

A black and white photograph of two women walking on a university campus. The woman on the left is wearing a dark top and jeans, carrying a bag. The woman on the right is wearing a light-colored top and dark pants, carrying a shopping bag with 'dch' on it. In the background, a building has a sign that says 'Murdoch'.

IR YEAR IN REVIEW: AUSTRALIAN CASE LAW AFFECTING UNIVERSITIES

CLAYTON UTZ

Stuart Pill,
Partner - Workplace Relations and Safety

10 May 2018

ROAD MAP

Complex cases

Bullying, adverse action, unfair dismissal and more
Personal Liability
Complex case checklist

Fixed term contracts

Navitas - new unfair dismissal risk
Managing employee engagement and "non-renewal"

Award Review

ACTU Casual and Part Time Common Claim
Higher Ed Awards Outcomes

Bargaining IA

Murdoch and key developments
Challenging IA notices

Consultation Restructuring

Workload models/consultation and managing change

COMPLEX IS THE NEW NORM?

Jane is a lecturer in the Faculty of Engineering and has been employed on 3 successive, 3 year fixed term contracts, as she is partly funded by some external funding.

Jane's research output is unsatisfactory and the HoD raises this with Jane on a couple of occasions, and tells her he is going to have to get HR to start a formal performance management process.

Jane considers that the criticism is unfair. She has been the subject of bullying and inappropriate comments about her looks by some of the senior academics in the department which has impacted on her work, but the HoD says she just needs to be tougher and nothing he can do.

Jane mentions the bullying and SH to the Dean, and says she is very stressed. She says she doesn't really want to make a formal complaint or go through an investigation and the Dean therefore doesn't take any steps.

The HoD decides the performance process would take too long and tells HR not to renew her contract.

Jane goes "off sick", lodges a workers' compensation claim, writes to the VC and Chancellor about the hostile work culture, bullying and sexual harassment.

Jane then threatens proceedings against the Uni, the alleged harassers, the HoD and the VC, and also makes an FOI request for all documents and emails from the HoS to other staff concerning her treatment.

The VC requests HR / Legal to provide urgent advice.

RISK OF BULLYING, ADVERSE ACTION AND SEXUAL HARASSMENT CLAIMS

Bullying

- Repeated unreasonable behaviour towards a worker that creates a risk to health and safety
- FWC stop bullying orders jurisdiction
- 722 applications lodged in the FWC in FY2016-17

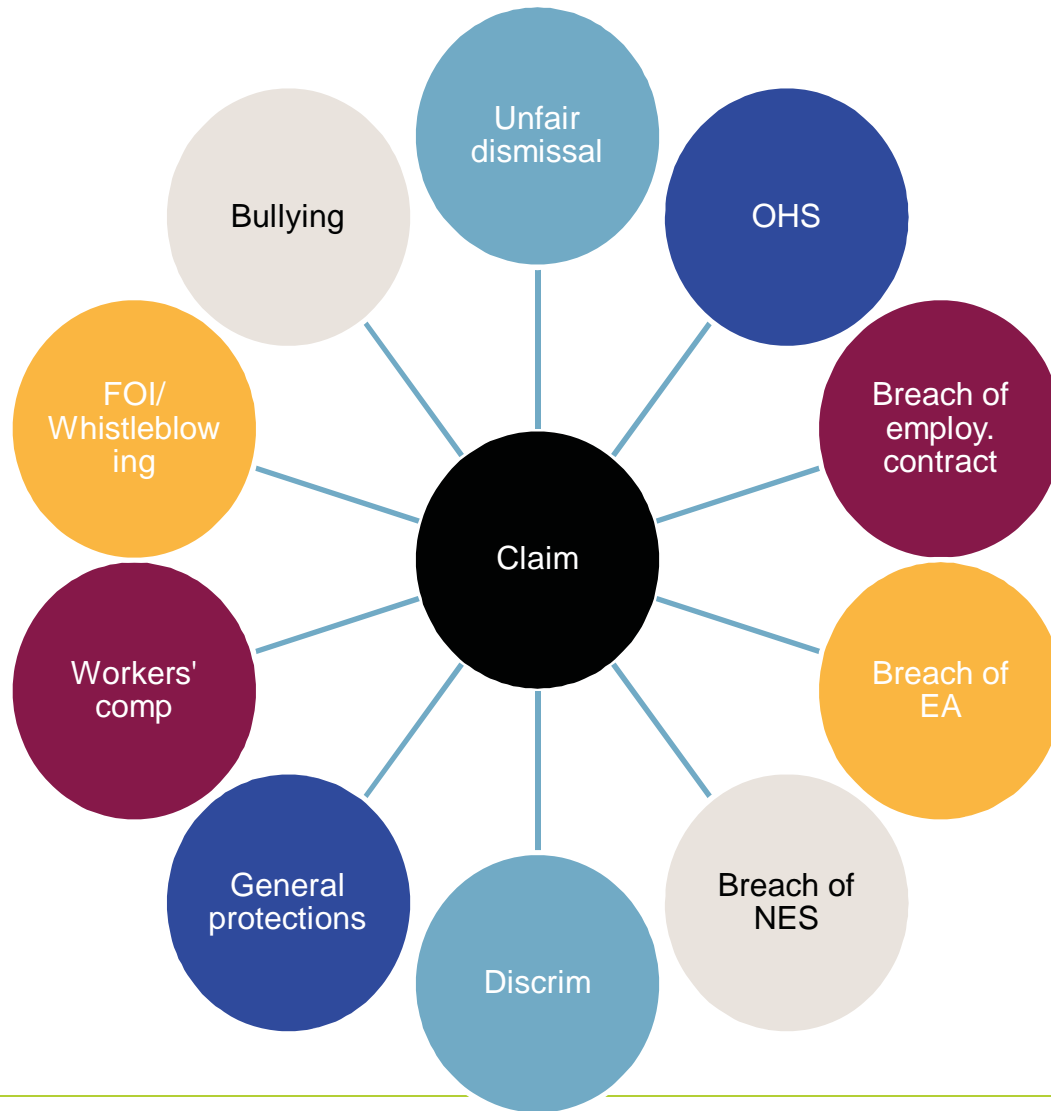
Adverse action

- Adverse action because of a prohibited reason
- Reverse onus of proof on the employer
- 4,666 applications lodged in the FWC in FY2016-17

Sexual harassment

- Heightened attention - "The Weinstein Effect"
- AHRC *Change the Course* Report on universities
- #MeToo

ISSUES THAT UNIVERSITIES GRAPPLE WITH



***DEWAN V UC* [2017] FWCFB 5162**

Dr Dewan employed on a "*contingent continuing*" basis with accelerated career path to Level D

Dr Dewan satisfactory performance at Level C, but not on the trajectory for promotion to Level D

Valid reason for dismissal and upheld on appeal

Performance management under the old EA applies to satisfy obligations under the new EA

Test is not breach of EA, test is HUU

Clarity of what constitutes satisfactory performance for particular employment provides a strong platform for dismissal

HAYES V MURDOCH [2017] FWC 2174

No unfair dismissal for serious misconduct of sending abusive emails from uni account to ABS

"Tell you what why don't you just use the data you stole from me for all these years and put that in your ##*-ing Census!"*

Breach of Code of Conduct

Cf academic freedom

Importance of clear policy regarding acceptable conduct and boundaries as to public/private activities

GRAMOTNEV V QUT [2018] QSC 37

"I once again urge you to immediately dismiss the acting head of school [name] from his position on the basis of his official misconduct and misuse of position and administrative powers, as well as his incapability to provide reasonable, fair and independent leadership...I urge you to reinstate the rule of law, as opposed to the jungle of administrative bullying, intimidation and misconduct..."

- Previous UD claim and appeal dismissed
- QSC - Breach of contract, including incorporated EA provisions
- The terms and conditions of your appointment are prescribed by the relevant enterprise bargaining agreements applicable to the University...your employment conditions include the provisions of the MOPP and relevant University Statutes and Policies as current from time to time."
- "Definitions of misconduct and serious misconduct and the procedures to be followed are contained in the relevant enterprise bargaining agreements: QUT Enterprise Bargaining Agreement (Academic Staff), clause 44"

***GRAMOTNEV V QUT* [2018] QSC 37 CONT..**

- Alleged failure to notify allegations in sufficient detail to understand their precise nature and properly respond and failure to have MIC
- Breach of grievance procedure

HELD

- Notification letter and attachments (including controversial emails) sufficient to advise allegations
- Re: "failure" to refer to MIC, QUT entitled to rely on his admissions in sending the emails to proceed to dismissal
- Grievance policy not (all) contractual - no contractual obligation that complaint would be resolved. Regardless QUT did not breach Grievance Policy

GULLIVER V CURTIN [2017] FCCA 2822



Restrictive reading of s 341(1)(a) of the FW Act - "a person has a workplace right if the person is **entitled to the benefit of...a workplace instrument**"

Mr Gulliver was not entitled to the benefit of conversion to ongoing employment, so Curtin could not take adverse action against him because of that purported workplace right

Ensure reasons are clear and permissible
Protect decision maker through clear paper trail and recommendations

STOP-BULLYING APPLICATIONS DURING INVESTIGATIONS - OPPOSITE RESULTS

Bayly

- *Lynette Bayly* [2017] FWC 1886
- Interim order freezing investigation and management action (likely imminent dismissal)

Subramanian

- *Dr Subramanian* [2017] FWC 3492
- No interim order preventing finalising the hiring of a better candidate

ACCESS TO INFORMATION: *NOBLE V UNSW* [2017] NSWCATAD 2

Review into culture and behaviour of Professional and Technical Staff in the Faculty of Built Environment


Applicant sought access under the *Government Information (Public Access) Act 2009* (NSW) to redacted information in a workplace report

NCAT considered that public interest considerations, on balance, did not favour disclosure



Some weight

- Enhance government accountability
- Inform public about University operations
- Ensure effective oversight of expenditure
- Maintain high standards of administration
- Access to own personal information



Significant weight

- Prejudice effective exercise of University's functions
- Prejudice future supply of information to investigators

ALLON V RMIT (ONGOING VSC CASE)

Investigation into an allegation of improper conduct within RMIT's School of Engineering (TAFE) Aerospace



Mr Allon, whistleblower, reported Mr Hana, selling exam answers, to the Victorian Ombudsman

Report concluded that RMIT either did not investigate or investigated poorly, putting whistleblowers at risk

Allon now alleges that RMIT dismissed him for complaining to the Ombudsman

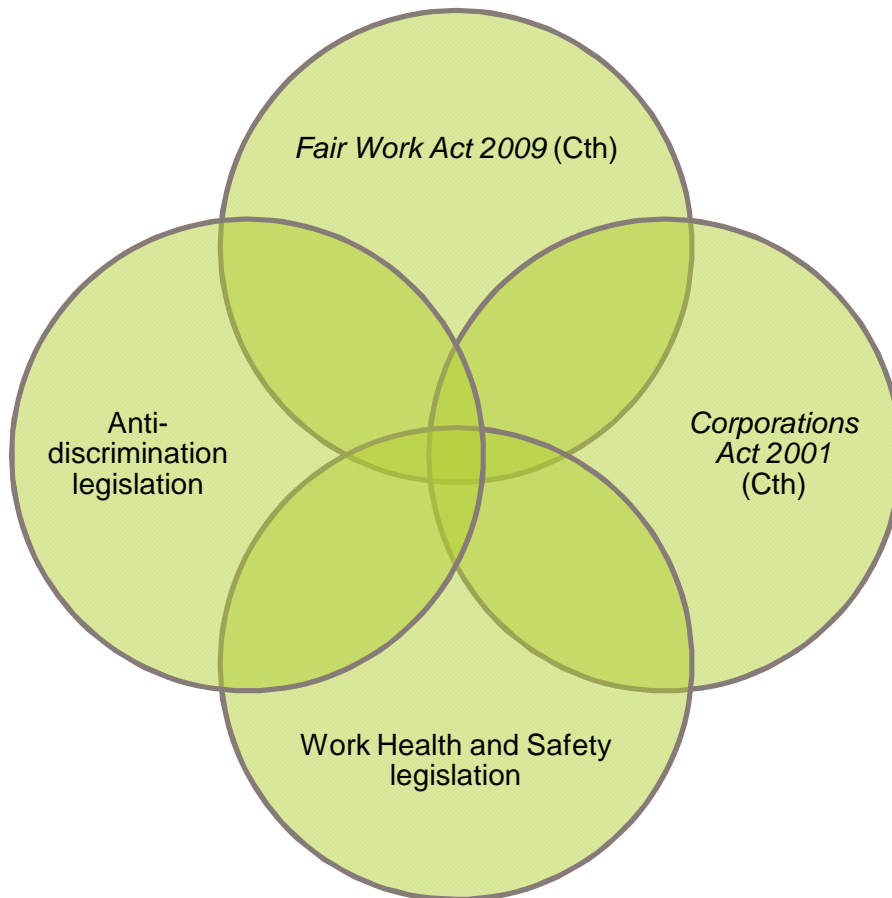
VSC - ordered ombudsman to produce documents forming part of their investigation

Again emphasises the importance of prejudicial emails and documents

Whistleblowers Protection Act 2001
Investigation into an allegation of improper conduct within RMIT's School of Engineering (TAFE) – Aerospace

July 2010

PERSONAL LIABILITY OF SENIOR OFFICERS



\$12,600 - Individual
\$63,000 - Corporation
10 x for serious contraventions

Council Members /
Senior Execs / VC / DVCs /
HR Managers / Accountants /
Payroll Managers

\$100K - \$300K - Individual
5 years imprisonment

FAIR WORK ACT 2009 (CTH): AREAS OF POTENTIAL INDIVIDUAL LIABILITY

Adverse action -
workplace rights

Discrimination (s351)

Underpayments of
enterprise
agreement
entitlements

Breach of the NES
(e.g. notice of
termination, annual
or sick leave
entitlements)

Bullying (not
complying with an
anti-bullying order)

Failure to maintain
required employee
records

New Serious Breach Contraventions

FAIR WORK ACT - S 550

- ▶ *(1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision*
- ▶ *(2) A person is involved in a contravention of a civil remedy provision if, and only if, the person:*
 - » *(a) has aided, abetted, counselled or procured the contravention; or*
 - » *(b) has induced the contravention, whether by threats of promises; or*
 - » *(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or*
 - » *(d) has conspired with others to effect the contravention*

WHS LAWS - OFFICER'S AND SENIOR MANAGER'S DUTIES AND ALL WORKERS

State	Liability
NSW, QLD, ACT, NT, Tas, SA - Harmonised WHS Legislation Section 17	Duty of Due Diligence
VIC - OHS Act 2004 (Section 144)	Managers (as employees) have liability if there is a company breach and the contravention is attributable to an officer failing to take reasonable care. Can be convicted or found guilty whether or not the body company is convicted or found guilty
VIC - OHS Act 2004 (Section 25) Model WHS Act (Section 28)	Take reasonable care for the health and safety of persons who may be affected by the employee's acts or omissions at a workplace

COMPLEX CASE MANAGEMENT CHECKLIST

Key steps

1. Sound policy framework within which to manage such cases / Code of conduct and processes / Do not incorporate into the contracts
2. Initial case assessment to identify cases as complex or potential complex/high risk
3. Seek advice early if required about nature and extent of risks and how best can be managed
4. Identify key case officer/co-ordinator and co-ordinate actions and decisions
5. Identify all current and likely future issues: Operational, staff impact, legal, industrial so as to plan and to inform decision making.- Identify different areas/persons requiring consideration and possible involvement
6. Have clear plan and protocols for communications and the preparation of documents, including to minimise the risk of documents later damaging the defence of an unfair dismissal, adverse action or other claim in a Court or Tribunal

Use paper trail to your advantage
7. Minimise email
8. Commence and maintain a chronology and all communications with the staff member (for legal advice)

COMPLEX CASE MANAGEMENT CHECKLIST

Key steps

9. Plan for complexity:

- steps to ensure basic compliance
- contingencies including disputes and challenges and likely options for response
- mental health/stress issues
- escalation steps

10. Early proactive intervention and avoid delay

11. Brief area to know what to expect and ensure clear expectations, alignment and support.
Brief senior management - no "surprises"

12. Ensure rigour in particulars of allegations and in communications (put prejudicial emails)

13. Regular case management meetings

14. Identify likely decision makers and consider who "evidence givers" would be- avoid creating a cast of thousands

Clarity of who is decision maker and basis for decision

15. Ultimately ensure decisions are reasonable and defensible (or carry acceptable risk) and take into account all risks and impacts

MAXIMUM TERM CONTRACTS: NEW UNFAIR DISMISSAL RISK

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Saied Khayam v Navitas English Pty Ltd t/a Navitas English [2017] FWCFC 5162 (9 December 2017)

THE RELEVANT PROVISIONS - DISMISSED (S.386)

(1)(a) A person has been dismissed if the person's employment with his or her employer has been **terminated on the employer's initiative**

(2)(a) However, a person has not been dismissed if the person was employed under a contract of employment for a specified period of time, for a specified task, or for the duration of a specified season, and the employment has **terminated at the end of the period, on completion of the task or at the end of the season**

NAVITAS - UNCERTAINTY AND EMERGING PRINCIPLES

- ▶ FWCFB opened door to unfair dismissal applications
- ▶ Emerging principles

Total employment relationship - "genuine agreement" that employment will not continue beyond specified term?



Are there any vitiating or other factors?

VITIATING FACTORS

Contract was entered into as a result of misrepresentation, mistake, unconscionable conduct, duress and/or coercion.

Employment relationship was made up of successive short term contracts, or whether the use of maximum-term contracts was appropriate in the relevant field of employment (e.g. tied to external funding or project specific).

Contract operated for administrative convenience and did not represent the reality or totality of the terms of the employment relationship.

Employer engaged in conduct or made representations that the employment would continue.

Terms of the contract were inconsistent with the terms of an award or enterprise agreement prohibiting/regulating term employment.

IMPLICATIONS AND RECOMMENDATIONS FOR UNIVERSITIES

- Widespread adoption of fixed-term or max term contracts
- Consider basis for the fixed term contract (HECE categories)
- Exercise caution when engaging employees on a series of "rolling" max term contracts (that don't align with particular funding)
- Clear contractual provisions
- Avoid extra-contractual promises or representations
- Performance management v expiry focus (conundrum)

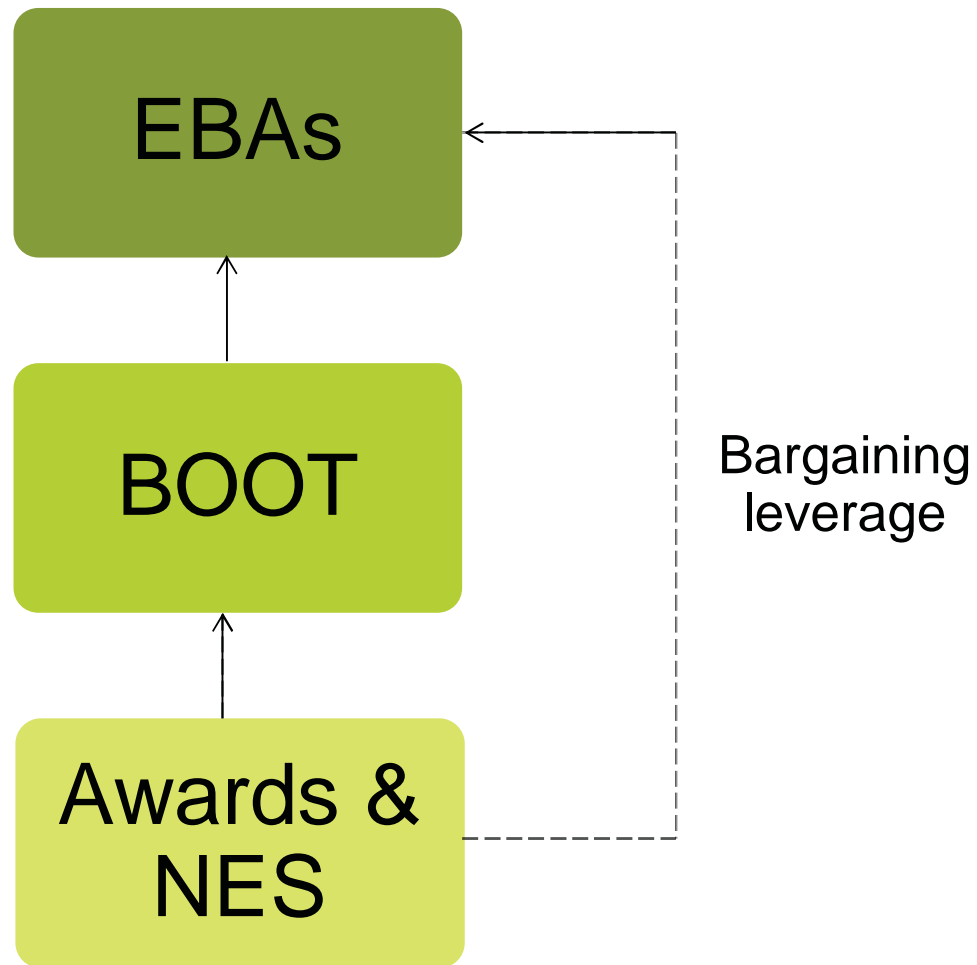
HIGHER EDUCATION MODERN AWARDS UPDATE

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Review into casual employment under the General Award

Review of the Higher Education Industry General and Academic Staff Awards

SIGNIFICANCE OF AWARD DECISIONS



REVIEW OF THE HIGHER EDUCATION INDUSTRY AND ACADEMIC STAFF AWARDS

[2018] FWCFB 1087



DECISION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

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

VICE PRESIDENT CATANZARITI

DEPUTY PRESIDENT KOVACIC

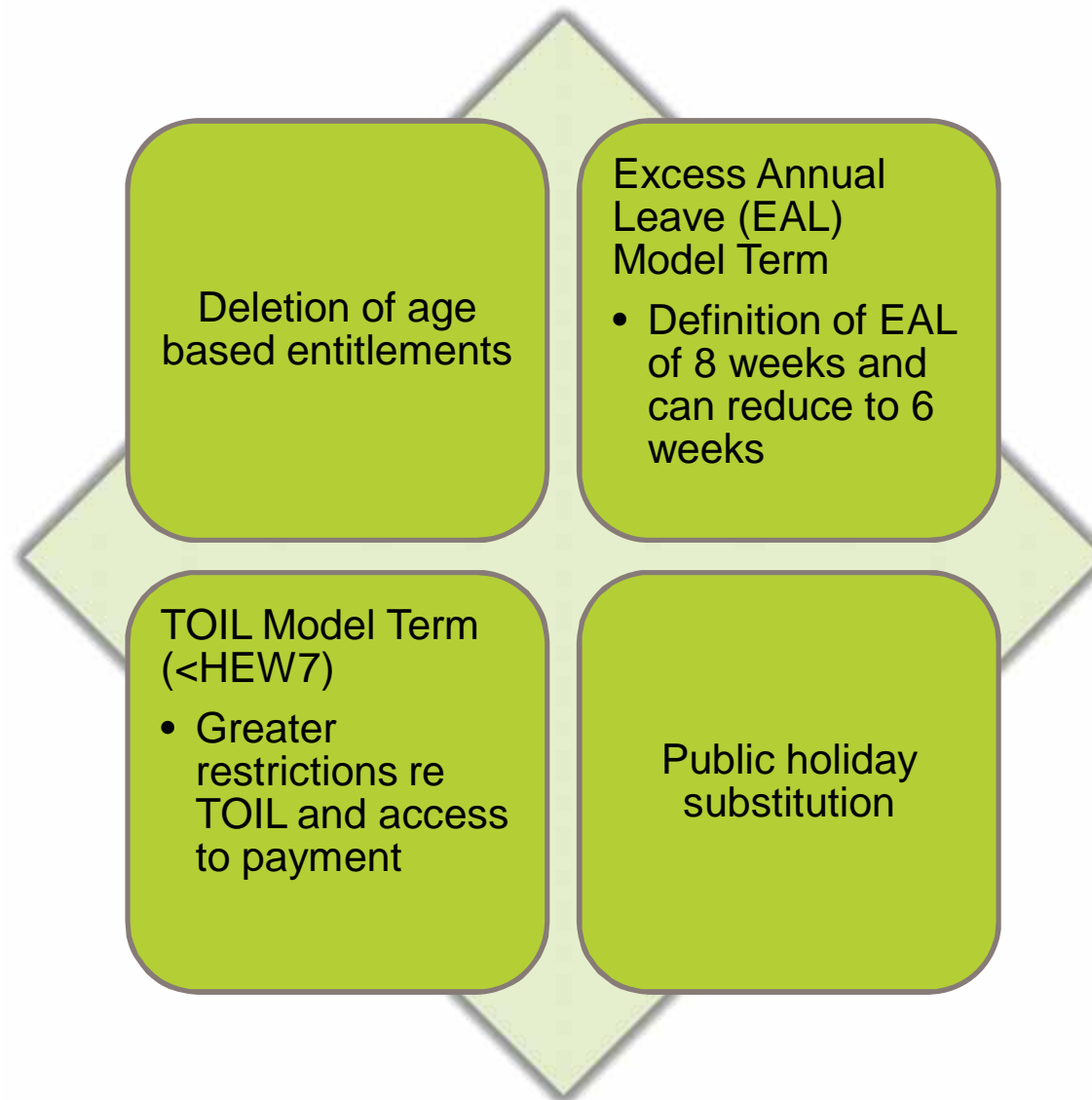
COMMISSIONER JOHNS

SYDNEY, 20 FEBRUARY 2018

SUCCESSFULLY RESISTED

- Hours limitations and overtime payments for academics - lack of reliable evidence and matter can be addressed in bargaining
- Inclusion of additional policy allowance - paid induction most appropriate and many universities already providing it
- Inclusion of discipline currency allowances - noted that around half of casual academics are assisted by study or relevant work
- ICT allowances - sufficient facilities available on campus
- Positive obligations to avoid unpaid overtime - some general staff working additional hours, but capable of being compensated or otherwise dealt with
- Extension to cover medical research institutes

IMPACT ON UNIVERSITIES



REVIEW INTO CASUAL AND PART-TIME EMPLOYMENT

[2017] FWCFB 3541



DECISION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards – Casual employment and Part-time employment

(AM2014/196 and AM2014/197)

VICE PRESIDENT HATCHER
SENIOR DEPUTY PRESIDENT HAMBERGER
DEPUTY PRESIDENT KOVACIC
DEPUTY PRESIDENT BULL
COMMISSIONER ROE

SYDNEY, 5 JULY 2017

4 yearly review of modern awards – Part-time employment and Casual employment.

SUCCESSFULLY RESISTED, IN RELATION TO THE GENERAL AWARD

A deeming provision to the effect that casuals would be automatically deemed to be continuing employees after 6 months (unless they opt out in writing)

Existing casual conversion

Minimum engagement for casuals of 4 hours

Obligations to offer work to existing casuals or part time employees performing similar work, who have less than 38 hours a week, before increasing the number of casuals and part-time employees

Outstanding issue of minimum engagement of 2 hours for academic casuals

INDUSTRIAL ACTION AND BARGAINING

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Recent
industrial
action cases

Murdoch

University
bargaining
(briefly)

RECENT INDUSTRIAL ACTION DECISIONS

Protected (i.e. lawful) industrial action

- Type of action must have commenced within 30 days of the declaration of the result of the protected action ballot

JCU v NTEU [2017] FWC 4976

- 24 hour work stoppage not the same type of action as a 1 hour work stoppage

UTAS v NTEU [2017] FWC 5723

- 24 hour ban on preparing and delivering teaching not the same type of action as ban on taking attendance and recording or transmitting results

THE TERMINATION EQUATION

EA passed
nominal expiry



Not contrary to
public interest



**Appropriate to
terminate in all the
circumstances**

- View of employees, employers and unions
- Circumstances of employees, employers and unions

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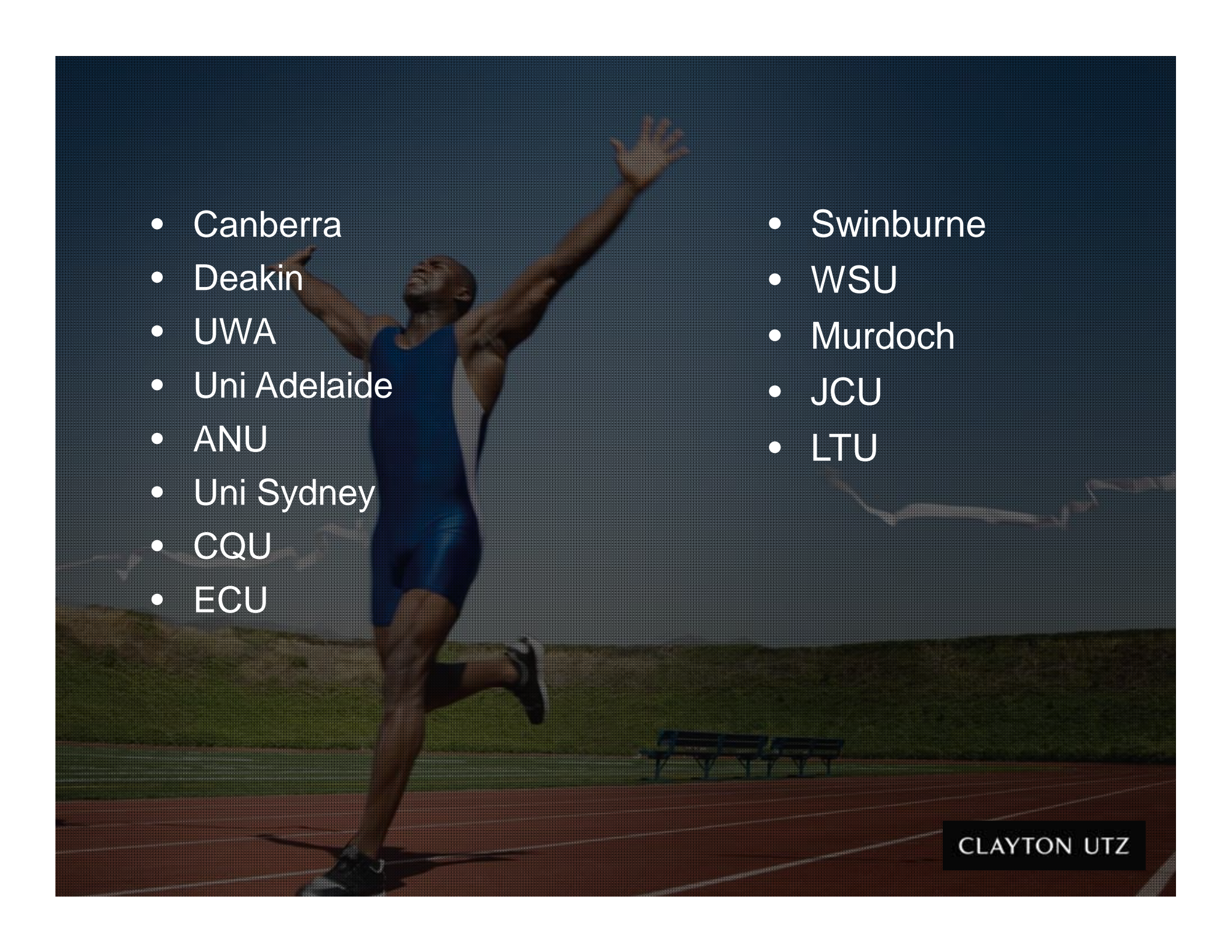
Landmark enterprise agreement decision gives universities 'nuclear' option

Not contrary to public interest

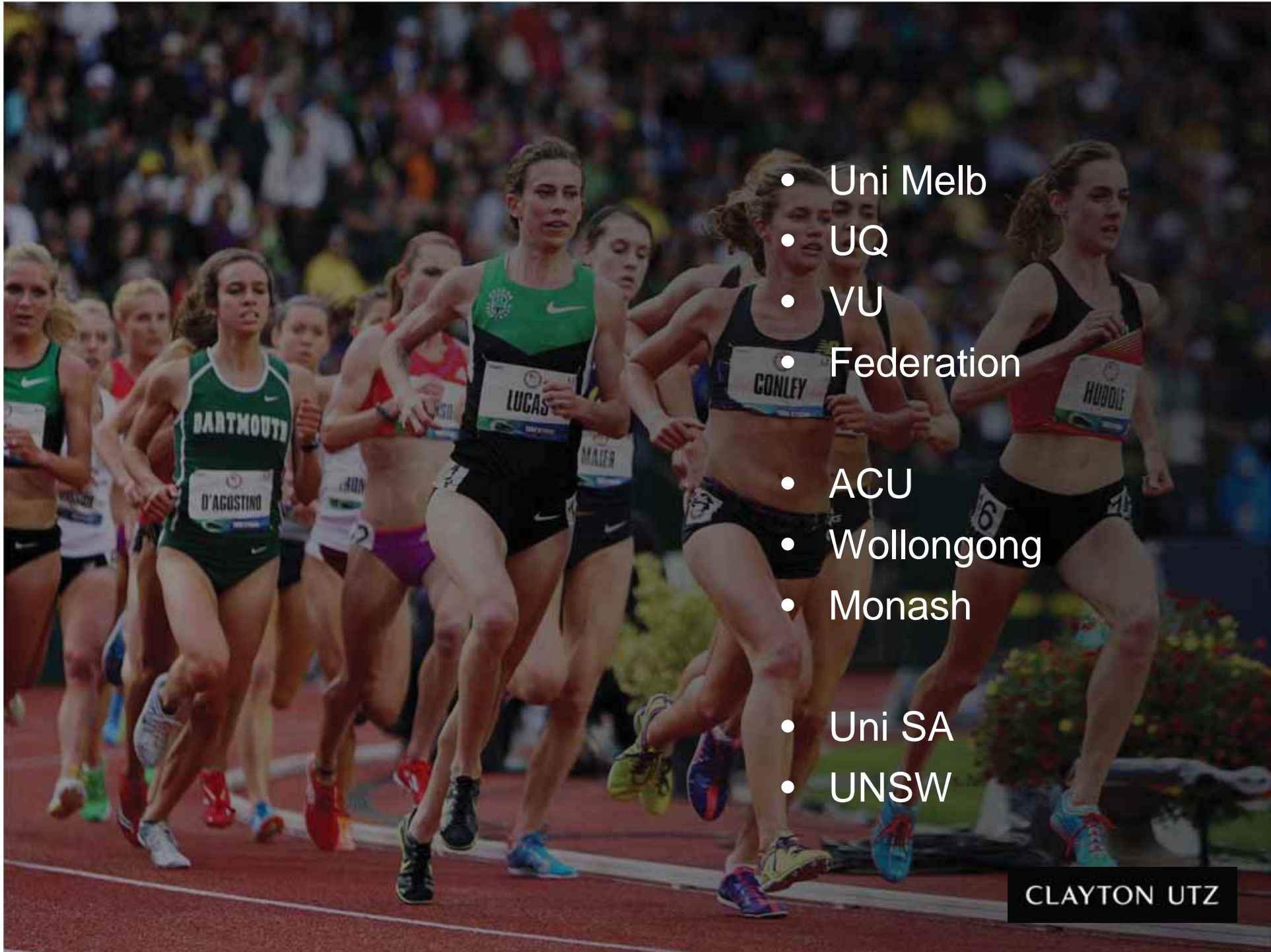
- Removal of problematic clauses = assist financial situation
- Will assist bargaining; remove deadlock
- Will tip the balance more in favour of the University
- Academic freedom not constrained by termination

Appropriate

- Immediate impact reduced by undertaking to maintain wages and certain conditions for 6 months
- No discernible negative consequences on the NTEU

- 
- A male athlete in a blue singlet is captured in a celebratory pose on a red running track. He has his arms raised high and is looking upwards. The background shows a green field and a dark sky. The image has a halftone or dithered texture.
- Canberra
 - Deakin
 - UWA
 - Uni Adelaide
 - ANU
 - Uni Sydney
 - CQU
 - ECU

- Swinburne
- WSU
- Murdoch
- JCU
- LTU



- Uni Melb
- UQ
- VU
- Federation
- ACU
- Wollongong
- Monash
- Uni SA
- UNSW

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KEY OUTCOMES TO DATE

Achieved	Concessions
No committees for discipline/redundancy	Domestic Violence leave for casuals
Workloads – 80% teaching	17% super for fixed term
Consultation – where definite/firm proposal	Increased parental leave
Increases in TFR/EFR roles	Emphasis on conversion rules
Flexibility in spread of hours	Payment for casual policy familiarisation
Job security clause removed	Wage increases – ranging from 1.5 – approx 2.2%
Increased fixed term categories	
Wages linked to CPI	

CHECKLIST FOR BARGAINING

- EA is biggest "contract" university has - treat accordingly
- Plan
- Clear, cohesive, rationale and supporting communications, setting platform for bargaining and employee engagement
- Consider appetite for adverse criticism and potential for protracted bargaining and disputation
- Bargaining Plan and supporting comms Plan
- Continued battle ground is casual and fixed term engagement, workloads and job security

CONSULTATION AND RESTRUCTURING

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Recent cases

Key consultation issues

NTEU V UNE [2018] FWC 1913

Change

- Formed a new Faculty comprised of two Schools
- Sought to implement a "work around" work allocation while new Policy was negotiated

Claim

- NTEU argued that the "work around" allocation breached the EA staff consultation and agreement requirements

Decision

- Arguable case - interim orders for old Policy
- UNE interpretation would allow it to use restructures to defeat the principles of staff consultation and agreement in the EBA

NTEU V VIC UNI [2017] FWC 3479

Change

- Proposed First Year College
- Aimed to maximise student success, reduce reliance on sessional academics, and improve financial position

Claim

- NTEU alleged various breaches of the EBA

Decision

- Breaches not made out
- Vic Uni was implementing change in accordance with the requirements of its EBA

KEY CONSULTATION ISSUES

- ▶ A good EA clause
- ▶ Progressive change v. big event
- ▶ One change or many
- ▶ Clear and cohesive rationale
- ▶ Staff engagement
- ▶ Trigger points for consultation
- ▶ Contingency plan re extent and timing

WHAT'S NEXT?

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MARKET
LEADERS
IN HIGHER
EDUCATION

Clayton Utz

+30 years
experience advising
the Australian
Higher Education
sector

Questions?



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