

## ENFORCEABLE UNDERTAKING

This undertaking is **given** by the University of Newcastle ABN 15 736 576 735 and **accepted** by the Fair Work Ombudsman pursuant to s 715 of the *Fair Work Act 2009*

## ENFORCEABLE UNDERTAKING

### PARTIES

1. This enforceable undertaking (**Undertaking**) is given to the Fair Work Ombudsman (**FWO**) pursuant to section 715 of the *Fair Work Act 2009* (**FW Act**) by the University of Newcastle (**UoN**).

### COMMENCEMENT

2. The Undertaking comes into effect when:
  - a) the Undertaking is executed by UoN; and
  - b) the FWO accepts the Undertaking so executed (as evidenced by the FWO's endorsement below) (**Commencement Date**).

### BACKGROUND

3. UoN was formed on 1 January 1965 and is a New South Wales State Government owned educational institution established in its current form under the *University of Newcastle Act 1989*. The UoN's principal objects include delivery of education and research as well as the provision of enabling programs providing alternative entry pathways into university. As at May 2020, UoN employed approximately 2,880 full time equivalent staff (excluding casuals).
4. UoN is a registered charity under the *Australian Charities and Not-for-Profits Commissions Act 2012* (Cth) and is subject to the governance and accountability obligations under the *Higher Education Support Act 2003* (Cth), the *Tertiary Education Quality and Standards Agency Act 2011* (Cth), and the *Higher Education Standards Framework (Threshold Standards) 2021* (Cth).
5. Between February 2020 and the execution of this Undertaking, UoN notified the FWO that:
  - a) UoN had become aware of claims that 42 casual staff at the UoN Conservatorium of

Music had been underpaid \$64,600 as a result of not being paid overtime and/or penalty rates (**Self-Report**);

- b) at the time of the Self-Report in February 2020, UoN had:
  - i) rectified the underpayments for 42 current and former employees; and
  - ii) commenced an initial review of applicable casual employee entitlements under the Applicable Enterprise Agreements that had identified potential underpayments of between \$2 - \$5 million for approximately 1,000 casual academic and professional employees (**Initial Review**);
- c) following the Initial Review, UoN conducted a detailed review of employee entitlements under the Applicable Enterprise Agreements (**Detailed Review**).
- d) as a result of the Detailed Review, a total underpayment of \$6,269,241.18 (**Wage Underpayment**) impacting 7,595 current and former employees covered by the Applicable Enterprise Agreements over a period from 25 February 2014 to 6 August 2020 (**Affected Employees**) was identified. In addition to the Wage Underpayment, additional costs of \$171,017.43 in relation to superannuation (**Superannuation Amount**) and \$1,375,201.97 in relation to interest owed (**Interest Amount**) were identified;
- e) UoN is fully committed to remedying the non-compliance in full as soon as possible and by the dates set out in this Undertaking;
- f) the non-compliance identified was likely the result of:
  - i) deficiencies in its payroll systems
  - ii) the complexity of the Applicable Enterprise Agreements and interactions between overtime, allowances and penalty rates, and
  - iii) incorrect application of the clauses in the Applicable Enterprise Agreements;
- g) changes to policy and controls to address the underlying causes of the Wage

- Underpayment have been implemented by UoN in parallel to the wage remediation;  
and
- h) UoN will implement on-going compliance monitoring activities to confirm the accuracy of payments.
6. The FWO acknowledges the cooperation and early and open disclosures made by UoN to the FWO.
7. The FWO also acknowledges UoN's commitment to establish and implement systems/processes across the institution to avoid any similar contraventions recurring as detailed in, but not limited to, the Undertakings in clause 19 below.
8. In consideration of these matters, the FWO accepts this Undertaking, the terms of which are set out below.

#### **ADMISSIONS AND UNDERTAKINGS**

9. The FWO has formed a reasonable belief, and UoN admits, that between 25 February 2014 and 6 August 2020 (**Relevant Period**) UoN contravened:
- a) section 50 of the FW Act by failing to pay each Affected Employee the amount or amounts to which that employee was entitled under each of the Applicable Enterprise Agreements as set out at Attachment A;
  - b) section 323(1)(a) of the FW Act due to full payment not being made to each Affected Employee at least each month; and
  - c) section 535(2)(b) of the FW Act due to failure to keep actual start and finish times for overtime for each Affected Employee as required by Regulation 3.34 (b) of the *Fair Work Regulations 2009*.
10. The contraventions identified in clause 9 of this Undertaking do not include:
- a) any contraventions which relate to or arise as a consequence of UoN failing to correctly apply the Applicable Enterprise Agreements to any employee who is not an

Affected Employee or because of any failure by UoN to correctly apply the Applicable Enterprise Agreements to an Affected Employee other than those set out in clause 9 above;

- b) any contraventions which have not yet occurred at the date that this Undertaking is offered by UoN.

11. Upon commencement of this Undertaking, UoN will take the actions set out at clauses 12 to 24 (inclusive) below.

12. By 31 October 2022, UoN will (subject to clause 15):

- a) pay to each Affected Employee any outstanding Wage Underpayment and associated Interest Amount relating to that Affected Employee; and
- b) pay to the nominated superannuation fund for each Affected Employee any outstanding Superannuation Amount and associated Interest Amount relating to that Affected Employee.

13. UoN will take all reasonable steps to locate each Affected Employee owed an outstanding Wage Underpayment, Interest Amount or Superannuation Amount.

14. By 30 November 2022, UoN will provide to the FWO Reasonable Evidence of:

- a) all payments made to Affected Employees to rectify the Total Underpayment and Interest Amount; and
- b) the steps taken in accordance with clause 13, for any Affected Employees UoN could not locate.

15. If any of the Affected Employees to whom a Wage Underpayment is owed cannot be located by 31 October 2022, UoN will pay the Wage Underpayments owing to those Affected Employees to the Commonwealth of Australia in accordance with section 559 of the FW Act by 30 November 2022. UoN will complete the required documents supplied by the FWO for this purpose.

16. In the event that the FWO is able to locate and contact any Affected Employees to whom the Wage Underpayments are owed, the FWO will (in addition to its obligations under section 559 of the FW Act) notify UoN in writing of the name and contact details of the Affected Employee. Within 28 days of receiving any such notice UoN will:

- a) pay to the Affected Employee the Interest Amount relating to the Affected Employee's Wage Underpayment; and
- b) pay to the Affected Employee's nominated superannuation fund the Superannuation Amount and associated Interest Amount relating to the Superannuation Amount relating to that Affected Employee.

#### **Systems improvements and training**

17. By 1 January 2023 UoN will have completed the implementation of the following systems improvements and/or training to avoid any repeat of similar contraventions that are relied on as the basis for this Undertaking:

#### *Systems and Process Improvements*

- a) creation and implementation of a tiered assurance framework with Tier-1 as the initial point of contact to HR and Tier-2 the escalation point to Assurance Services for compliance support and monitoring;
- b) development of a range of Exception Reports to allow correction of timesheets with incorrect or incomplete information by Payroll Staff including:
  - i) notifications to Timesheet Approvers and Submitters that timesheets have required adjustment in line with Enterprise Agreements;
  - ii) reports to identify non-complying timesheets for revision prior to payment;
  - iii) automatic uplift to minimum hours of engagement;
  - iv) automatic adjustment to Academic Rates for PhDs;
  - v) automatic overtime adjustments for Out-of-Span work;

- vi) automatic adjustment for Meal Allowance;
- c) development and distribution of Time and Attendance Submission Process Guide for Casuals and Academics;
- d) development and implementation of an updated Non-Casual Professional Staff Overtime Claim Process;
- e) development and implementation of updated Payment Processing Procedures for Academics, Professionals (shift and non-shift) and Teachers;
- f) development and implementation of a Work Travel Claim Form;

#### *Training*

- g) training programs to be developed and delivered by qualified internal HR resources as either face to face or online training modules including:
  - i) mandatory training for Timesheet Approvers (Casual Staff Manager and Approvers);
  - ii) training sessions with College General Managers and School Executive Officers to outline the correct interpretation/application of the Applicable Enterprise Agreements and ensure a consistent approach is applied; and
  - iii) training for timesheet submitters advising of entitlements (Casual Staff Timesheet Awareness).
- h) reporting and tracking of metrics associated with training completion with approval access for timesheet approvers removed until successful completion;

#### *Communications*

- i) development and distribution of FAQs covering key agreement entitlements for Academics, Professionals (shift), Professionals (non shift) and Teachers;
- j) comprehensive internal communications with affected Colleges and Schools regarding timesheet submission and approval processes and correct interpretation of

agreement provisions; and

k) development and distribution of a Professional Timesheet Entry Assistance Guide.

18. By 28 February 2023 UoN will provide to the FWO Reasonable Evidence of UoN's compliance with clause 17.

#### **Establishment of a complaints and review mechanism for Affected Employees**

19. By 12 September 2022, UoN will establish a complaints and review mechanism (**Mechanism**) for Affected Employees in relation to the Total Underpayment and Interest Amount. The Mechanism will follow the procedural steps established under and be consistent with the process for the resolution of disputes established under clauses 48.4, 48.5, 48.7 and 48.8 of the Academic Staff and Teachers Agreement 2018. The existence of the Mechanism will be promoted to Affected Employees in each communication in relation to the Total Underpayments. Guidance will be issued to all decision makers under the terms of the Mechanism detailing UoN's approach to assumptions and expectations in regard to resolving the disputes.

20. UoN will notify the FWO within 14 days of becoming aware of any concern covered by Clause 19 and will take all necessary steps to seek to resolve any dispute within 30 days.

21. UoN will establish and maintain centralised oversight of any dispute covered by clause 19 above to ensure consistent management and outcomes.

22. Where appropriate, the FWO will notify UoN within 14 days of any request for assistance being received by the FWO where the FWO identifies that the Mechanism has not first been applied. Where appropriate, the FWO will take no further action in relation to such a concern raised in a request for assistance until the Mechanism in clause 19 has been followed.

23. Within 60 days of receipt, UoN will provide to the FWO information regarding the outcome of any complaint and/or review made under the Mechanism. UoN will also provide, within a reasonable period specified by the FWO, any such further Reasonable

Evidence requested to satisfy itself that UoN has met its obligations with respect to the Affected Employee/s who raised the concern under the Mechanism under this Undertaking and/or the FW Act.

24. UoN undertakes to cooperate fully in relation to any request for assistance received by the FWO in relation to an Affected Employee where the Affected Employee does not consider the concern has been addressed through the application of the Mechanism.

#### **Extensions on times for completion**

25. UoN may request of the FWO an extension on a time specified for completion of an obligation under this Undertaking. The FWO will not unreasonably withhold agreement on a request for an extension of time.
26. Where a time specified for undertaking an obligation under this Undertaking is contingent on or follows from the time specified for the completion of another obligation under this Undertaking, and that time for completion has been extended by the FWO, the time specified for completion of the later obligation is correspondingly extended by the same period.

#### **No Inconsistent Statements**

27. UoN must not, and must use its best endeavours to ensure that its officers, employees or agents do not, make any statement or otherwise imply, either orally or in writing, anything that is inconsistent with admissions or acknowledgements contained in this Undertaking.

#### **ACKNOWLEDGEMENTS**

28. UoN acknowledges that:

- a) the FWO may;
  - i) make this Undertaking available on the FWO internet site at [www.fairwork.gov.au](http://www.fairwork.gov.au);
  - ii) release a copy of this Undertaking pursuant to any relevant request under the *Freedom of Information Act 1982* (Cth);

- iii) issue a media release in relation to this Undertaking;
  - iv) from time to time, publicly refer to the Undertaking and its terms; and
  - v) rely upon the admissions made by UoN set out in clause 9 above in respect of decisions taken regarding enforcement action in the event that UoN is found to have failed to comply with its workplace relations obligations in the future, including but not limited to any failure by UoN to comply with its obligations under this Undertaking;
- b) consistent with the Note to section 715(4) of the FW Act, this Undertaking in no way derogates from the rights and remedies available to any other person arising from the conduct set out herein;
  - c) consistent with section 715(3) of the FW Act, UoN may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO; and
  - d) if UoN contravenes any of the terms of this Undertaking:
    - i) the FWO may apply to any of the Courts set out in section 715(6) of the FW Act, for orders under section 715(7) of the FW Act; and
    - ii) this Undertaking may be provided to the Court as evidence of the admissions made by UoN in clause 9 above, and also in respect of the question of costs.

## Dictionary


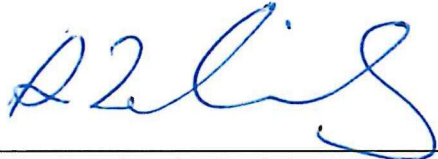
Unless the contrary intention appears, words in the singular include the plural, and other than terms defined, have their ordinary natural meaning.

- **Applicable Enterprise Agreements** means
  - From 26 February 2014 to 11 December 2014
    - The University of Newcastle Academic Staff Enterprise Agreement 2010 (Academic Staff EA 2010)



- The University of Newcastle Teachers Enterprise Agreement 2010 (Teachers EA 2010)
  - The University of Newcastle General Staff Enterprise Agreement 2010 (General Staff EA 2010)
- From 12 December 2014 to 21 March 2019
  - The University of Newcastle Academic Staff Enterprise Agreement 2014 (Academic Staff EA 2014)
  - The University of Newcastle Teachers Enterprise Agreement 2014 (Teachers EA 2014)
  - The University of Newcastle Professional Staff Enterprise Agreement 2014 (Professional Staff EA 2014)
- From 22 March 2019 to 6 August 2020
  - The University of Newcastle Academic Staff and Teachers Enterprise Agreement 2018 (Academic Staff and Teachers EA 2018)
  - The University of Newcastle Professional Staff Enterprise Agreement 2018 (Professional Staff EA 2018)
- **Interest Amount** in relation to the Wage Underpayment is calculated in accordance with the Federal Court Pre Judgment Rate. Interest on Superannuation is to be calculated at a rate of 10%
- **'Reasonable Evidence'** means such evidence as the FWO may reasonably require, and which could reasonably be expected to comfortably satisfy a court of:
  - a) the truth of any fact asserted by UON or by any of its servants or agents; and/or
  - b) the accuracy and correctness of any information provided by UON, or by any of its servants or agents; and/or
  - c) compliance by UON with any term of this Undertaking
- **Total Underpayment** means the Wage Underpayment and the Superannuation Amount

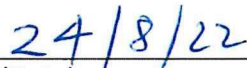
**Executed as an undertaking**

EXECUTED by an authorised person of UoN ABN 15 736 576 735 in the presence of:

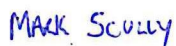


 _____ (Name and position of authorised signatory)	 _____ (Signature of authorised signatory)
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in the presence of:

 _____ (Name of witness)	 _____ (Signature of witness)
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\_\_\_\_\_  
(Date)

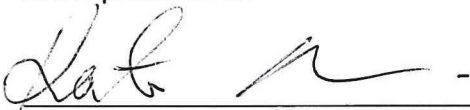
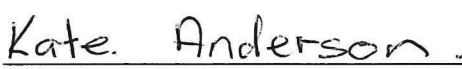
ACCEPTED BY THE FAIR WORK OMBUDSMAN PURSUANT TO SECTION 715(2) OF THE FAIR WORK ACT 2009 ON:

  _____ [Insert name and role of Delegate]	 _____ (Signature of Delegate)
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\_\_\_\_\_  
(Date)

Delegate for the FAIR WORK OMBUDSMAN

in the presence of:

 _____ (Signature of witness)	 _____ (Name of Witness)
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Minimum Engagement	
Primary Provisions	Secondary Provisions
<b>Minimum engagement of casual staff</b>	
Professional Staff EA 2018, Clause 49.34, page 47  Professional Staff EA 2014, Clause 48.33 page 42  General Staff EA 2010, Clause 46.8.4 Page 33	Professional Staff EA 2018, Clause 43.3 iv page 37 and Schedule 1 1.6 ii, page 89  Professional Staff EA 2014, Clause 42.3 iv page 32 and Schedule 1 1.8 ii Page 83  General Staff EA 2010, Clause 40.3 iv page 25 and Schedule 1 1.9 ii Page 65
Academic Staff and Teachers EA 2018 Section 190 Undertaking, Item 3, page 3 (Note that this applied only from 22 March 2019)	N/A
<b>Overtime, Minimum engagement</b>	
Professional Staff EA 2018, Clauses 43.3(iv) and 67.2, pages 37 and 70 respectively.  Professional Staff EA 2014, Clauses 42.3(iv) and 67.2 pages 32 and 66 respectively.  General Staff EA 2010, Clauses 40.3(iv) and 66.2, pages 24 and 53 respectively.	N/A
Academic Staff and Teachers EA 2018, Clause 67.3(iii and iv) - <b>Part D – Teachers only</b> - page 78  Teachers EA 2014, Clause 35.3(iii and iv), page 29  Teachers EA 2010, Clause 31.3 (iii and iv), page 22	N/A
<b>Overtime, Work Outside Span of Hours Including Weekends and Public Holidays</b>	
Professional Staff EA 2018, Clause 43.3 (i), (ii) and (iii) page 37  Professional Staff EA 2014, Clause 42.3 (i), (ii) and (iii) page 32  General Staff EA 2010, Clause 40.3 (i), (ii) and (iii) page 25	N/A
Professional Staff EA 2018, Clause 67.2 page 70  Professional Staff EA 2014 Clause 67.2 page 66	N/A

General Staff EA 2010, Clause 66.2 page 53	
Academic Staff and Teachers EA 2018, Clause 67.3(i), (ii), and (iii) – <b>Part D Teachers Only</b> – page 78	N/A
Teachers EA 2014, Clause 35.3(iii and iv), page 29	
Teachers EA 2010, Clause 31.3 (iii and iv), page 22	
<b>Overtime, Work in excess of daily maximum hours</b>	
Professional Staff EA 2018, Clause 49.33 page 47	N/A
Professional Staff EA 2014, Clause 48.32 page 42 General Staff EA 2010, Clause 46.8.3 page 33	
<b>Meal Allowance</b>	
Professional Staff EA 2018, Schedule 2, Clause 2.1 page 90	N/A
Professional Staff EA 2014, Schedule 2, Clause 2.1 page 83	
General Staff EA 2010, Schedule 2, Clause 2.1 page 66	
Professional Staff EA 2018, Schedule 2, Clause 2.3 page 91	N/A
Professional Staff EA 2014, Schedule 2, Clause 2.3 page 84	
General Staff EA 2010, no equivalent clause	