Enterprise Bargaining Update about which the universities complain were issues, amongst others, raised in the AHEIA's submission to the Productivity Commission, refers to the absence of specific claims as yet having been received from the universities and provides a link to the AHEIA correspondence.

[124] As the NTEU submit, in my view this 9 May 2016 Enterprise Bargaining Update has "*put the record straight*". Whilst the universities may complain that the NTEU did not admit its 27 April Enterprise Bargaining Update was misleading they have actively provided full information to their members that explains the universities' complaint and puts the original statements the NTEU had made as to what "*...the Vice-Chancellors have already signalled...*" into a proper context.

[125] Consequently from 9 May 2016 when this Enterprise Bargaining Update was sent to members I am satisfied the NTEU has properly responded to the legitimate concerns raised by the universities. Whilst the universities and the AHEIA may have preferred a public admission by the NTEU that they had misrepresented the Vice Chancellors' bargaining positions in their earlier update the clarification provided by the NTEU in their latter 9 May update as to the basis for their statement that "*...the Vice-Chancellors have already signalled...*" what "*simple*" agreements mean leaves the universities with little to complain about.

[126] The NTEU was not obliged to issue a retraction. The alternative approach the NTEU adopted to inform their members of the universities' complaints and provide further information to clarify its previous statements was reasonable and appropriate in the circumstances. The 9 May Enterprise Bargaining Update did not amount to a repeat of the NTEU's previous failure to observe good faith bargaining principles.

Should the Commission issue orders?

[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*³:

“[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.

COMMISSIONER

Appearances:

S Andrews of the Australian Higher Education Industrial Association for the universities.
Y Bakri of Counsel for the NTEU.

Hearing details:

2016.
Perth:
May 25.

Printed by authority of the Commonwealth Government Printer

<Price code G, PR581002>

¹ [2011] FWA 4103.

² AHEIA Submissions at paragraph 26.

³ [2014] FWC 7469.