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1 February 2013

The Committee Secretary
House of Representatives Standing Committee on Education and Employment
Parliament House
CANBERRA ACT 2600

Via email: efairworkamend@aph.gov.au

Dear Secretary

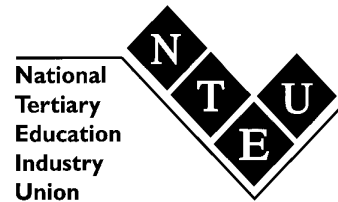
RE: Inquiry into the Fair Work Amendment (Tackling Job Insecurity) Bill 2012

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.



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NTEU Submission

on the

Fair Work Amendment (Tackling Job Insecurity) Bill 2012

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1. Introduction

The National Tertiary Education Union (NTEU) represents over 27,000 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, from all general staff to academics, of whom we have exclusive coverage. These workers include world leading experts in their field, academics across all disciplines, researchers, technical and administrative staff, and university and institute trades and related staff.

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

- for academics, achieving a balance between teaching and the pursuit of research;
- large workloads for all staff; and
- excessive hours of work.

Each of these issues is impacted by job insecurity which is perhaps the most significant concern facing our members.¹

After many years of working to improve the job security of casual and fixed-term contract staff in higher education, NTEU welcomes the introduction of this significant piece of legislation and the chance to comment on the detail of the proposal.

Evidence across many industries indicates that now is the time to stop the spread of precarious employment, and to limit casual and fixed term employment to instances where it is truly appropriate. Indeed, the Report of the *Inquiry into Insecure Work* recommends a form of secure work orders, as provided by the Bill.²

NTEU supports the *Fair Work Amendment (Tackling Job Insecurity)* Bill 2012. We also make several recommendations which we believe would complement the provisions of the Bill to provide a comprehensive approach to tackling job insecurity via industrial laws.

NTEU also supports Submission to this Inquiry of the Australian Council of Trade Unions.

¹ Two NTEU surveys have confirmed this. In 2008, a University of Queensland Branch Research Committee survey found that 64% of 100 research-only staff respondents cited continuing employment as their most important issue; [unpublished survey]. A 2011 NTEU staff survey found that 97% of the 400 casual and early career research academics identified job security as 'important' or 'very important' to their employment.[NTEU University Staff Survey, 2011].

² *Lives on Hold: Unlocking the Potential of Australia's Workforce*. The Report of the Independent Inquiry into Insecure Work in Australia, Independent Inquiry into Insecure Work in Australia, 2012. See Chapter 1. NTEU Submission on the Fair Work Amendment (Tackling Job Insecurity) Bill 2012

2. Summary of NTEU Recommendations

Recommendation 1: NTEU recommends that the Fair Work Act be amended to incorporate a Secure Employment Principle for Modern Awards and Enterprise Agreements. This Principle should also become an Object of the Act at s.3.

Recommendation 2: Extend and strengthen the right to request flexible work arrangements by:

- Including the ability to challenge decisions of employers to deny requests for flexible work arrangements in the Fair Work Commission. The NTEU recommends that the *Fair Work Act* be amended to ensure that denials of requests for flexible work arrangements are able to be dealt with as a dispute regardless of whether or not the parties have agreed in a contract of employment, enterprise agreement or other written agreement to the Fair Work Commission dealing with the matter.
- Extending the ability to request flexible working arrangements to all workers, not just limited to workers with caring responsibilities.

Recommendation 3: Make improvements to the Bargaining System through the removal of existing restrictions on the content of agreements, particularly as they relate to the use of contractors and labour hire.

Recommendation 4: Ensure access to unfair dismissal remedies in circumstances where the purpose of the use of limited term employment is to avoid the employer's obligations.

Recommendation 5: Amend the Bill to ensure that the Fair Work Information Statement required under s. 124 of the Act includes information about the right to request secure working arrangements and seek secure working orders.

3. Job Insecurity in Australian Universities

The NTEU made a substantial Submission to *the Independent Inquiry into Insecure Work in Australia* last year³.

Our submission cited academic research, member responses to quantitative and qualitative surveys and our significant industrial history in dealing with the regulation of precarious employment.

We urge the Committee to consider the detailed analysis of insecure working arrangements in higher education, as set out in our submission to the Inquiry.

Below is a summary of the key indicators of insecure work in our sector illustrated in that NTEU submission.

- Around 1/3 of all university employees have on-going employment.
- Conversely, only a minority of casual employment in universities is 'true casual' employment; that is required because the work is ad hoc or irregular. NTEU argues that casual work is used *primarily* to deny workers employment rights.
- The use of fixed-term employment is also not always necessary; this is evidenced by the number of employees on 'rolling' fixed term contracts which result in long-term (but precarious) employment.
- Over the 15 years between 1996- 2011, the total number of employees in Australian Universities increased from approximately 120,000 to over 183,000; around a 53% increase. However the proportion of continuing employees increased by only 37%; of limited term employees by 47% and the estimated number of casual employees by 81%.⁴
- The *Higher Education Contract of Employment (HECE) Award* operated from 1998 until the introduction of the Howard Government's *Higher Education Workplace Relations Requirements (HEWWRs)* in 2005. This Award regulated the use of fixed/limited term employment to 8 clearly defined circumstances. The Award did not, however, place any restrictions on the use of casual employment.
- The introduction of the HEWWRs saw a direct link between funding and industrial relations requirements, including the abolition of any restrictions on forms of employment.

³ *Independent Inquiry into Insecure Work in Australia*, Submission of National Tertiary Education Union (NTEU), 2012. <http://www.unicasual.org.au/publications/submissions>

⁴ These are categories used in statistical data collection by the relevant Commonwealth Department (formerly DEEWR, now the Department of Industry, Innovation, Science, Research and Tertiary Education (DIISRTE). NTEU uses the term 'fixed-term employment' to denote limited term employment, and our enterprise agreements also use this term.

Casual data is based on estimates; see NTEU Submission to *Inquiry into Insecure Work*, pg. 8, for methodology. NTEU Submission on the Fair Work Amendment (Tackling Job Insecurity) Bill 2012

Figure 1

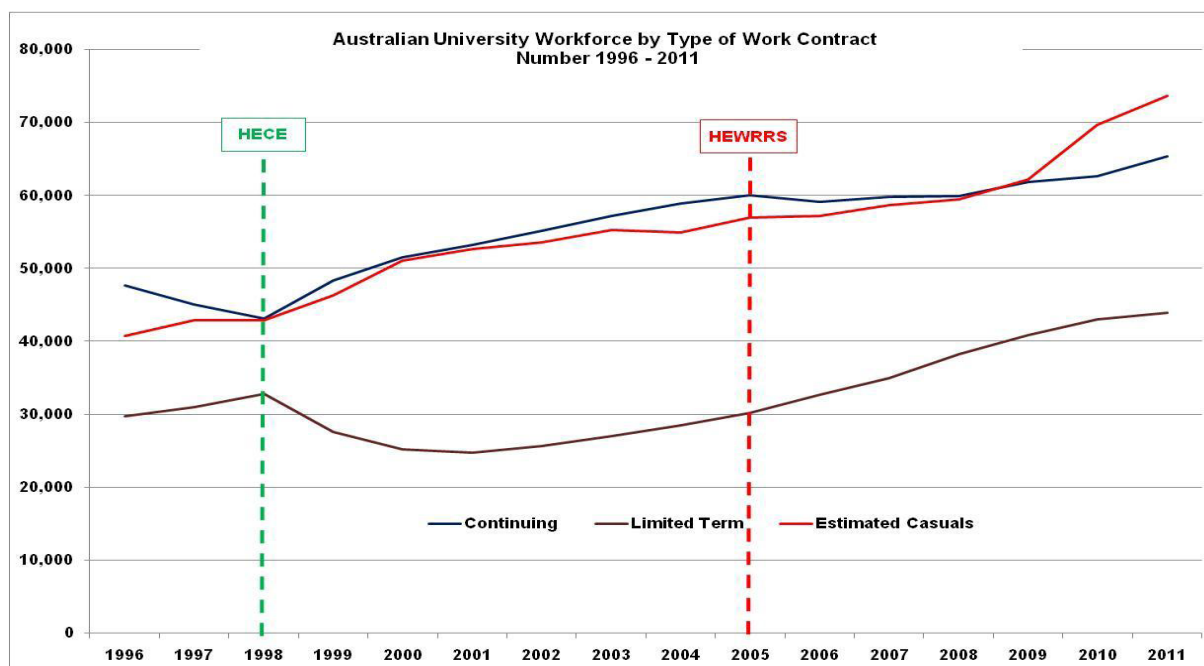


Figure 1 demonstrates the decline in the number of limited-term (fixed term) employees and a corresponding increase in the number of continuing and casual employees, following the introduction of the HECE Award in 1998. It also illustrates the drop in continuing employment following the HEWWRs in 2005.

The terms of the HECE Award are now largely incorporated into the key Modern industry Awards; the *Higher Education Industry – Academic Staff – Award 2010* [MA000006] and the *Higher Education Industry – General Staff – Award 2010* [MA000007], and reflected in NTEU enterprise agreements.

Why the increase in insecure work in Australian universities?

In our submission to the *Inquiry into Insecure Work*, the NTEU identified the following factors as impacting the regulation of work in Australian universities:

- Globalisation from the mid-90s led to increased competition and the ‘massification’ of Australia’s higher education system (which had previously been elite). This led to new patterns of funding and to tertiary education being “increasingly constructed as a driver of economic growth and national prosperity”; [NTEU, 2012; pg 12].
- A commensurate decline in public funding of universities; between 1995 and 2005, public funding per student fell by 28% in real terms
- Universities have become more exposed to the vagaries of the market and funding shortfalls are increasingly met by the promotion of full fee paying international students. University managements have argued they require a more flexible

workforce, particularly in order to meet growing but sometimes unpredictable enrolment numbers and subsequent teaching requirements.⁵

- There is an ageing academic workforce in Australia and insecure employment has created gaps in the development of newer and mid-career academics. The nature of the work itself has fragmented, partly in order to meet demand in new teaching only positions but also demand for digital technology and specialist learning support for a broader cohort of students in a mass system. Insecure forms of employment provide universities with 'flexibility' to match skills to emerging jobs; casual work of course represents a lower industrial risk.⁶

The Impact on workers, the sector and the community

Our primary focus here is on academics, and this makes sense given the strong link between funding and employment arrangements. However, general staff are also affected.

- Students and the quality of education must be affected by insecure working arrangements. Between 1986 and 2010, student to staff ratios increased from 13:1 to 21:1, and the majority of staff responsible for teaching/tutoring in such large classes, are casual or 'sessional' staff.⁷
- NTEU highlighted a "*lost generation of PHD graduates*" in our Submission to the Insecure Work Inquiry. In November 2012 the Report of a Government commissioned study was released which supported this assertion. The Report noted that:

*"The central issue for the study group is jobs. Early and even midcareer researchers are concerned about the challenges of finding a position or winning grants and fellowships in a very competitive environment. Insecurity and lack of stability is a constant factor in their lives. A specific study of the impact on the sector of casual and short-term contracts at all career stages may be called for."*⁸

- NTEU contrasts the plight of these very early career researchers with the other extreme of long-term, highly specialised and experienced researchers who have experienced decades of rolling contracts, "*periodically chasing funding grants, and who have neither had the opportunity to embed permanent careers, nor bring work/life balance into their lives*". [NTEU 2012].
- General staff are also affected by short-term contract arrangements and the consequent impacts on their work and private lives. For example, an academic grant

⁵ The current Federal Government does not demand full fees for domestic undergraduate students but this is likely to change if a conservative Government is elected in 2013. A coalition Government will likely mirror the policies of the former Howard Government in respect to higher education fees.

⁶ See D. Anderson, R. Johnson & L. Saha, (2002) *Changes in academic work*, Commonwealth of Australia, Canberra; H. Coates and L. Geodegebuure (2010) *The Real Academic Revolution*; R. May (2011), "Casualisation; here to stay. The modern university and its divided workforce"; E. Bexley, R. James, and S. Arkoudis (2011) *The Australian academic profession in transition*.

⁷ Universities Australia (2007) *2006 Student to Teacher Ratio for Academic Staff with Teaching function*, Universities Australia, Canberra.

⁸ *Career support for researchers: Understanding needs and developing a best practice approach*, Australian Council of Learned Academies, November 2012.

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may provide short-term funding for an administrative assistant, or a technician working in a science laboratory.

- Casual and fixed term employment brings a degree of financial insecurity to all workers employed on these terms, and at best, financial uncertainty.⁹
- There is a disproportionate impact on women working in the sector. There is still severe gender segmentation in certain areas of the tertiary education workforce. Women still predominate in traditional female dominated disciplines such as the humanities, education and health sciences and in occupations within these disciplines. For example, women predominate in human resource occupations, and are represented at higher classification levels, but there are no engineering faculties which have a woman in charge.¹⁰ This has resulted in limited career paths and an on-going gender pay gap.
- Evidence suggests that family responsibilities impact more heavily on working women. Though higher education has led industries in adopting flexible and 'family friendly' work practices, women in insecure forms of employment cannot generally access these provisions.¹¹
- The quality of research across disciplines must be affected over time by the prevalence of casual teaching only and fixed-term teaching/research positions which have such extensive curriculum, teaching and administrative workloads, that research comes off second best. The following extract from the NTEU Submission to the *Insecure Work Inquiry* best illustrates this point.

“Breaking down the types of academic employment reveals further differences in the types of roles undertaken by staff employed on different types of work contract. The data show that teaching only employees account for more than half of all casual employees (FTE basis) and research-only staff account for one third of limited-term employees. The insecurity of teaching-only staff in particular is demonstrated by the fact that more than two out of three teaching-only employees are employed at the lowest level – that is at a Lecturer Level A or Associate lecturer level (date not shown).teaching-only and research-only employees account for a very insignificant proportion of continuing employees.

The vulnerability of these staff to insecure employment is emphasised in Figure (2) (see below), which demonstrates the bifurcated character of insecure employment in these types of work. In 2010 less than 10% of teaching-only or research-only staff (measured on a full

⁹ 'Casual Employment in Australia: The influence of employment contract on Financial Wellbeing', Journal of Sociology, 45: 271-89; Sandra Buchler, Michele Haynes and Janeen Baxter (2009).

¹⁰ See for example *Gender, Citizenship and Discipline Trends in Australian Higher Education Research Training*, Australian Higher Education Policy Analysis, Larkins, Frank P; LH Martin Institute; <http://www.lhmartininstitute.edu.au/insights-blog/26-professor-emeritus-frank-larkins>

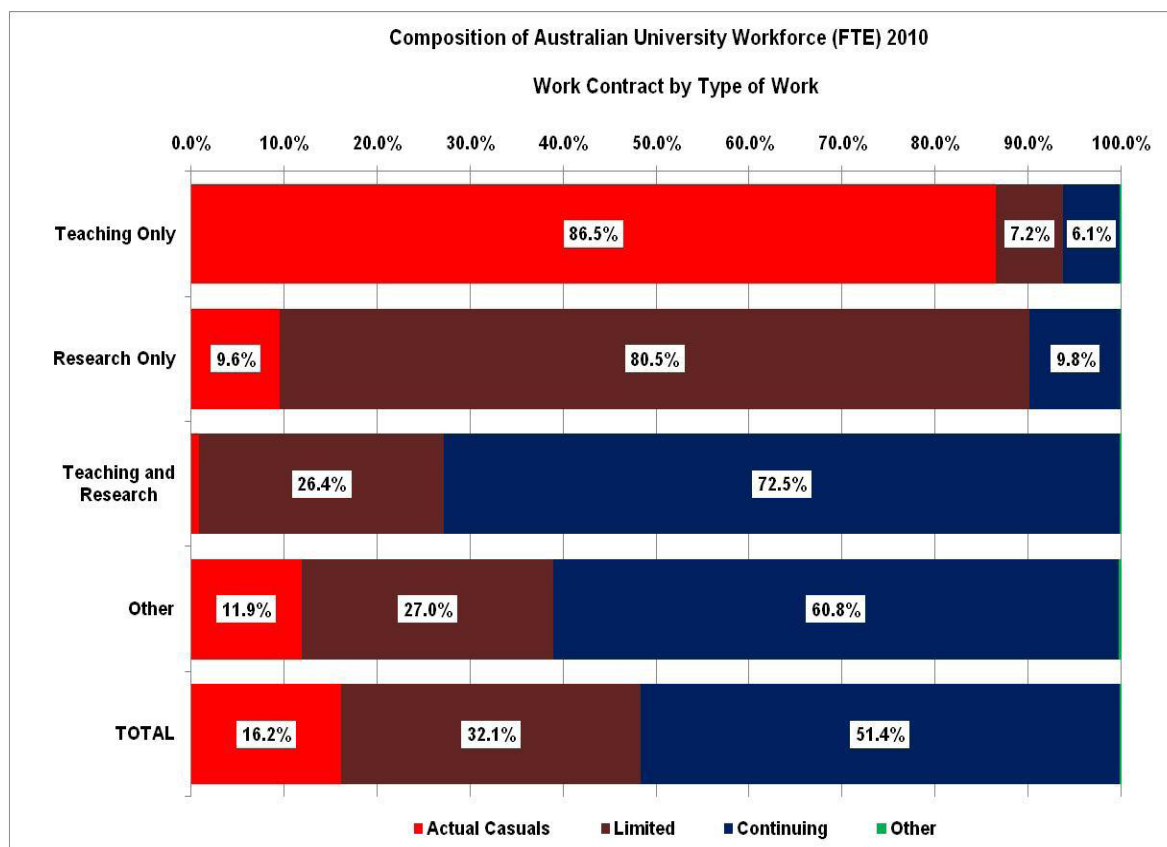
¹¹ It was estimated by Robyn May that of the 67,000+ academic staff employed in universities in 2011, 57% were women. See May, R, "Casualisation; here to stay", (2011).

See *Gender Equality: What matters to Australian women and men*; The Listening Touring Community Report, HREOC, 2008. Since this report was written, Australian women and men have achieved access to statutory paid parental leave; something which participants in the 2008 report felt would assist men (and women of course) in meeting caring responsibilities without sacrificing such as large degree of income. A 2012 study on the Australian University workforce found that while women were far more likely to nominate themselves as the person 'mainly responsible for the care' of their children (46% of women respondents compared to 4% of men), men were also more likely to say they 'shared (this responsibility) equally with their partner'; (58% of men compared to 46% of women). *Work and Careers in Australian Universities: Report on Employee Survey*; Griffith University, The University of Queensland; Centre for Work Organisation and Wellbeing, Griffith University, October 2012.

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time equivalent basis) were employed on a continuing basis. However, as the data shows there are stark differences between teaching-only and research staff. Almost nine out of ten (86.5%) teaching-only staff were employed as casuals in 2010. Eight out of ten (80.5%) research-only staff were employed on a limited-term basis". [NTEU, 2012].

Figure 2



Source. Higher Education Statistics Collection (deewr.gov.au)

It is now estimated that approximately 60% of academic staff in Australia's universities (on a headcount basis) are employed as casual (hourly paid) staff with more than half of all undergraduate teaching in Australia's universities performed by casual academic staff.¹²

The Regulation of insecure work in Higher Education

Key efforts to restrict the inappropriate use of precarious employment by the NTEU include:

- Negotiated restrictions on forms of insecure employment.
- Improved conditions for insecure workers, including access to parental and long service leave, superannuation entitlements, and higher casual loadings.
- Conversion clauses for long-term casual staff.¹³

¹² Ibid.

¹³ These have had mixed success with many vulnerable casual workers not choosing to take up their entitlement for fear of drawing attention to themselves and risking their jobs. See provision in the General Staff Award [MA000007], Clause 12.3.

- Many cases before the Fair Work Commission (and predecessor tribunals) around inadequate processes and notice of non-renewal of contracts, as well as unfair dismissal applications.

4. The Bill

NTEU supports the straight-forward approach to tackling job insecurity provided by the Bill.

Most importantly- and given the degree of insecure employment in our industry – NTEU supports the option for a class of employees to be provided with secure employment orders and for the role of unions in applying for secure employment orders on behalf of their members. This will provide certainty to employees who may be in dispute with their employer and may not be able to negotiate a secure employment arrangement.

The legislation provides for secure employment arrangements via enterprise bargaining (at 10.) NTEU has made previous recommendations – including to the Insecure Work Inquiry – which would take this amendment further. We contend that there should be an overarching principle which enshrines continuing employment as the ‘norm’.¹⁴

Recommendation 1: NTEU recommends that the Fair Work Act be amended to incorporate a Secure Employment Principle for Modern Awards and Enterprise Agreements. This Principle should also become an Object of the Act at s.3.

This Principle would act to ensure that continuing employment is the normal form of employment and is duly taken into account in the making and review of modern awards and the approval of enterprise agreements. Inserting the Principle in the objects of the Act would emphasise the centrality of secure employment to the Australian workplace.

Part 2-3 of the FW Act deals with the operation of modern awards. The modern award objective in section 134 should be varied to include reference to the need to promote continuing employment through the secure employment principle.

Section 135 could then be amended in the following terms:

Modern awards secure employment principle

(3) In making, varying or reviewing modern awards, FWA must give effect to the secure employment principle. For the purpose of this section, the secure employment principle means that;

(a) The normal form of employment should be continuing employment rather than casual, fixed term or temporary employment, subject to the following:

¹⁴ See NTEU, 2012, part 8.

- i. The established need for genuinely short term or ad hoc employment to meet the genuine operational requirements of an employer or industry;*
 - ii. The need to allow for seasonal or fluctuating employment in an industry or enterprise, to the extent that part-year or annualised arrangements are not practicable or appropriate, or not in the interests of employees;*
 - iii. Appropriate accommodation of employment on projects of limited duration, or replacement of employees on leave, or like circumstances;*
 - iv. Traineeships, apprenticeships, cadetships, internships or like arrangements where the relevant employees gain significant skills or experience which outweighs any disadvantage caused by a lack of job security;*
 - v. The wishes of the majority of the relevant employees, and their representatives, in circumstances where FWA is satisfied that arrangements involving the use of non-continuing employees involve a clear overall advantage to employees, including those in less secure forms of work;*
 - vi. Arrangements to protect the interest of any employee who was in a particular type of employment as at the [commencement of this Section] and wishes to remain in that type of employment;*
- and;*
- (b) Casual, fixed term, temporary and like employees who will be covered by the modern award will not be worse off overall in relation to modern award conditions than comparable continuing employees are or, if there are no comparable continuing employees, to a continuing employee who might be employed in the same circumstances to do the same work.*

The Secure Employment Principle would then be reflected in other relevant sections of the FW Act including Part 2-4 Enterprise Agreements. The NTEU recommends that the general requirements for the approval of an enterprise agreement by FWA be amended to provide the following:

*186(2)(d) the agreement passes the better off overall test **and does not disadvantage precarious employees.** [new text in bold]*

A new provision in relation to passing the better off overall test could be included in section 193 as follows:

193(1A) An enterprise agreement is taken to disadvantage precarious employees if a casual, fixed term and/or temporary employee would be worse off under the enterprise agreement than a comparable continuing employee employed under the enterprise agreement or if

there are no comparable continuing employees, to a continuing employee who might be employed in the same circumstances to do the same work.

The NTEU submits that such amendments would provide an effective safety net for those in insecure work. This would underpin the provisions in the Bill designed to settle disputes and aid conversion to secure work.

Recommendation 2: Extend and strengthen the right to request flexible work arrangements by:

- **Including the ability to challenge decisions of employers to deny requests for flexible work arrangements in the Fair Work Commission. The NTEU recommends that the *Fair Work Act* be amended to ensure that denials of requests for flexible work arrangements are able to be dealt with as a dispute regardless of whether or not the parties have agreed in a contract of employment, enterprise agreement or other written agreement to the Fair Work Commission dealing with the matter.**
- **Extending the ability to request flexible working arrangements to all workers, not just limited to workers with caring responsibilities.**

Recommendation 3: Make improvements to the Bargaining System through the removal of existing restrictions on the content of agreements, particularly as they relate to the use of contractors and labour hire.

If the Bill is to be thorough in protecting workers in insecure jobs, it should address a flaw in the original legislation which NTEU has highlighted on several occasions.¹⁵ At Recommendation 39 of its Report, the Fair Work Act Review 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.¹⁶

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

¹⁵ See Submission to the *Fair Work Act* Review Panel, NTEU, February 2012 and Submission to the Senate Education, Employment and Workplace Relations Inquiry into the *Fair Work Amendment Bill*, NTEU, November 2012.

¹⁶ See *Towards more Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation*, Department of Education, Employment and Workplace Relation, [DEEWR], June 2012, p 218.

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.

Recommendation 4: Ensure access to unfair dismissal remedies in circumstances where the purpose of the use of limited term employment is to avoid the employer's obligations.

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

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*
- 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].*

Recommendation 5: Amend the Bill to ensure that the Fair Work Information Statement required under s. 124 of the Act includes information about the right to request secure working arrangements and seek secure working orders.

5. Concluding comments

The NTEU has been trying to address the issue of insecure work for nearly 20 years, via instruments such as the *HECE Award*, and various provisions through enterprise bargaining, including the right to convert to on-going employment. It is clear that a comprehensive statutory regime is required if workers are to have certainty around their security of employment.

NTEU is encouraged by the provisions around insecure work provided by the *Tackling Job Insecurity Bill*. We urge the House Committee to recommend the speedy passage of the Bill through the Parliament.

NTEU recommendations in this Submission are designed to ensure that the opportunity for a *comprehensive* approach to job insecurity is not lost. The need for this approach is supported by evidence from the higher education sector and from the many submissions and final report of the *Inquiry into Insecure Work in Australia*. In our view there is no need to

debate the need for these provisions any longer. It is time for our industrial legislation to reflect the reality of the Australian workplace.