



FAIR WORK
AUSTRALIA

DECISION

Fair Work Act 2009

s.739 - Application to deal with a dispute

National Tertiary Education Industry Union

v

Victoria University and the Council of Victoria University

(C2010/4773)

SENIOR DEPUTY PRESIDENT DRAKE

SYDNEY, 8 APRIL 2011

Alleged dispute about any matters arising under the enterprise agreement and the NES;[s186(6)] .

[1] This decision arises from an application lodged by the National Tertiary Education Industry Union (NTEU) pursuant to the Dispute Resolution Procedure in clause 63 of the *Victoria University (Academic & General Staff) Enterprise Agreement 2009* (the Agreement), to have a dispute resolution process conducted by Fair Work Australia (FWA).

[2] Clause 63 is set out below:

“63 Dispute Settling Procedures

63.1 It is agreed that the University and all of its staff members have an interest in the proper application of this Agreement, and in minimising and settling disputes about matters arising under this Agreement and the National employment Standards in a timely manner.

63.2 To facilitate their timely resolution, disputes about matters arising under this Agreement or relating to the National Employment Standards will, as far as is practicable, be raised and resolved at their source, therefore:

63.2.1 In the first instance the affected staff member(s) should discuss the matter with the relevant Supervisor,

63.2.2 where the dispute is not resolved under sub-clause 63.2.1, the affected staff member(s) may request further discussions with the Director Human Resources for resolution. If no such request is made within five working days of the discussions under sub-clause 63.2.1, the matter will be deemed to have been resolved, unless it is agreed to extend the time for discussions. Where a meeting is requested, it will be convened within five working days of the request or at such later time as the parties may agree.

63.2.3 An employee may be represented in these procedures by the Union or by a Representative.

63.3 The University or the Union may also initiate a dispute regarding matter(s) arising under this Agreement by providing written advice detailing the particulars and circumstances upon which the dispute is based. The dispute will be progressed by direct discussions between officials of the Union and senior officers of the University, rather than under the process in sub-clause 63.2

63.4 Until the procedures described in sub-clauses 63.2, or 63.3 (as applicable) have been exhausted:

63.4.1 work shall continue in the normal manner;

63.4.2 no industrial action shall be taken by either party to the dispute or any party bound by this Agreement;

63.4.3 the University shall not change the work, staffing or the organisation of the work if such is the subject of dispute, nor take any action likely to exacerbate the dispute; and

63.4.4 the subject matter of the dispute shall not be taken to Fair Work Australia by the parties to the dispute.

63.5 If the dispute remains unresolved either party to the dispute may refer the matter to Fair Work Australia. If no party to the dispute refers the matter to Fair Work Australia within ten working days of concluding the discussions referred to under sub-clause 63.2 or 63.3, the matter will be deemed to have been resolved, unless the parties agree to extend the time for discussions.

63.6 Fair Work Australia may exercise any method of dispute resolution permitted by the Act and any recommendation, decision or order of Fair Work Australia will be binding on all parties covered by this Agreement.

63.7 Nothing in this clause prevents the parties to the dispute from agreeing to refer an unresolved dispute to a person or body other than Fair Work Australia for resolution. Any decision or recommendation of the Third Party shall be binding on all parties covered by this Agreement.

63.8 workplace grievances will be addressed using the process set out in Schedule 6.”

[3] Mr Joseph D’Abaco of Counsel, instructed by Clayton Utz solicitors, appeared at the hearing of this dispute on 18 October 2010 and 8 November 2010 in Melbourne on behalf of the Victoria University (the University) and the Council of Victoria University (the Council of the University). The NTEU was represented by its Industrial Officer Ms Linda Gale. The University’s final submissions were received on 6 January 2011.

[4] The member, who the NTEU submitted had been and still is affected by organisational changes which the NTEU submitted have not been the subject of appropriate consultation as required by clause 70 of the Agreement, is Dr Steven Stern, the University General Counsel.

[5] The University submitted that FWA only has the power “-----to determine disputes about matters which ‘arise under’ the Agreement and in relation to the National Employment Standards” pursuant to s186(6) and s738(b) of the Fair Work Act 2009¹ and also, that FWA does not have the jurisdiction to determine this application as there had not been any organisational change in this case within the ambit of clause 70 of the Agreement.² For this clause to apply, **the University submitted that there has to be a “major change proposal”**.³

(my emphasis)

[6] In this case I am satisfied that there is a dispute about a matter that arises under the Agreement. The parties are in dispute about whether or not clause 70 applies or has been appropriately applied. I am satisfied that the relevant steps of the dispute settlement procedure have been followed in respect of this disputed matter. It was not disputed by the parties that the workplace level steps had been followed which then enabled conciliation to take place. Conciliation having failed the matter can be arbitrated under the dispute settlement clause of the Agreement.

[7] I am persuaded by the submissions of Mr D’Abaco that the proper respondent to this application is the University and not the Council of Victoria University.

[8] I now have to determine whether or not there has been organisational change as contemplated by a clause 70 of the Agreement and, if so, whether there has been consultation as contemplated by the Agreement.

[9] The NTEU contended that “organisational change” had been implemented by the University without compliance with clause 70 of the Agreement.

[10] Ms Gale did not call Dr Stern to give evidence. She advised that she intended to “-----rely on the evidence in the documents, including the subsequent correspondence from the University stating their position.”⁴

[11] Mr D’Abaco submitted that Ms Gale’s submissions could only be treated as assertions:

“----- In those circumstances, the Tribunal is entitled to draw the inference (in accordance with the well known principles in *Jones v Dunkel*) that his evidence would not have assisted the applicants and to take that into account in assessing the veracity of the assertions which could have been the subject of evidence by Dr Stern and which were made by the applicants.”⁵

[12] In reaching my findings of fact and determining issues in this application I have relied on the common documents before me and the evidence of the University. Adverse inferences **may** be found when a witness is not called. It is not mandatory. It is a matter to be determined on the facts in each case. In the circumstances of this case I have not drawn any adverse inference from Ms Gale's decision not to call Dr Stern to give evidence. The NTEU are entitled, without any adverse influence, to rely on the material submitted by the University to the Tribunal.

[13] Clause 70 of the Agreement is set out below:

“70 Organisational Change

70.1 Principles

70.1.1 Sound management of workplace change requires the timely consultation and involvement of the staff members who will be affected by the change and the NTEU. Such consultation is to provide affected staff members and the NTEU with a bona fide opportunity to influence the University in its decision making and explore alternatives and options aimed at mitigating any adverse consequences of such change.

70.1.2 Consultation does not necessarily mean that an agreement can be reached. If agreement cannot be reached the University will provide reasons in writing to affected staff and the NTEU.

70.1.3 Any outsourcing proposal that would have an impact on members of staff will be subject to the formal change management process prescribed in this clause.

70.1.4 The University will notify the NTEU where a decision to undertake a major change proposal affects staff in a work area.

70.1.5 Staff members may choose to be represented by the NTEU or another staff nominated representative in any discussions regarding workplace change.

70.2 Preliminary Consideration of Change

70.2.1 Prior to a decision being made to undertake major workplace change, the University will hold preliminary discussions with affected staff and the NTEU where such workplace change may significantly affect staff.

70.2.2 When preliminary discussions lead to the development of a specific change proposal, such discussions will involve all staff likely to be directly affected as soon as practicable. A staff member will be considered to be directly affected when the proposed change is likely to have an impact on that staff member's conditions of employment.

70.2.3 The parties accept that preliminary and/or informal discussions may lead to agreement. In such instances, the formal change management process will commence at the implementation stage as outlined under clause 70.4.

70.3 Formal Change Management Process

70.3.1 The formal change management process will apply where a specific major change proposal is made which is likely to lead to one or more of the following: significant changes to work practices; introduction of major new technological change; relocation of whole, or significant parts of, organisational areas; contracting out of functions currently performed by Victoria University staff members; restructuring of work areas, including impacts on job numbers, the elimination or diminution of job opportunities, promotion opportunities or job tenure; redundancy.

70.3.2 Where there is a specific major change proposal, the University will issue documentation setting out the change to directly affected staff and the NTEU. The documentation will include the extent and nature of the change proposal, reasons for making the change, the aim of the change, timeframe for change, the likely number, if any, of redundancies; and any relevant financial information.

70.3.3 Consultation

a) Staff members and the NTEU will be consulted in relation to the specific change proposal. Consultation will include: circulation of specific proposals for consideration; an opportunity for written responses, including alternatives from affected staff and the NTEU; meetings to discuss and examine the major change proposal and alternatives; and provision of relevant information related to the proposed change and its implementation. The University will respond in writing to matters raised in submissions from the NTEU and affected staff.

b) In the case of major change affecting an individual staff member, consultation will include relevant information and the opportunity to discuss the proposal with the staff member and, where he or she chooses, the NTEU or other staff nominated representative.

70.4 Implementation

Where the change proceeds, the University will consult and confer with affected staff and the NTEU to determine those measures to be adopted in order to implement that change, including means of avoiding or mitigating detrimental outcomes for the affected staff member(s).”

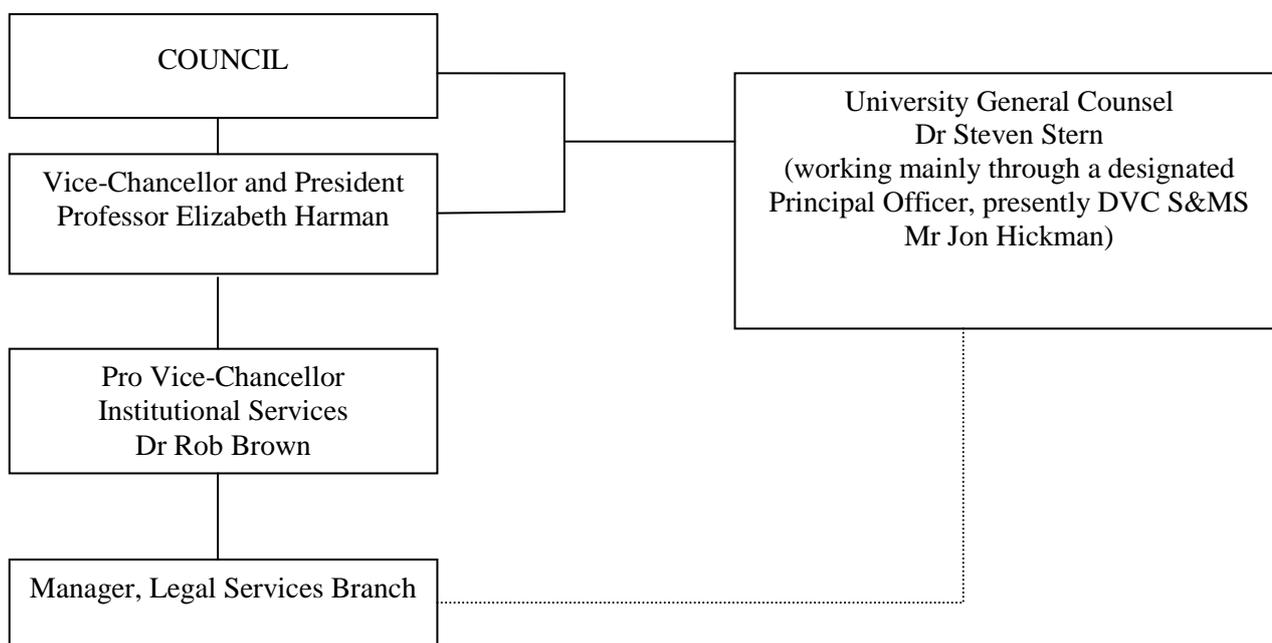
(my emphasis)

[14] Dr Stern was first employed by the University on 5 October 1992 as the University Solicitor.⁶ In late 1996 he became University General Counsel and University Secretary.

[15] In late 2007 there was a restructure of the Legal Services Division which was then managed by the University General Counsel. In that restructure a separate office of the University General Counsel was established.

[16] In March 2008 a position description was issued for the University General Counsel.⁷ The position description included an organisational chart which is set out below.

ORGANISATIONAL CHART



[17] At that time a new Compliance Services Directorate was established. A Director was appointed at the end of 2008. That Director is the current Director, Ms Natalina Velardi.

[18] Following her appointment Ms Velardi requested a list of files in the possession of Dr Stern. Dr Stern eventually provided that list although he identified confidentiality concerns related to the identity of the employees whose files were in his office. This arose from the confidential nature of the files. Dr Stern subsequently raised the possibility of a complaint concerning Ms Velardi's conduct to the Victorian solicitor's professional body. Dr Stern was concerned about a possible breach of professional privilege by the disclosure, by Ms Velardi to Deputy Vice Chancellor Hickman (DVC Hickman), of the identity of the complainants whose files were with Dr Stern.

[19] On 17 June 2009, arising out of these issues, the University stood Dr Stern down on full pay. This stand-down was the subject of a dispute lodged by the NTEU which was listed before Senior Deputy President Kaufman.⁸ The dispute was settled by negotiation. The terms on which Dr Stern would return to work were set out in a letter from Victorian Government Solicitors dated 22 October 2009. **There were no limitations on Dr Stern's previous duties included in the terms of the negotiated return to work.** The text of the letter is set out below:

“Dear Mr Farouque

Dr Steven Stern & Victoria University

We refer to our previous communications.

The University has received a medical report from Dr Anthony Sheehan in relation to Dr Stern's health. As agreed, we have forwarded a copy of the report to Dr Stern's medical practitioner.

In summary, Dr Sheehan states in his report that in his opinion, Dr Stern is fit for duty. Accordingly, we set out below the arrangements in relation to Dr Stern's return to work as General Counsel for the University.

Supervision/Reporting Lines

1. Dr Stern is to return to work on 4 November 2009. Initially, he should report directly to DVC Hickman in his office. DVC Hickman will brief him on any work matters requiring his urgent attention, in addition to informing him about any issues or developments which have arisen within Dr Stern's area of responsibility while he has been absent from work.

As agreed in previous correspondence, Dr Stern will, as part of his ordinary and ongoing reporting requirements, provide DVC Hickman with a fortnightly briefing on the progress of the various matters he is working on. In respect of matters which may be referred directly to Dr Stern by the Chancellor (including the current Acting Chancellor) or Vice Chancellor, Dr Stern will provide to DVC Hickman a general description of such matters in his fortnightly briefings.

Any concerns which Dr Stern may have regarding the performance or conduct of University staff will be reported directly to DVC Hickman. After seeking legal advice, where necessary, DVC Hickman will determine the appropriate course of action.

Liaison with Compliance Services Directorate

2. Dr Stern shall meet with a representative of the Compliance Services Directorate lawyers once every three weeks, together with the Director of the Compliance Services Directorate, for the purpose of exchanging information about respective current activities to ensure alignment of University activity. Dr Stern shall also meet with Compliance Services Directorate lawyers individually on an 'as required' basis.

Mentoring

3. The University has arranged for Mr Ron Beazley to provide mentoring to Dr Stern. Mr Beazley will meet with Dr Stern every month, as well as on an 'as needs' basis if Dr Stern requires it. The University will meet the costs of this mentoring. The University will arrange for Mr Beazley to contact Dr Stern after he returns to work, so arrangements can be made for the two to meet and discuss future mentoring.

Yours faithfully
Victorian Government Solicitor's Office

John Cain
Victorian Government Solicitor⁹

[20] During the period of Dr Stern's stand down from 17 June 2009 until 4 November 2009 Ms Natalina Velardi, the Director of Compliance Services, managed the University's legal affairs.

[21] A copy of Dr Stern's previous and current position descriptions were tendered at the hearing¹⁰ and were the subject of submissions by both Ms Gale and Mr D'Abaco in relation to the role of the University General Counsel.

[22] NTEU submitted that there have been changes to Dr Stern's role, duties and responsibilities since his return to work in late 2009, which constituted organisational change¹¹ and that the University had failed to comply with clause 70 of the Agreement in implementing this organisational change.

[23] Both parties acknowledged that changes had occurred in the manner in which the legal work of the University was managed whilst Dr Stern was absent from work between 17 June 2009 and 4 November 2009. The NTEU initiated this dispute when they received correspondence from the University stating that the changes to the office of University General Counsel were:

“... not inadvertent or related to Dr Stern's stand-down the previous year, but were **permanent changes the university had decided upon or in some cases stop-gap changes that had been put in place in anticipation of future reviews**”¹²

(my emphasis)

[24] The University acknowledged that the following changes had occurred:

- “a) Dr Stern, in providing advice to University Council Committees, is now required to provide that advice to DVC Hickman (his manager and direct report) rather than directly to the Chair of the relevant Council Committee;
- b) Dr Stern is no longer the sole University officer authorised to engage external lawyers;
- c) Rather than being assisted by a person with para legal qualifications, Dr Stern is assisted by an executive administrative assistant; and
- d) Dr Stern is no longer the Secretary of the Remuneration Committee.”¹³

[25] In addition to these changes the NTEU submitted that there had been changes to the requirement that Dr Stern provide overall legal direction to the work at the University¹⁴, his attendance at committee meetings,¹⁵ a restructuring of his own staffing arrangements and also in the department to which Dr Stern’s paralegal officer was moved, and an overall contraction of Dr Stern’s key duties and responsibilities as University General Counsel.

[26] The NTEU submitted that the changes introduced by the University are significant changes to work practices and involve the restructuring of work areas. Ms Gale relied on the organisational chart of the University which was attached to Dr Stern’s position description.¹⁶ She submitted that the office of the University General Counsel was an organisational unit of the University and also that the work and structure of his office impacts on the work practices of many other staff at the University.¹⁷ Ms Gale submitted that organisational change “----- **is not about major change, but about the sound management of workplace change, whether big or small**”.¹⁸

(my emphasis)

[27] In relation to the term “organisational change” and the application of clause 70 of the Agreement, Mr D’Abaco submitted the following:

“It’s a form of change which is contemplated. It’s variously referred to as workplace change; major workplace change; changed proposals; major changed proposals. We say in that context - and we’ll take your Honour in due course to a number of relevant decisions of the tribunal - **what the clause deals with is major workplace change of a nature which impacts upon the structure or organisation of, in this case, the university.**”¹⁹

(my emphasis)

[28] Deputy Vice Chancellor Hickman gave the following evidence in relation to the office of the University General Counsel:

“And why do you not characterise it as an organisational unit for the purposes of this matter?---The other organisational units that are referred to in the organisational chart involve a number of people and levels of management, and considerably larger numbers than in the university general counsel's office. The university general counsel's office is an advisory office rather than a management office.”²⁰

[29] In relation to the changes to Dr Stern's duties the University submitted that:

“----- These changes have been of an incremental and isolated nature and not part of any ‘major change proposal’ as required by clause 70 or, in particular, clause 70.3.1 of the Agreement. Nor have the changes led to any of the consequences contained in clause 70.3.1 of the Agreement.”²¹

[30] The University submitted that the changes did not constitute changes to work practices in the sense of having affected the functions of the University. They state that the changes are not significant and they are not a consequence of major change proposal. The University described the changes in relation to Dr Stern as follows:

“In the context of Dr Stern's overall duties and responsibilities, as contained in his Position Description dated March 2008, **the changes can hardly be considered to be important or notable. They are, at best, very much peripheral to his everyday duties and responsibilities.**”²²

(my emphasis)

[31] The NTEU sought the following relief:

“A direction that, in the absence of compliance with the provisions of clause 70, the employer desist from implementation of organisational change with respect to Dr Stern and restore the circumstances prior to the implementation of those changes, including:

1. Allow Dr Stern to perform his duties as University General Counsel as set out in his Position Description;
2. Reverse the directions restricting Dr Stern's contact with the Chairs of University Council Committees and Principal Officers and the direction preventing him from attending Council Committee meetings, and restoring him as Secretary to the Remuneration Committee;
3. Allow Dr Stern to provide professional direction of the University's legal affairs, such that appropriate legal matters be referred to him as required by his Position Description and that he not be excluded from such matters;
4. Reverse the arrangements which enable the engagement of external lawyers by the University without involving Dr Stern as University General Counsel;
5. Prompt appointment of a Para Legal Officer to assist Dr Stern in the discharge of his duties.”²³

[32] The University oppose this relief being granted and submit that:

“-----it is within jurisdiction and power for the Tribunal to express an opinion (and indeed, make findings) as to whether the actions of the University were in accordance with the provisions of clause 70 of the Agreement. **The Tribunal may make an order to resolve such a dispute which would have the effect that those clauses would be properly observed in respect of Dr Stern. But it is *not* open to the Tribunal to make orders of the nature sought by the applicants**, as in doing so, it would be going beyond the powers conferred upon it by the Agreement and the FW Act [Fair Work Act 2009].”²⁴

(my emphasis)

[33] The NTEU addressed the removal of the paralegal from the University General Counsel office to another area in the University as one of the factors constituting organisational change.²⁵ Ms Gale submitted at the hearing that the paralegal was not replaced by a “paralegal executive legal secretary”, but instead by a “-----general administrative officer without paralegal skills”.²⁶ Ms Gale stated that this change was “-----not a change to what Dr Stern is required to do. It is a change to his capacity to do that work to a professional standard.”²⁷

[34] Ms Gale further stated:

“----- We say that in a unit of two with a senior legal officer and a paralegal assistant, that change is quite significant - clearly significant - to the support role, and we say also significant to the work of Dr Stern.”²⁸

[35] The University insisted that the non replacement of a paralegal was not organisational change.

“(b) ----- There is no evidence that Dr Stern’s ability to discharge his duties and responsibilities has in any way been affected or impeded by the replacement of the paralegal employee with an experienced administrative assistant.

(d) Dr Stern’s Position Description makes no reference to the provision of a dedicated paralegal to the position of University General Counsel”²⁹

[36] I questioned DVC Hickman regarding issue:

“So you could have a temporary paralegal as easily as you could have a temporary administrative officer, could you not?---We could have, but the consideration was that the person who was acting in the role was well acquainted with university processes, protocols and had good working relationships with others. Somebody coming in would have had to have established a new suite of relationships.

I don't understand the decision not to provide the existing support level in terms of a paralegal. There's a vast difference between a paralegal, who I understand mostly

have research skills and other skills, and a secretarial person. **Did you make some decision that that support was unnecessary?---I wasn't convinced, given that there wasn't a need for that position, with paralegal skills** - I felt that the advantages of having somebody familiar with the university's modus operandi warranted the appointment of the current temporary person to that role...³⁰

(my emphasis)

[37] Ms Gale submitted that the next change was in relation to the power of the University General Counsel to appoint external lawyers, which is one of Dr Stern's responsibilities identified in his position description.³¹ Since Dr Stern's return to work Ms Velardi, the Director of Compliance Services, has shared this responsibility. Ms Gale made the following remarks to this change:

“The change affects two key elements of one of Dr Stern's major duties: both his oversight responsibility for retaining and engaging external lawyers and his capacity to monitor their performance and cost-effectiveness. -----”³²

[38] In relation to the power Dr Stern possesses to appoint external lawyers, the University made the following statement:

“(a) In accordance with University policy, and his Position Description, Dr Stern has the authority to engage external lawyers. There has been no change to Dr Stern's authority - he can still engage external lawyers.”³³

[39] The University submitted that the only change in this area has been to authorise the Director of Compliance Services to also engage external lawyers, which the University submits is not “organisational change” for the purposes of clause 70 of the Agreement.

[40] In a letter from Professor Linda Rosenman to Dr Stern's representatives dated 19 February 2010, she stated:

“**Regarding the engagement of external lawyers, there has been a change in University Policy.** Changes to the policy were designed firstly, to enable the Director of Compliance Services who has day to day knowledge of issues and work-flows in the Compliance Services Directorate, to engage external lawyers in accord with the Directorate's business needs and secondly, to enable the Vice-Chancellor and Deputy Vice-Chancellor (capital and management services) to engage external lawyers directly, when required. **The reasons for these changes were explained to Dr Stern by Deputy Vice-Chancellor Hickman at the time the changes to the policy were promulgated.**”³⁴

(my emphasis)

[41] Deputy Vice Chancellor Hickman's evidence was:

“-----Firstly, in relation to the authority to engage legal external lawyers, what is the foundation for the university position in relation to who can authorise that?---There is the university policy on the engagement of external lawyers.

And in the past what was that policy?---The policy had been that Dr Stern could - the university general counsel has the responsibility for engaging external lawyers.

When did that policy change?---Toward the end of 2009. The change reflected the fact that during Dr Stern's absence, Natalina Velardi as director of compliance services had been engaging external lawyers to the extent that that was necessary. Natalina had the day-to-day understanding of pressures in the legal services branch and was best placed to determine whether external advice should be sought in relation to matters that came within the ambit of the university's solicitors. The change was a change in university policy and I note that at page 4 of 8 under Major Changes/Freedom to Act, the position description - that position operates within the university's policies, procedures and guidelines, so this was a change in policy.

At the time when the change was put into place, were there any discussions held with Dr Stern in relation to the change?---**I discussed the change with Dr Stern, but it was not a discussion about whether there would be a change. It was, I guess, advice to Dr Stern that the change was imminent or had in fact been signed off, and I advised Dr Stern of the reasons for that change.**

And has there been any change to the ability of Dr Stern to engage external lawyers?--
-No.³⁵

(my emphasis)

[42] Professor Rosenman described the change in the overall direction of legal work at the University as follows:

“Since the establishment of the Compliance Services Directorate, these professional legal staff have demonstrated that they are able to manage most of the legal issues facing the University **without the need for direction from the University General Counsel.**”³⁶

(my emphasis)

[43] Ms Gale asserted at the hearing that this undermined one of Dr Stern’s major responsibilities which is to provide effective professional direction of the University’s legal affairs. The NTEU submitted this hinders his ability to “----- perform his role of managing legal risk and advising on legal risk”.³⁷

[44] The University submitted that organisational change has not taken place merely because **principal officers can now seek advice from lawyers in the Compliance Services Directorate rather than from Dr Stern:**

“-----

(b) The Position Description which has applied to Dr Stern’s position since March 2008 does not require that principal officers seek the advice or assistance of the University General Counsel. Rather, Dr Stern is available as a resource to those officers; it is a matter for the officers to determine whether they wish to seek the

advice and assistance of the University General Counsel, or instead other lawyers in the compliance services directorate.”³⁸

(my emphasis)

[45] Deputy Vice Chancellor Hickman gave evidence at the hearing that there has not been any direction from the University restricting Dr Stern’s contact with principal officers.³⁹

[46] In relation to the direct reporting to University Council and Chairs of University Committees, the NTEU referred the Tribunal to the following statement in Dr Stern’s position description:

“The University General Counsel exercises these responsibilities mainly by working through a Principal Officer designated by the Vice-Chancellor.”⁴⁰

[47] It was NTEU’s submission that the responsibilities encompassed by Dr Stern are mainly, but not exclusively, exercised through the Vice Chancellor, who is currently DVC Hickman.⁴¹

[48] Professor Rosenman responded as follows:

“Dr Stern is still able to review Council and Committee papers prior to meetings and advises the Deputy Vice-Chancellor, Capital and Management services) in relation to matters arising from those papers. Liaison with Committee Chairs, if required, is managed through the Deputy Vice-Chancellor. Dr Stern is thus well able to exercise his role in relation to matters going to Council and its Committees, but now does this through the Deputy Vice-Chancellor.”⁴²

[49] Deputy Vice Chancellor Hickman gave the following evidence in cross-examination:

“MS GALE: Who made the decision that Dr Stern should no longer report directly to counsel committee chairs?---The vice-chancellor in discussion with myself.

Has the university council itself made any decision to that effect?---I don't know that it's a matter that comes within the ambit of the university council. **It's an organisational matter that is within the purview of the vice-chancellor.**”⁴³

(my emphasis)

[50] As this appeared to be an unusual arrangement in relation to professional advice I also sought clarification on this matter:

“THE SENIOR DEPUTY PRESIDENT: Whose plan was this, to do this? To go to a situation where you are between the chair and Dr Stern?---It was the vice-chancellor's decision.

It seems an odd arrangement to me, if you excuse me saying so - - -?
---Because - - -

To have a non-lawyer filtering a lawyer's advice, between the lawyer and the recipient of the advice, which is the chair of committee?---I think the vice-chancellor probably trusts my judgment, your Honour, as to - - -

Yes, but it's legal advice. I mean, I don't mean to - this is not a criticism. You're not a lawyer. This is legal advice and somehow you're the filter between making a judgment about what is appropriate to go to the chair, when the chair is supposed to be getting the advice and exercising that-----.”⁴⁴

...

“SENIOR DEPUTY PRESIDENT: ----- What was it that caused you to decide to have Dr Stern report to you instead of directly to the committees to provide, as he had in the past, his legal advice directly to the committees instead of now to you?---**The advice that was going forward from Dr Stern was not often discussed with the university management prior to Dr Stern - it was often, in my view and I think in the view of others, poorly expressed. It was often not given in knowledge of all the relevant issues that were appropriate for consideration into the matter.**

This is not a matter that you'd attended to or dealt with prior to standing him down and him returning, is it?---I dealt with it in relation to a submission that Dr Stern made to the director of the audit and risk committee in June, which was a long and lengthy submission to the chair which was ultimately referred by the chair back to the vice chancellor, and the vice chancellor referred it back to me. It was of concern I think to the vice chancellor and to myself that such a piece of advice could go forward without the knowledge of the university management.”⁴⁵

(my emphasis)

[51] The NTEU submitted that this is a clear change in the reporting role of Dr Stern. Ms Gale also cross-examined DVC Hickman on the issue of him passing Dr Stern's reports on to committees:

“Of those reports how many have you felt the need to amend prior to passing them on to the relevant committee?--- I haven't amended any of Dr Stern's reports and I haven't passed them on to committees as a matter of course.

You haven't passed them on to committee?---That's correct.”⁴⁶

[52] In relation to the reporting relationship to University Council and Council Committees it was the evidence of DVC Hickman that Dr Stern continues to attend all meetings of the University Council.⁴⁷ The University submitted the following:

“(a) The University acknowledges that since November 2009, there has been a change to the manner in which Dr Stern provides advice to the Chairs of Council Committees. Rather than providing that advice directly to the Chairs (as was the case prior to November 2009), he has been required to provide that advice (at first instance) to his supervisor, DVC Hickman. While this is a change in practice, it is clearly contemplated in Dr Stern’s Position Description, which provides that he shall exercise his responsibilities ‘mainly by working through a Principal Officer designated by the Vice-Chancellor (presently the Deputy Vice Chancellor (Capital and Management Services))’.”⁴⁸

(my emphasis)

[53] Ms Gale submitted at the hearing that Dr Stern has not been invited to attend any meeting of a Committee since his return to work. She submitted that this was a significant change to the role of a University General Counsel.⁴⁹ She put this proposition to DVC Hickman:

“Well again I put it to you that Dr Stern has not actually attended a single council committee meeting since his return to work in 2009; you don't have any reason to believe he has?---I don't have any contrary knowledge.”⁵⁰

[54] In relation to Dr Stern having been removed from the role of Secretary to the Remuneration Committee, a position which he held since its inception in 1996,⁵¹ Ms Gale submitted:

“Dr Stern was verbally advised after his return to work that that change was a permanent change and he would not be restored to the role of secretary to the remuneration committee. We say that the changes in Dr Stern's role and the performance of his work - those changes have been implemented and the fact of those changes is acknowledged in Prof Rosenman's letter.”⁵²

[55] The University submitted that there is no reference in Dr Stern’s position description to him having this responsibility.

“(b)----- after he [Dr Stern] was stood down, the Secretary to the University Council was appointed to the position and the University has decided to continue with that appointment as it is satisfied with the performance of the person who replaced Dr Stern.”⁵³

[56] In summary Ms Gale submitted that the University has implemented significant changes to the role of the University General Counsel and that there has been no consultation with Dr Stern or the NTEU in relation to these changes. She submitted:

“-----At best, they assert that they have advised Dr Stern of changes at the time those changes had been implemented or after the time that those changes had been implemented”.⁵⁴

[57] The University submitted that at the time of the changes, it had consulted with Dr Stern, which included explaining to him the reasons for the changes.⁵⁵

[58] In regard to this issue of consultation DVC Hickman gave the following evidence:

“MS GALE: Mr Hickman, **was Dr Stern consulted** about the development of this policy, the change in 2009?---**Dr Stern was informed that the policy would - had been changed.** The processes - the - in the period leading up to the change in policy Dr Stern had been absent from the workplace for four or five months. During that period the director of compliance services had managed the university's legal affairs. The director of compliance services was acquainted with the workload that her lawyers had and the - in discussion with the vice-chancellor it was agreed that in that circumstance the director of compliance services as well as the university general counsel might have responsibility for the engagement of external lawyers.

THE SENIOR DEPUTY PRESIDENT: Where had Dr Stern been for this particular few months?

MS GALE: Dr Stern had been stood down.

THE SENIOR DEPUTY PRESIDENT: That's the period of his being stood down.

MS GALE: He returned to work on 4 November, I believe.”⁵⁶

(my emphasis)

[59] The first issue to be determined by me is whether these changes constitute organisational change as contemplated by clause 70 of the Agreement. This term is not defined in the enterprise agreement. The second issue to be determined is whether there was consultation.

[60] I find that the changes implemented by the University to the work of the University General Council were:

- A change in the manner by which the University General Council provided advice to the University Council and Committee Chairs, in that the University General Council was required to provide his advice through DVC Hickman. This became a filtering process. The advice of the University General Council was considered by DVC Hickman, who is not himself a lawyer. A judgement about the necessity and relevance of that advice was then made by DVC Hickman before its provision to the various Chairs and Committees and the Council.
- The University General Council no longer had exclusive capacity to decide whether or not to engage and brief external lawyers. This responsibility was thereafter divided between himself and the Director of Compliance Services.

- The University General Counsel was replaced as Secretary of the Remuneration Committee in his absence and not returned to that position on his return to work.
- The University General Counsel's support person was changed from one who was a "para legal" to one who was an administrative assistant with extensive University work experience.

[61] The role of Secretary of the Remuneration Committee is not part and parcel of the University General Counsel's position. It does not involve an organisational change - major or otherwise - to appoint a different person to this position. However, what is clear is that it was not in the spirit of the terms of settlement of the dispute before Senior Deputy President Kaufman that such a role of significant standing would remain with the person who had filled it during Dr Stern's leave, no matter how satisfactorily they had performed the role.

[62] I have considered DVC Hickman's evidence concerning the replacement of Dr Stern's paralegal with an administrative assistant with University experience. I am not persuaded there was any justification for this change which necessarily involved a reduction in support for Dr Stern and a consequent effect on his ability to deliver outcomes. I can only wonder at the motivation for this change. However, the fact that the transfer of Dr Stern's paralegal meant that this employee was transferred to another area does not make it a change that amounts to organisational change within the contemplation of clause 70. It is simply the movement of one staff member.

[63] I have determined that the first two of these changes constituted organisational change either together or considered separately. As a result of these organisational changes I am satisfied that Dr Stern's overall contact with the senior management of the University was downgraded and therefore, his opportunity to deliver overall legal direction to the University was and continues to be diminished. I am satisfied that the first change at least was a deliberate one aimed at dealing with perceived difficulties with Dr Stern's performance.

[64] I do not accept that these changes were peripheral to Dr Stern's everyday duties. They were changes to Dr Stern's core responsibilities and therefore to the Office of the University General Counsel. It is not a peripheral matter to share or split Dr Stern's existing responsibilities for external briefs between the office managed by Ms Velardi and Dr Stern's office. Whilst Dr Stern still retains a joint responsibility for engaging external lawyers the number of occasions on which he exercises that responsibility is reduced. This also results in an equivalent reduction in the supervisory and instructing work that flows from the exercise of that responsibility. This is not a minor matter. Dr Stern is a senior professional who has been employed for a very long time. These changes are a direct reflection on his present work and standing.

[65] The changes led to a reduction in the demand for direction from Dr Stern in general and in particular in the quantum of direct advice provided by Dr Stern to principal officers of the University.

[66] Deciding what matters can be conducted by the considerable legal resources of the University's internal legal department, and what matters might require legal assistance from external lawyers, is a significant responsibility. There are equally significant consequences from these decisions in terms of the range of legal outcomes for the University and, not least, the financial outcomes and consequent budgetary obligations of the University as a whole.

[67] Clause 70.3.1 states that “a formal change management process” shall apply “where a specific major change proposal” is likely to lead to significant changes which are then defined. The defined significant changes in my view give an understanding of the sort of organisational changes which can be regarded as major changes. If a proposed change is likely to lead to the significant changes defined in this sub-clause then they are likely to be properly regarded as major change proposals. I am fortified in this view by the fact that it is commonplace in Awards and Agreements for consultation procedures to be linked to the concept of significant or major change and such changes are distinguished by the likely consequences of the change on employees.

[68] For a change to be a major change it must also be of significance to the employer. This is a matter that must be determined on the facts of each case. In *National Tertiary Education Industry Union and University of Adelaide*⁵⁷ Senior Deputy President Duncan determined that a particular change to the Humanities and Social Sciences Department at the University of Adelaide was not a significant change and thereby concluded that it was not a change contemplated by the particular clause in that Agreement. Deputy President Hamilton also discussed the meaning of organisational change in a decision in *Austin Health and Health Services Union*⁵⁸. In determining that application the Deputy President determined that the extent of the change involved at Austin Health was limited and did not amount to organisational change. Both of these decisions turned on the facts of the particular case.

[69] I am satisfied that there have been significant changes implemented from November 2009 which amounted to a major change proposal affecting the work practices of the Office of the University General Counsel and the Office of the Legal Services Branch. I am satisfied that both of these offices are separate organisational units of the University and that they became separate organisational units from the time that Ms Velardi was appointed as Director. The organisational 2009 change involved a relocation and/or downgrading of a significant proportion of the University General Counsel’s duties and responsibilities.

[70] I am satisfied that the changes are “significant changes to work practices” and also involve “restructuring of work areas.” These are two examples of organisational change which require a formal change management process in clause 70.3.1.

[71] These changes appear to me to be an organisational change which also amounts to performance management. Dr Stern would, in addition to having a complaint about these matters arising from the University’s failure to comply with clause 70, have a legitimate grievance about the imposition of all of these changes which attempt to limit the range of his work. DVC Hickman is quite open about what he considers to be shortcomings in Dr Stern’s written communications. The cure for this perceived difficulty is the imposition of DVC Hickman’s filtering or censorship of Dr Stern’s work.

[72] I was not persuaded by DVC Hickman’s reasoning that the different units of the University can be distinguished by way of function or size. Whether a unit is advisory rather than managerial is irrelevant. The function of various organisational units within the University can and do vary significantly. Their function does not affect their independent existence as separate organisational units nor, in my opinion, does their size necessarily determine the matter.

[73] The University suggested that an example of a major change proposal is the Integrated Services Project (ISP). This is obviously correct but the application of the ISP is not in dispute before me. Consultation will be necessary in relation to the ISP but the necessity for that particular consultation does not mean that consultation in relation to the changes identified by Dr Stern were not also necessary.

[74] When Dr Stern returned to work in November 2009 he was supposed to be briefed on work areas requiring his attention and to be informed about issues and developments during his absence. There is nothing in the arrangements outlined in the correspondence setting out the terms of the settlement of the dispute before Senior Deputy President Kaufman that indicated that the manner in which Dr Stern performed his work would be subject to alteration. The process required an exchange of information regarding progress related to pre-existing duties not post dated information about the changes to his duties and responsibilities imposed during his absence, significant or otherwise.

[75] Compliance with the principle in clause 70.1.1 requires consultation which must precede any decision to implement relevant changes. Post change notification is not consultation. The correspondence of Professor Linda Rosenman (Acting Vice Chancellor) of 19 February 2010,⁵⁹ and the evidence of DVC Hickman, make it clear that the changes implemented in Dr Stern's absence were permanent. The University was satisfied with the way in which the changes it had implemented worked. They did not consult with Dr Stern about the development of their change proposals or the implementation of those changes during the period of his absence and they had no intention of consulting about whether those changes should continue.

[76] I have concluded that there had not been any timely consultation with, or involvement of, Dr Stern or the NTEU in the decision making process engaged in by the University which produced the changes which I have already found amounted to organisational change. I am also satisfied that the consultation requirements in clause 70.1, 70.2 and 70.3 have not been complied with. The actions of the University have not been in compliance with these provisions.

[77] I have made my findings concerning breach of the Agreement and I now have to consider what remedy, if any, should arise.

[78] I am persuaded by the arguments of the University that some of the remedies sought by the NTEU are not available to them.

[79] I make an order requiring the University to now properly observe the requirements of clause 70 in respect to those matters I have identified in this decision as organisational changes that come within the scope of clause 70 of the Agreement. This is an order that in effect means that the University must treat those changes already in place as if they were proposed changes and undertake consultation in respect to the continuance of those changes in accordance with the requirements of clause 70. The University must be open to a final decision at the end of that consultation process which could include the matters raised by the NTEU in its proposed orders. The NTEU must have a bona fide opportunity to influence the University in its decision making and explore alternatives and options aimed at mitigating any adverse consequence of such change.

[80] I do not believe that it is appropriate for me to make Orders about the specific organisational arrangements which should apply during the period of consultation about the proposed changes. The orders which I could make about this matter would be limited in any case. In the circumstances of this case I have concluded that the imposition of such orders as I could make would not assist in the resolution of the dispute. The resources of the parties and of the Tribunal would be better spent on resolution of the substance of the dispute. The parties should engage in a bona fide process of consultation about the proposed changes in accordance with clause 70.

[81] I strongly recommend to the parties that further conferences take place as soon as possible. It is clear from the evidence of DVC Hickman that there are matters which ought to be discussed. The process which has been engaged in by the University in relation to Dr Stern and the concerns which DVC Hickman has outlined require attention, not avoidance. It is in the interests of both parties that these matters be addressed. If requested I will arrange a conference for this purpose either before myself or another Member as appropriate in relation to these issues.

SENIOR DEPUTY PRESIDENT

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¹ Exhibit Victoria University 5 - paragraph 5.

² Transcript 18 October 2010 - PN373

³ Exhibit Victoria University 5 - paragraph 14.

⁴ Transcript 18 October 2010 - PN196.

⁵ Exhibit Victoria University 5 - paragraph 27.

⁶ Transcript 18 October 2010 - PN9

⁷ Exhibit NTEU1 - page 6 - 16

⁸ C2009/89 - 10 July 2009

⁹ Exhibit NTEU1 - Tab 6

¹⁰ Exhibit Victoria University 1.

¹¹ Transcript 18 October 2010 - PN7.

¹² Transcript 18 October 2010 - PN 218. Exhibit NTEU1 page 33 - Letter to Dr Stern from Professor Rosenman

¹³ Exhibit Victoria University 5 - paragraph 16.

¹⁴ Transcript 18 October 2010 - PN265.

¹⁵ Transcript 18 October 2010 - PN294.

¹⁶ Exhibit NTEU 1 - page 16

¹⁷ Transcript 18 October 2010 - PN145 and 153.

- ¹⁸ Transcript 18 October 2010 - PN12.
- ¹⁹ Transcript 18 October 2010 - PN372.
- ²⁰ Transcript 18 October 2010 - PN383.
- ²¹ Exhibit Victoria University 5 - paragraph 16.
- ²² Exhibit Victoria University 5 - paragraph 20.
- ²³ Application for FWA to deal with a dispute - Paragraph 7.
- ²⁴ Exhibit Victoria University 5 - paragraph 49.
- ²⁵ Transcript 18 October 2010 - PN8.
- ²⁶ Transcript 18 October 2010 - PN234.
- ²⁷ Transcript 18 October 2010 - PN243.
- ²⁸ Transcript 18 October 2010 - PN247.
- ²⁹ Exhibit Victoria University 5 - paragraph 30.
- ³⁰ Transcript 18 October 2010 - PN550 -551.
- ³¹ Exhibit Victoria University 1.
- ³² Transcript 18 October 2010 - PN258.
- ³³ Respondent's Outline of Submissions - paragraph 32.
- ³⁴ Exhibit NTEU1 page 34.
- ³⁵ Transcript 18 October 2010 - PN538 - 542.
- ³⁶ Exhibit NTEU 1.
- ³⁷ Transcript 18 October 2010 - PN275.
- ³⁸ Exhibit Victoria University 5 - paragraph 34.
- ³⁹ Transcript 18 October 2010 - PN526.
- ⁴⁰ Exhibit Victoria University 1.
- ⁴¹ Transcript 18 October 2010 - PN278.
- ⁴² Exhibit NTEU1 page 34.
- ⁴³ Transcript 8 November 2010 - PN 183 - 184.
- ⁴⁴ Transcript 8 November 2010 - PN274 - 277.
- ⁴⁵ Transcript 18 October 2010 - PN562 - 563.
- ⁴⁶ Transcript 8 November 2010 - PN 212 - 215.
- ⁴⁷ Transcript 18 October 2010 - PN515.
- ⁴⁸ Exhibit Victoria University 5 - paragraph 37.
- ⁴⁹ Transcript 18 October 2010 - PN294.
- ⁵⁰ Transcript 8 November 2010 - PN294.
- ⁵¹ Transcript 18 October 2010 - PN295.
- ⁵² Transcript 18 October 2010 - PN305.
- ⁵³ Exhibit Victoria University 5 - paragraph 39.
- ⁵⁴ Transcript 18 October 2010 - PN335.
- ⁵⁵ Exhibit Victoria University 5 - paragraph 41.
- ⁵⁶ Transcript 8 November 2010 - PN435 - 439.
- ⁵⁷ Print T2282 - 20 October 2000
- ⁵⁸ Print PR980507 31 January 2008 para 35 and 36
- ⁵⁹ Exhibit NTEU1 page 33 - Letter 19 February 2010 to Dr Stern from Professor Rosenman