HR RESPONSE TO
OUTSIDE WORK AND PRIVACY: LEGAL ISSUES
For Staff Consultative Group

Background

The outside work clause was hotly negotiated in the last round of bargaining and the words and intent were considered at length and through a number of iterations. This included a number of discussions in staff fora as well as in the bargaining room. The policy was also developed during the bargaining process and one of the conditions of bargaining was that this policy and a limited number of other policies were agreed in advance of finalising the agreement.

The form of words were drafted with the help of formal legal advice and assistance which in included checks on both allowable matters and prohibited content. Clause 4.12 of the Macquarie University Enterprise Agreement 2006-2009 was agreed by all parties the NTEU, the CPSU, the staff representatives and the University. It was also voted on by staff.

Response

I did not obtain formal legal advice in regard to this matter.

I recognise that *the Outside and Personal Leave Working Party* raised issues about the extent of the EA 4.12 Outside Work clause and its interaction with state and federal law. I note however that neither HR or the VC's office have received a single complaint from an individual about the policy actually being to onerous to comply with or that the execution of the policy has invaded their privacy or has in any other way been heavy handed in the 18 months since the implementation of the agreement. In particular no staff have indicated they have needed to in significant additional work let alone engage an accountant to check if they have a conflict of interest.

1. EA 4.12 Outside Work

I note the concerns about the breadth and range of the potential applications of terms "Monetary Activity and "Conflict of Interest" in the EA. Neither the SCG nor the University can change the clause. The only way these clauses can be changed is by re-bargaining them. I will address this issue in response to the recommendations.

I note the identified inconsistencies in content and relative seriousness between items in the Code of Conduct and the EA including: satisfactory performance, misuse of resources, research data collection, vicarious liability and 'Monetary Activity' in outside work is omitted.

Following the release of the Macquarie University Ethics Statement we are reviewing the Code of Conduct. We will of course be discussing the draft with the SCG. The review will include a check of consistency with other MQ documents including the EA and the university Privacy Code of Practiced and policies as well as considerations of breadth.

2. 'Prohibited content'

As mentioned the University has not obtained specific advice but did gain general advice at the time of bargaining. Our view is the clause does not constitute prohibited content. Our overall view is that issues of conflict of interest directly relate to the employment relationship.

3. The Code of Conduct

We note your view that the Code, being still in operation, is therefore an indication that the breadth of EA 4.12 is not necessary, we disagree as we see the Enterprise Agreement as a more enforceable instrument and that scope is appropriate.

4. The *Privacy and Personal Information Protection Act 1998* (NSW)

We have different interpretation and believe the information collected is relevant to and the University's activities.

While we are willing for this view to be tested, no complaints against the University have been received in this regard by the University the Privacy Commissioner, or the Ombudsman.

6. The Code of Conduct and PPIPA

The University's *Code of Conduct* also appears to conform to PPIPA.[1]

7-9. The EA, the WRA and PPIPA

We note the Rudd Government is replacing the Workplace Relations Act (WRA). Any test will need to be against its replacement.

Our view is the EA has the force of Commonwealth law.

10. PPIPA and the *Privacy Act 1988* (Cth)

Again we have different interpretation and believe the information collected is relevant to the University's activities and the information is necessary for one or more of its functions or activities.

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We note the EA 4.12 says nothing about access to information collected—nor does it spell out any consequences of non-compliance. I will raise these issues with the University Counsel and see whether we can state these requirements satisfactorily in associated policy.

Individuals necessarily give consent to the collection of 'sensitive information', in relation to outside work and conflict of interest – they supply it.

11. What should be done?

We have considered what action should be taken.

A. Varying the EA

We agree there are substantive problems with seeking variation of such an agreement. The major one is that any party to the agreement may see the occasion as an opportunity to seek further variations or even simply protracted debate and negotiation on this issue.

B. Business as was usual

We agree the EA should be fully implemented, so far as may be feasible.

We also agree it is wise to proceed upon the ground that the EA is secure.

12. Recommendations

I'm not sure that recommendations of the SCG should be subject to CPSU and NTEU consent. It is a body constituted to directly consult with the University in its own right. In any regard, the university has the following responses to the recommendations:

Recommendation 1

The University will review and revise the Code of Conduct in the light of the inconsistencies identified and the ethics project, and consult with the SCG on the proposed redraft;

Recommendations 2 &3.

2 apply EA 4.12.9 as if the expression 'may arise' were 'is likely to arise'; and

3 apply EA 4.12.7-8 with an understanding that 'potential' refers not to mere possibility but to likelihood.

My understanding is the university is bound to interpret and apply the words of the enterprise in their normal meaning as written and certified. Otherwise the university could decide to apply any expression as it chooses. In the most extreme we could choose to treat "will apply" in the salary increases clause to "might apply". Again having said this, in practice the University's application of these clauses has not generated a concrete issue of either undue workload or invasion of privacy.

I recognise that these words cause some concern and I'm in no doubt that they will almost certainly become the issue of bargaining in the next round. I

welcome that debate at a time when we have the legal and practical ability to change these words.