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Mr John Carter
Committee Secretary
Senate Education, Employment and Workplace Relations Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

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Dear Mr Carter

Group of Eight: Concerns regarding the *Fair Work Bill 2008* (Cth)

We act for the Group of Eight (Go8). The Go8 is a coalition of leading Australian universities, intensive in research and comprehensive in general and professional education.

The Go8 universities are the University of Melbourne; Monash University; the University of Western Australia; the University of Sydney; the University of Adelaide; the Australian National University; the University of Queensland and the University of New South Wales.

We are aware that submissions to the Senate Education, Employment and Workplace Relations Committee (the Committee) in relation to the proposed *Fair Work Bill 2008* (Cth) (the Bill) closed earlier in January 2009 and apologise for the lateness of this submission. However, the Go8 has just become aware of provisions in the Bill which are of significant concern to it. The Go8 has therefore requested that we forward the enclosed submission to you for provision to the Committee, if possible.

The Go8 also requests an opportunity to address the Committee at the Melbourne hearings scheduled for 16 and 17 February 2009. We would appreciate your advice as to whether this is possible and, if so, when the Go8 may be able to address the Committee.

Please contact Graham Smith or Emma Goodwin (03 9286 6966) to discuss these matters.

Yours faithfully

Clayton Utz

Dr Graham F Smith, Partner

GROUP OF EIGHT

SUBMISSION TO THE SENATE EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS COMMITTEE REGARDING THE *FAIR WORK BILL 2008* (CTH)

The Go8 is a coalition of leading Australian universities, intensive in research and comprehensive in general and professional education.

The Go8 universities are the University of Melbourne; Monash University; the University of Western Australia; the University of Sydney; the University of Adelaide; the Australian National University; the University of Queensland and the University of New South Wales.

The Go8 wishes to make the following submission regarding Part 3-2 of the proposed *Fair Work Bill 2008* (Cth) (the Bill).

The need for long probationary periods of employment in the university sector

It is currently standard practice for universities to include in their enterprise agreements and contracts of employment comparatively long probationary periods, usually of three years, for academic staff. The reason is that long experience with academic employment has demonstrated to the Go8 members that it is not possible to establish in a shorter period whether a person is capable of sustained teaching and research performance, which are the core functions necessary for successful academic employment.

Research projects and degrees commonly take several years to complete. It is not possible to fully assess an academic staff member's capacity to properly undertake substantive and substantial research until the staff member has actually completed a significant research project or higher degree. Such a project or degree will take years, not months, to complete.

The research performance of academic staff is also evaluated according to the number and quality of their publications in refereed journals. However, the time taken for preparation of a paper; submission of the paper; consideration of the paper by a journal and referees; acceptance for formal publication; and finally publication, is generally well over a year and frequently two years.

The teaching performance of academic staff is usually evaluated by formal student evaluations. In the first year of an academic's employment with a university, the academic will usually teach in semester blocks. Students will not evaluate an academic's teaching until the end of the semester and the results of the evaluation take time to moderate. It will therefore rarely, if ever, be possible to complete a full evaluation of a new academic's teaching performance in a period of less than six months.

Once probation is completed, a staff member gains significant protection from performance and disciplinary committee procedures as established in the relevant enterprise agreement. This is known as "tenure".

The present legal situation for probationary employees in the context of unfair dismissal

Under the existing *Workplace Relations Act 1996* (Cth) (the WRA), probationary employees are ineligible to make unfair dismissal claims, provided the probationary period is reasonable and has been established in advance: section 638(1)(c) of the WRA.

The reasonableness of long probationary periods in the university context (that is, up to three years) has long been accepted by the Australian Industrial Relations Commission. See, for example, *Kocsis v Charles Sturt University*, AIRC Full Bench, Print PR911718, Munro J, Cartwright SDP and Harrison C, 26 November 2001; and *Faruqi v Queensland University of Technology*, AIRC Full Bench, Print S0878, Harrison SDP, Duncan DP and Hoffman C, 12 November 1999. In both cases the special situation of university staff is expressly acknowledged and a three year probationary period was deemed reasonable.

In *Hornby v Canberra Institute of Technology*, AIRC, Print P9183, Duncan SDP, 27 February 1998, a three and a half year probationary period was held reasonable.

The present legal position enables universities to fairly assess academic staff and to properly establish their capacity to perform their duties effectively. The employment of staff who have demonstrated an ability to perform academic work can then be confirmed at the end of that period while the probationary exemption can be relied upon, if necessary, to terminate the employment of those who do not meet the requirements which should have been met during probation.

The removal of the probationary exclusion in the *Fair Work Bill 2008* (Cth)

The Go8 is deeply concerned by the fact that, under the Bill, the capacity to set a reasonable probationary period no longer exists and probationary employees will no be longer excluded from being able to bring unfair dismissal claims.

Instead, academic staff of Australian universities (all of whom have more than 15 employees) will be required only to complete a six month qualifying period before they have access to the unfair dismissal jurisdiction of Fair Work Australia (see clause 383 of the FWB). This six month qualifying period is said in the Explanatory Memorandum to be designed to give the employer "a period of time to assess the capacity and conduct of a new employee without being subject to an unfair dismissal claim if they dismiss the employee during this period" (paragraph 1512 of the Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) (**the Explanatory Memorandum**). In the Go8's submission, this is also the precise function of a probationary period.

There is no capacity for the parties to agree to extend the six month qualifying period, as currently exists under the WRA (see sections 643(6) and (7) of the WRA). It will be unlawful to attempt to lengthen the qualifying period in an enterprise agreement (see 194(d) of the FWB and paragraph 832 of the Explanatory Memorandum).

The effect of this is that the members of the Go8 will no longer be able to rely upon lengthy but reasonable probationary periods as a jurisdictional barrier to an unfair dismissal claim. This will cause significant human resources management difficulties given the special nature of academic employment and the difficulties in assessing academic performance within a short period, as outlined above.

The Go8's proposal

The Go8 proposes that the Federal government consider alleviating these concerns by amending the Bill to:

- reinstate the existing jurisdictional bar which prevents employees who are employed for a reasonable (given the nature of the employment) probationary period, established in advance of the commencement of employment, from making an unfair dismissal claim. A six month default period could be established, with the onus on an employer to demonstrate why a longer period was reasonable; **or**

- to make it possible for all employers to extend the six month qualifying period where this is reasonable given the nature of the employment and where the extension is established in advance of the commencement of employment. A six month default period could be established, with the onus on an employer to demonstrate why a longer period was reasonable; **or**

- to specifically provide that universities may, in recognition of the special nature of academic employment, extend the six month qualifying period where this is reasonable given the nature of the employment and where the extension is established in advance of the commencement of employment.

In the Go8's submission, these proposals would permit the Federal government to continue with its policy of a six month default period before an employee is eligible to make an unfair dismissal claim, while still accommodating the special needs of employers such as universities.