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NTEU Submission to the

Senate Education, Employment and Workplace Relations Committee

Inquiry into the Fair Work Bill 2008

Organisation: National Tertiary Education Industry Union

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1. About the NTEU

The National Tertiary Education Industry Union (NTEU) represents over 24,000 staff in tertiary education institutions around the country. Our members are academic staff employed in universities, and "general staff" employed in TAFE, universities and Adult Education.

NTEU represents the professional and industrial interests of its members through:

- improving and protecting conditions of employment through industrial negotiations at local, state and federal levels;
- promoting the work of universities and colleges and, in particular, their independence and integrity;
- defending the rights of academic staff to teach, research and disseminate knowledge without fear or reprisal, and to defend the professional standing of general staff members;
- working with other stakeholders to lobby for a strong, publicly funded tertiary education sector, and participating in relevant policy debates.

The working conditions of NTEU members are regulated overwhelmingly through federal awards and agreements.

NTEU welcomes the opportunity to make a Submission to the Inquiry.

2. The nature of these Submissions

These Submissions are selective rather than comprehensive and concentrate on matters of greatest concern to the interests of NTEU members.

NTEU supports the positions and concerns expressed by the ACTU. Specifically, the NTEU wishes to underline its support for the ACTU positions regarding the following issues:

- The repeal of the *Building and Construction Industry Improvement Act 2005*.
- The unenforceability of the "right-to-request" provisions regarding family-friendly working arrangements. The proposed terms of 739(2) and 740(2) send a clear signal to employers that of all employee entitlements, this is the one which the Parliament does not take seriously.
- Cooling-off periods. These provisions are unnecessary and entirely inconsistent with the principle that bargaining should be between the industrial parties subject only to the public safety considerations.
- Industrial Action and third parties. The retention of this provision means, in effect, there is no real right to take industrial action in sectors such as health or education.
- Industrial Action and Ministerial direction. This provision is not merely objectionable and unnecessary. It is also undemocratic. Given the history of industrial disputes in Australia and the responses of Governments to them, the powers to issue directions under 433(1) is open to egregious abuse. There appears to be nothing which would prevent the Minister from directing that a specified union or its officers not make any statements critical of the direction, or communicate with their members or hold meetings of members. These "police

state" powers should not be defended simply on the basis that the current Government will not abuse them.

- Confidential Information. The provisions of 228(1) (b), insofar as they exempt confidential information, render this sub-section virtually worthless. Information is "confidential" whenever a person or corporation has kept it secret and intends to continue keep it so. This means that an order can only relate to information which the employer is happy to share. The word "properly" should be inserted before "confidential" to give this sub-section something to do.

3. General Comments on the Bill

NTEU welcomes the Bill and urges the Senate to pass the Bill into law in sufficient time for it to operate from 1 July 2009. The urgency and importance of legislating is amplified by the *WorkChoices* regime, the continuation of which means that Australia currently has the most unfair labour laws in the OECD.

NTEU notes that the Government has substantially implemented the *Forward with Fairness* Policy which it took to the 2007 election. NTEU also notes in particular the failure of the Bill to give effect to that Policy in relation to the scope of the subject-matters of bargaining – for example in relation to right-of-entry and bargaining around claims for environmental sustainability.

At the time of the introduction of WorkChoices, NTEU and many other persons and organisations that made submissions asserted that that legislation should be assessed against the requirements of Australia's international obligations under those Conventions of the International Labour Organisation (ILO) to which Australia is a party.

NTEU believes that the Senate should also in the case of the Fair Work Bill ensure that it has before it, a proper and independent assessment of the compliance of the Bill with those Conventions. NTEU suggests that this be provided before the Bill is passed. However, if that were not possible or if it would delay the legislation, NTEU suggests that the Senate should obtain an undertaking from the Government that it will write to the ILO Committee of Experts seeking an opinion on the compliance of the new law (and the BCII Act) with the relevant ILO Conventions.

At the same time, NTEU believes an opinion should be sought on compliance with the *UNESCO Recommendation on the Status of Higher Education Teaching Personnel* to which Australia is also a party.

4. Specific Concerns about the Bill

High-Income threshold for loss of Award Coverage

NTEU accepts that the Government is determined to proceed with removing award entitlements from the "high paid". However, NTEU believes that the legislation should not allow a future Government to use the "high-income" threshold to undermine the award safety net by, for example, refusing to update the relevant Regulations under Section 333, or even using the Regulation-making power to reduce the threshold. NTEU can see no good reason why the legislation cannot simply specify a minimum below which the Regulations cannot allow the threshold to fall. Alternatively it could specify a figure and state that the threshold was to move in line with Male Average Full Time Earnings. Many other Acts do this – notably the *Social Security Act 1991* and the *Veterans Entitlement Act 1986*.

Individual flexibility provisions in Agreements

Sections 202-205 deal with the requirement that there be an individual-flexibility provision in enterprise agreements. It is hard to see how sub-section 202(2) and (3) will operate together, especially where a "model" clause operates under sub-section (4). For example, if an Agreement says that *"all academic staff shall enjoy academic freedom"*, this of course is a right conferred on *all* employees and therefore on *each* employee. An individual-flexibility provision which allows a particular person to work as an academic but which exchanges a payment of $5000 per annum for a prohibition on publication of research results (which would be a breach of academic freedom) may or may not leave the individual employee "better off". However, it is hard to know how the requirements of Sub-sections 202 (2)(a) and (3)(a) could be reconciled. Many other examples could be cited where the collective rights of each employee are inconsistent with individual flexibility. This contradiction shows the drafters of the Bill misconceive the nature of a *collective* agreement as merely a bundle of rights conferred on individuals in a collective form.

Six-month Minimum Employment Period for Qualification for Unfair-Dismissal Jurisdiction

Sections 382-384 of the Bill define who has protection from unfair dismissal. The NTEU submits that in the case of a non-casual employee, a requirement for *continuous* service may have quite unfair consequences. For example, in education, employees move from fixed-term contract to fixed term contract, and from time to time move from fixed term contracts to permanent employment. Often there are short breaks between contracts – sometimes for legitimate reasons (e.g. funding uncertainty) and sometimes to deprive employees of entitlements. This fact may mean that under the scheme proposed in the Bill, an employee will not qualify for protection from unfair dismissal because she does not have 6 months *continuous* service, notwithstanding the fact that she has (say) 15 years service with the that employer. It should be relatively simple to insert a provision into 384 to say that the requirement is 6 months continuous service or 12 of the previous 24 months.

Unfair Dismissal and Genuine Redundancy

NTEU welcomes the removal of the very broad and very unfair "operational reason" provisions in *WorkChoices.* However, the proposed provisions in the Bill regarding "genuine redundancy" (Section 389) should either be removed or substantially amended in order to avoid similar unfairness. It is acknowledged that a genuine redundancy has not occurred if the employee could have been redeployed, or if the employer failed to comply with the consultation procedures in an award or an agreement. However, there are many other circumstances where a redundancy can be contrived unfairly, which would still comply with 389(1). For example:

- The employer may have breached another provision of an agreement – for example one which requires an assessment of whether the employees selected for redundancy were selected according to fair and objective criteria (NTEU has such provisions in its agreements); or a provision which required the giving of 3 months notice to allow for the possibility of redeployment. Under the scheme proposed in the Bill, neither of these breaches would prevent the dismissal from being a "genuine redundancy".
- An employer might employ two nurses but no other staff except clerks. Both these nurses have 20 years of loyal service and are paid $60,000 p.a. In February the employer employs a third nurse on $50,000, but in May there is a downturn in business. After the consultation required under the Award, one of the two nurses with 20 years' service is dismissed for redundancy. This nurse has no redress for unfair dismissal.

In the second example it may or may not be that the dismissal is unfair. However, under the scheme proposed in the Bill, FWA could not even enquire into this.

To justify a blanket exclusion for "genuine redundancy" the Senate would need strong evidence to show that in the pre-WorkChoices regime (which had no statutory exclusion for redundancy) the Commission was giving remedies in circumstances where it should not. There is no such evidence. Fair Work Australia should be empowered to assess the merits of the dismissal, including in circumstances of redundancy.

At the very least, a "genuine redundancy" should require that the employees were fairly chosen.

Dispute-Settling Procedures

NTEU strongly endorses the position stated by the ACTU regarding the incapacity of the unfortunately named "Fair Work Australia" to settle disputes over the application of Awards and the NES. Awards have always been drafted as "practical" prescriptions, in relatively simple terms, rather than in a highly legalistic form. One of the reasons for this is that the Commission has had a general power to deal with disputes about their application.

So, for example, the recently made "modern" award - *Higher Education Industry General Staff Award 2010,* has within it a list of 10 classifications and pay scales described as Higher Education Levels 1-10, and a set of classification descriptors. However, nowhere in the Award does it say that an employee has to be employed in the classification which corresponds to the work they perform. In theory, the employer could employ all staff at the lowest level and lowest pay scale, without *breaching* the Award. In these circumstances, the Courts will be of no value, as no breach has occurred.

However, traditionally this has not been a problem. Where the Commission has the power to *settle* a dispute over the application of the Award, any attempt by the employer to employ staff below the appropriate scale would have been remedied by the Commission. However, the scheme in the Act now effectively leaves no remedy. What will need to occur over time is a substantial revision to all awards for them to operate as a fair safety net.

In the meantime, the making of the Awards for the "priority industries" such as higher education *prior to* the Government making its intentions clear about the Commission's powers of dispute-settlement, significantly disadvantages the NTEU and its members as well as employees in other industries covered by those Awards made in December 2008. Had we (and the Commission) been aware of the intended approach of the Government we (and, we suspect, the Commission) would have taken a very different approach to the drafting of these Awards. Either the discretions conferred on these employers in these Awards must be re-visited in order to make disputes amenable to settlement through the Courts, or the power of FWA to settle disputes over Awards and the NES by arbitration must be included.

Secret Ballots

NTEU strongly endorses the comments of the ACTU about the need to streamline the secret ballot procedures.

One issue which appears quite unclear after several readings of the Sections of the Bill dealing with industrial action is whether it is the *class* of employees who are balloted who are protected or only the named individuals who participated in the ballot. As a ballot *for an Agreement* binds employees of an employer who are employed up to 4 years after the ballot occurs and who never had a vote (in many cases the majority), it would seem ridiculous that if a union ballots its members at a workplace in (say) mid-August and then gains 20 new members by mid-September, when action commences, these 20 members cannot participate in the action.

If this is a correct reading of the Bill, the Bill needs to be amended. Otherwise, unions such as NTEU will be forced to make a new ballot application each week during a bargaining dispute for those members who join the union in order to take protected action in support of the union's claims. This would be a very silly outcome but we would have little choice.

Partial Work Bans, Non-Payment and Protected Action

NTEU understands the rationale for the scheme set out in the Bill for protected action and the deduction of pay for industrial action. NTEU also understands the logic of sub-section 471(4), which builds on the common-law capacity of an employer to say "no work-as-directed, no pay". However, we do have one serious concern with this provision, and how it interacts with the provisions on protected action. This might best be illustrated by an example.

At a school, the teachers have a protected partial work ban in place. This consists of refusing to do 1% of their duties – taking the roll. In response to this, the employer advises them that they will not be paid at all under Section 471 (4). In response to this action the employees say "Fair enough. But if you are not going to pay us, we are not going to work."

The employees refusing to work in the absence of wages is entirely consistent with the common law position. The question which then arises, however, is whether the employees in these circumstances are taking unprotected industrial action, and therefore be subject to orders to cease unprotected action.

The legislation should make it clear that when an employer stands down without pay an employee taking a protected partial ban, the employees are not required to continue working with no wages, and if they do not continue working, they *are not* taking unprotected action.

13 January 2009.