Australian
Higher
Education
Industrial
Association

9 January 2009

Mr John Carter
Committee Secretary
Senate Education, Employment and Workplace Relations Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

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

Dear Mr Carter

Re: AHEIA Submission to the Inquiry into the Fair Work Bill 2008

The Australian Higher Education Industrial Association (AHEIA) is the registered employer association for Australia's higher education sector. AHEIA represents 29 of Australia's public universities and the Batchelor Institute of Indigenous Tertiary Education

… Attached is AHEIA's submission to the Committee about the Fair Work Bill 2008.

AHEIA would appreciate the opportunity to appear before the Committee during the public hearings. The AHEIA contact officer for this purpose is David Wedgwood, the Manager of the AHEIA Sydney Office, who can be contacted on 02 9283 7880 or 0409 249 844, dwedgwood@aheia.edu.au.

Yours sincerely

Robyn Trevaskis
Acting Executive Director

one attachment

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AHEIA Submission to the Inquiry into the Fair Work Bill 2008

1. The Australian Higher Education Industrial Association (AHEIA) is the registered employer association for Australia's higher education sector. The Association represents 29 of Australia's public universities and the Batchelor Institute of Indigenous Tertiary Education. The Association is not affiliated with any other national organisation.

2. In 2007/2008, education overtook tourism as Australia's dominant services export industry, now worth $13.7 billion to the national economy. Of the education exports, higher education accounts for about two-thirds.

3. The Association welcomes the simplification of the national workplace relations system contained in the Fair Work Bill 2008. However, there are some aspects of the legislation which AHEIA would like to draw to the Committee's attention to as matters that could be amended so as to better ensure an efficient and flexible system that serves the economic interest of Australia, as well as the interests of employers and employees, including those in the higher education sector.

<u>Enterprise Bargaining</u>

4. Clause 176 of the Bill enables employees to appoint any person, including themselves, as a bargaining representative. The employer must recognise and bargain with such representatives (clause 179). This absolute right raises two difficulties.

5. Firstly, for large employers, the number of such representatives may be impractical, if many individual employees nominate different bargaining representatives.

6. While clause 229(4)(a)(ii) allows for an application to Fair Work Australia (FWA) for a bargaining order if "the bargaining process is not proceeding efficiently or fairly because there are multiple bargaining representatives for the agreement", such an application cannot be made until the bargaining process is underway, and the employer is in a position to satisfy FWA that "the bargaining process is not proceeding efficiently". Thus, by definition, some inefficiencies must have already occurred.

7. A more efficient and practical solution to such circumstances would be to allow the employer to limit the number of bargaining representatives that are bargained with, provided such limitation is fair and reasonable. This would particularly be appropriate if most or many employees were represented by relevant employee organisations, as is the case in the higher education sector. Any dispute over whether the limitation imposed by an employer was fair and reasonable could be dealt with by FWA and a bargaining order, if needed, could then be issued.

8. Such an arrangement would enable the employer to adopt the most efficient work arrangements available in the circumstances, similar to the provisions

enabling employers to reduce an employee's wages by a proportion if an employee is engaging in partial work bans (clauses 471 & 472).

9. Secondly, there is no limitation on who may be appointed as a bargaining representative, although subclause 178(3) provides that the Regulations "may prescribe matters relating to the qualifications or appointment of bargaining representatives". Currently, the legislation appears to allow the appointment of legal practitioners as bargaining agents.

10. This is in marked contrast to clause 596, which provides that representation by a lawyer in matters before FWA may occur "only with the permission of FWA".

11. For over a century, industrial/workplace relations in Australia has been a non-legal jurisdiction, avoiding complex legal rules and procedures, and similar prohibitions on legal practitioners have existed throughout. The operation of FWA under clause 596 and indeed the proposed small claims jurisdiction of the courts, continues this tradition.

12. A reasonable alternative would be to exclude lawyers as bargaining agents, but to allow for FWA to issue a bargaining order allowing such appointments in cases where it could be justified. The standard exemption for officers or employees of registered organisations would continue to apply.

13. If there is not such a change in the bargaining agent appointment process, subclause 596(4)(c) may have the perverse effect of encouraging bargaining parties to "lawyer up" at the commencement of the process, as this would guarantee the right to be represented by that lawyer in any subsequent FWA proceedings.

Unfair Dismissal

14. Under the Bill, the previous exclusion of probationary employees from the unfair dismissal jurisdiction has been removed, with a standard minimum employment period of six months (or 12 months for small business) the only service exclusion.

15. The exclusion of probationary employees from the unfair dismissal jurisdiction has existed since the introduction of those provisions by the then Labor Government in 1993, provided that the length of the probationary period was "reasonable" as determined by the Australian Industrial Relations Commission (AIRC).

16. Because of lengthy teaching and research cycles and the high levels of employment protection afforded to "tenured" academic staff, university academics have traditionally had relatively lengthy periods of probation. The AIRC accepted in *Kocsis and Charles Sturt University*[1] that a probationary period of three years can be reasonable for a first academic appointment.

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[1] *Kocsis and Charles Sturt University*, AIRC Full Bench (Munro J, Cartwright SDP, Harrison C), 26 November 2001 [PR911718]

17. If probationary employment is no longer to be allowed as a separate jurisdictional issue, then large employers and their employees during bargaining should be able to agree on varying the “minimum employment period” upwards for particular employees where a period greater than six months is warranted for assessing an employee’s suitability for the position.

18. AHEIA would appreciate the opportunity to appear before the Committee during the public hearings.

Robyn Trevaskis
Acting Executive Director