National Tertiary Education Industry Union

NATIONAL TERTIARY EDUCATION UNION
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Committee Secretary
Senate Employment, Education and Workplace Relations Committee

Via email: ewer.sen@aph.gov.au

Dear Secretary

RE: FAIR WORK (AMENDMENT) BILL

Please find attached Submission to the current Inquiry.

NTEU welcomes the opportunity to make this Submission and we are happy for our Submission to be made public.

Yours sincerely

Grahame McCulloch
General Secretary
National Tertiary Education Union.

NATIONAL TERTIARY EDUCATION INDUSTRY UNION (NTEU)

Submission to Senate Education, Employment and Workplace Relations Inquiry into

Fair Work Amendment Bill 2012

November 2012

Overview:

The National Tertiary Education Union (NTEU) represents over 25,000 staff working in tertiary education in Australia, in sectors defined as Higher Education, Further Education and Vocational Education and Training (VET).

NTEU covers employers ranging from universities, TAFE institutions, other education providers and research institutes.

Our coverage includes a diverse range of workers, ranging from all general staff to academics, of whom we have exclusive coverage. These workers include world leading experts, academics across all disciplines, research staff, technicians, and university and institute trades and related staff.

NTEU members face a range of funding and industrial challenges, including:

- achieving a balance between teaching and the pursuit of research;
- large workloads;
- excessive hours of work; and
- job insecurity.

Given that some forms of employment within tertiary education are linked to limited or fixed term funding, NTEU members require scrutiny and vigilance in their employment arrangements. There are risks to job security and to the ability of many academics to maintain their intellectual freedom in the face of precarious employment.

These are key concerns for NTEU in the regulation of industrial arrangements.

The *Fair Work Amendment Bill 2012*:

NTEU has limited this Submission to issues of key significance to our industry.

However, we have taken the opportunity to support recommendations of the panel evaluating the Fair Work legislation, which have not been included in the Bill[1].

NTEU also submits some practical suggestions, based on our experience under the current legislation, which would assist in promoting the key Object of the legislation. We urge the Committee to consider these recommendations.

Contracts for a specified period or task

At Recommendation 39 of its Report, the Panel recommended amendment to s. 386 in respect to the definition of 'dismissed'. This was consistent with submission from NTEU to the Panel in February 2012, and as acknowledged by the Panel in their Report.[2]

Part of this section of the current legislation seeks to protect employees who may have been employed on contract, for a specified task, so that the employer can avoid their obligations under Part 3-2, Division 3 (Unfair Dismissal). As rightly pointed out by NTEU, there is a drafting error in this section as the clear intent of this part, s. 386 (3), has not been realised; as currently written, there is no link between *dismissal at the initiative of the employer* and this form of employment.

NTEU recommends that the following amendment be made to the Bill:

386 (3) Despite sub-sections (1) and (2) a person has been dismissed if:

a) The person was employed under a contract of the kind referred to in (2) (a); and

b) The employment has terminated at the end of the period, on the completion of the task, or at the end of the season; and

[1] *Towards more Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation,* Department of Education, Employment and Workplace Relation, [DEEWR], June 2012.

[2] See DEEWR, op.cit, page 218 and NTEU *Submission to the Fair Work Act Review Panel,* February, 2012.

c) A substantial purpose of the employment of the person under a contract of that kind is or was at the time of the person's employment, to avoid the employer's obligations under this Part, or under the Part 2-2 of the Act [the National Employment Standards].

This is an obvious drafting error which was recognised in the evaluation of the legislation, and which can and should be remedied via the current Bill.

Unfair Dismissal

NTEU supports the recommendation to extend timeframes for unfair dismissal applications to 21 days. In our view, this restores fair and reasonable access to Fair Work Australia, including time for consultation with representatives.

NTEU recommends a review of time required to lodge an application with the Court, **in the case of General Protection applications involving unfair dismissal,** once a certificate is issued or an interim injunction sought, in accordance with s. 371.

NTEU submits that it is reasonable to provide more time to parties making application to a Court, than to prepare for a conciliation conference. The applicant and their representative need reasonable time to consider:

- evidence required
- witnesses required
- preparation of affidavits
- possible discovery of documents and
- consultation with parties.

NTEU recommends that the Bill amend s. 371 (2) of the current legislation to substitute "28 days" where the sub-section currently states "14 days".

Reinstatement as the primary remedy for unfair dismissal.

The key Object of Part 3-2, Division 1 of the legislation (Unfair Dismissal), emphasises reinstatement as the primary remedy.

According to FWA figures, in 2011-12 around 1% of decisions of the tribunal in respect to unfair dismissal matters led to reinstatement. This figure rose to 3% for matters resulting in reinstatement and compensation.[3]

Granted, there is an emphasis on settling the vast majority of unfair dismissal applications via conciliation, and most do not result in agreement to reinstate.

Nevertheless, the NTEU submits that more needs to be done to strengthen the legislation around its stated primary remedy in respect of unfair dismissal.

If a review of case law is required to determine the common impediments to reinstatement, this should occur.

The NTEU recommends that s. 381 (c) of the legislation be amended to read:

381 (c) to provide a remedy of reinstatement if a dismissal is found to be unfair.

AND

that s. 390 (1) be amended to read:

390 When FWA may order remedy for unfair dismissal

(1) [FWA will order reinstatement unless there are exceptional circumstances] Subject to subsection (3), FWA will order a person's reinstatement, if:

(a) FWA is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and

(b) the person has been unfairly dismissed (see Division 3).

Enterprise Bargaining

There are several provisions in the legislation around bargaining which do not make practical sense to NTEU. These involve processes which are unclear and impede the parties from fulfilling the stated Object of the Act.

The first is the **"access period"** under Part 2-4, Division 4, s.180.

Sub-section 180 (4) defines the *access period* as 'the 7 day period ending immediately before the start of the voting process....'NTEU submits that the vagueness of *'immediately before the start'* could disadvantage some workers to be covered by an agreement. The 7

[3] *Fair Work Australia Annual Report,* 2011-12.

days may already include weekends, and the process could include varying factors such as access to shift workers and workers with limited levels of literacy. The 'period ending immediately before the start of voting process' could add up to 24 hours of arbitrary time which adds confusion and chance to the process. It is our view that an access period should be predictable and finite; all workers should have access to the agreement, relevant materials and an opportunity to vote for a period which has a defined beginning and end.[4]

NTEU submits that a period for consideration or activity should be a 'clear' period. The 7 days access period should therefore be a clear 7 days following the distribution of materials and notification of a vote for the agreement, and prior to any ballot closing.[5]

NTEU recommends that s. 180 (4) be amended to read:

(4) [Meaning of access period] The access period for a proposed enterprise agreement is 7 full and clear days prior to the day on which voting commences.

Scope Orders and Good Faith Bargaining

The *Fair Work Act* clearly enunciates the requirements for good faith bargaining (at s. 228) and the option of scope orders [s. 238].

However there is an anomaly in the legislation related to approval of agreements, and the interaction between good faith bargaining and scope orders which is confusing and unnecessary in our view.

Section 187 of the legislation includes additional requirements for approving an agreement.

Section 187 (2) states that:

> *(2) FWA must be satisfied that approving the agreement would not be inconsistent with or undermine good faith bargaining by one or more bargaining representatives for a proposed enterprise agreement, or an enterprise agreement, in relation to which a scope order is in operation.*

NTEU submits that the tribunal is required to consider good faith bargaining requirements in relation to *all* enterprise agreements it approves, as captured by Object 3 (f) of the Act.[6]

NTEU recommends that s. 187 (2) be deleted.

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[4] See *McKechnie Iron Foundry Pty Ltd,* [2010] FWA 3171, 19 April 2010.
[5] See *Acts Interpretation Act 1901,* sn 36 at Items 6 & 7
[6] See *Appeal by Philmac Pty Ltd*, [2011] FWAFB 2668, 5 May 2011