National Tertiary Education Industry Union

NTEU SUBMISSION

SENATE EMPLOYMENT, WORKPLACE RELATIONS, SMALL BUSINESS AND EDUCATION COMMITTEE

INQUIRY INTO THE WORKPLACE RELATIONS LEGISLATION AMENDMENT BILL 1999

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INTRODUCTION

The National Tertiary Education Industry Union (NTEU) represents approximately 25,000 staff in tertiary education institutions around the country. Approximately 17,000 of our members are academic staff employed in universities, and around 8,000 are "general staff", (mainly professional, administrative and technical staff involved in areas such as libraries, research and administration) employed in TAFE, Universities and Adult Education.

The NTEU aims to represent 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.

NTEU members have already been adversely affected by the *Workplace Relations Act 1996* ("the Act") and would be further adversely affected by the proposed *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999* ("the Bill").

SUMMARY OF RECOMMENDATIONS

For the reasons detailed in this submission, the NTEU recommends that the Senate reject the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999*.

Alternatively the Bill should be amended fundamentally to:

- encourage collective bargaining (including the abolition of Australian Workplace Agreements)

- provide an increased role for the Australian Industrial Relations Commission in preventing and settling disputes and in vetting Certified Agreements

- restore awards as a genuine safety net; and

- to ensure that Australia meets its international obligations.

GENERAL COMMENTS ABOUT THE BILL

These submissions do not seek to provide a comprehensive analysis of the effect of the Act, nor of the Bill.

We understand the submissions by the Australian Council of Trade Unions (ACTU) and others will provide such a comprehensive analysis. The NTEU endorses the publicly expressed concerns of the ACTU about the Bill.

This submission will therefore deal with the specific issues that have arisen in higher education under the current Act and the implications of the Bill most likely to affect the NTEU's members and our capacity to effectively represent our members' industrial interests.

The NTEU makes the following general comments about the Bill, having regard to its experience of nearly three years working under the Act:

- The existing Act and the proposed Bill are highly technical, legalistic and complex and ensure that issues of genuine merit are likely to be obscured by lengthy arguments about jurisdiction and the interpretation of statutory provisions.

- The Bill would render protected industrial action either ineffective, illegal or both through complex ballot procedures and other restrictions.

- The Act fails to encourage collective bargaining, and the Bill would give the employer even further rights to dictate, and change at will, the mode of bargaining (ie. individual, fragmented-groups or collective).

- The Act has already deprived NTEU members of significant Award rights through the so-called Award simplification process. The Bill would be even more disastrous, removing significant Award protections gained, including those gained even since the commencement of the Act.

- The Bill, in particular, unreasonably limits the rights of access of registered organisations to workplaces and limits the capacity of registered organisation to represent employees generally.

SPECIFIC CONCERNS OF THE NTEU IN RELATION TO THE PRESENT ACT AND THE PROPOSED BILL

1. The operation of Section 89A and the proposed amendments thereto

The NTEU is currently engaged in the onerous task of ensuring that its existing Awards comply with the requirements of Section 89A of the Act (allowable award matters).

Under the Act NTEU members have already lost from their awards:

- Study Leave and Professional Development Training
- Protections against arbitrary dismissal through industry-specific procedures for proper enquiries into allegations of misconduct or unsatisfactory performance.
- The right to consultation before being made redundant
- Redeployment
- Trade Union Training Leave
- Military Leave
- Fire-fighting Leave
- Blood donors leave

The NTEU submits there should be no further limitation on allowable award matters. There is no evidence that the existing award safety net limits any legitimate need of employers.

The following proposals contained in the Bill are of particular concern:

- *The deletion of "skill-based career paths" from the list of allowable matters (Bill, Schedule 6, Part 1, Item 2) and the proposed amendments to 89A3 (Schedule 6, Part 1, Item 12) requiring that the Commission make only minimum rates awards that provide for basic entitlements*

  This is likely to result in the deletion of all salary levels above the lowest rate in awards where an incremental structure has been in place.

  In several awards to which the NTEU is a respondent, this would effectively lower the existing safety net of salaries (against which Certified Agreements and AWAs are to be assessed) by up to seventy percent.

  Moreover, the impact of allowing individual bargaining supported by a safety-net significantly below the existing level would have a far greater impact on women, who are disproportionately concentrated in occupations which do not possess considerable labour market power – student welfare, libraries, humanities, social sciences.

- *The removal of long service leave (Bill, Schedule 6, Part 1, Item 4) would result in a significant reduction in existing awards entitlements for many thousands of employees in tertiary education.*

  For example Victorian Post-Compulsory and Higher Education Academic and Teaching Staff (Conditions of Employment) Interim Award 1990 provides for 13 weeks of Long Service Leave after 10 years service, whereas the Victorian Long Service Leave Act provides for 13 weeks leave after 15 years service.

- *The provisions of the Bill regarding redundancy (Bill, Schedule 6, Part 1, Item 9), notice of termination (Schedule 6, Part 1, Item 10) and types of employment (Schedule 6, Part 1, Item 13, particularly proposed Sub-Section 89A(3A)(i) would in combination, have a significant effect on the employment of thousands of employees in tertiary education.*

  In 1998, the NTEU obtained a new national award, the *Higher Education Contract of Employment Award 1998* (Print Q0703), which complies with the requirements of Section 89A of the Act. That Award was made by a Commission Full Bench after lengthy hearings and much evidence about the

use of, in particular, fixed-term contract employment in the higher education industry. The Commission found in its Decision (Q0702) that the many employees were employed for many years on annual or other fixed-term employment contracts, often to do work which was clearly on-going in character.

Such employees after, for example, twenty years continuous service on contract could be and were told the day before the expiry of their annual contract that their employment would not be renewed. No reason needed to be given, no entitlement to redundancy pay arose and such employees had no access to the unfair dismissal jurisdiction.

This is because, as a question of law, their employment was not terminated "by the employer" but by the effluxion of time.

The *Higher Education Contract of Employment Award 1998*:

1. defines the types of employment – ongoing, fixed-term and casual;

2. prescribes the legitimate circumstances in which fixed-term employment could be used; and

3. provides for limited redundancy payments in some circumstances where a contract was not renewed.

This has significantly reduced the abuse of these staff.

Although the proposed wording of the Bill is not entirely clear, the following conclusions would appear to be most likely:

1. Schedule 6, Part 1, Item 9, would strike down the redundancy payments currently provided, by making redundancy pay not payable where the technical device of effluxion of time was used to avoid termination "on the initiative of the employer".

2. Schedule 6, Part 1, Item 13 (89A(3A)(i)) would strike down the requirement to employ employees engaged in ongoing work on an ongoing basis (the impact of this is potentially far wider than tertiary education, as any employer could avoid redundancy payments and the

entire unfair dismissal jurisdiction simply by employing all employees on a fixed-term contract and "rolling-over" one contract after another).

3. Schedule 6, Part 1, Item 10, would remove the limited right of employees to be advised whether their contracts are to be renewed.

The Bill's provisions in this area would have a disproportionate effect on women. Prior to the HECE Award women were significantly over-represented in the fixed-term category of university employees.

2. Additional allowable award matters which should be included

The NTEU's primary submission is that the restriction of industrial disputes to so-called "allowable matters" should be repealed.

However, if this course were not to be adopted, the NTEU submits that the following additional matters should be included in Section 89A(2):

1. *"consultation with employees and organisations prior to termination for redundancy"*

and

2. *"requirements to make efforts to avoid termination for redundancy, such as redeployment"*

Both of these are obligations imposed on Australia by the *Convention Concerning Termination of employment at the initiative of the Employer*, set out in Schedule 10 of the Act. Moreover, in the experience of the NTEU consultation and redeployment procedures have been effective in avoiding termination for redundancy, which, while sometimes inevitable, must surely be considered a last resort.

3. *"the regulation of casual employment, including the circumstances under which, and duration for which, it is used, and the hours of work of casual employees."*

The NTEU is aware of thousands of employees in tertiary education who are employed for many years on a casual basis. These employees, some of whom work

a “full-time” casuals (ie. in excess of 35 hours per week) are denied many employment benefits, including annual leave, sick leave, parental leave. Although some employees (for example, visiting guest lecturers) obviously prefer casual employment, the great majority of these for whom their casual work is their livelihood would prefer part-time or full-time employment.

Tertiary education is one of the most casualised industries in the country, and a high proportion of casuals are women. Their work experience is difficult to study but it should be noted that some studies of casualisation of the Australian workforce (Jones, 1994; Mayhew and Quinlan, 1998) show that casual workers are less likely to receive training, to be aware of hazards affecting their work, or to report injuries, but more likely to suffer work intensification and work-related stress. No industrial relations system can be seen as relevant to the contemporary Australian workplace unless its regulatory framework encompasses the conditions of casual employees and the circumstances of casual employment.

The NTEU also notes that, although the Act states as part of its principal object (Section 3(j)) the elimination of various types of discrimination, the Commission has no power to pro-actively use the Award system to achieve this object. For example, while an award itself probably cannot discriminate directly, the employers use of the Award can do so, and it would seem that there is little the Commission could do about it in arbitration.

The model anti-discrimination clause in Sub-Section 89A(8) may give rise to a prosecution for breach of the model clause, but it gives the Commission no power to remedy any discriminatory practice.

3. BARGAINING – Problems with the current Act

3.1 Employer Options on Form of Bargaining

Rightly or wrongly Australia has moved away from a centralised system revolving around compulsory arbitration on a national, industry, and dispute-specific basis. What it has not done is develop a system which genuinely promotes and supports collective bargaining at the enterprise level, underpinned by relevant award standards.

The present system allows for three forms of bargaining and codification of employment conditions: collective bargaining with unions, collective

bargaining ostensibly with employees directly, and individual bargaining through Australian Workplace Agreements (AWA's). It may be argued that this was designed to accommodate the diversity of industrial and workplace circumstances – reasonably to heavily unionised workplaces, un-unionised medium to large workplaces, un-unionised small workplaces with a few employees. However, in the Act the forms of bargaining are disconnected from actual industrial and workplace circumstances. Consequently, the practical effect is to create an employer-driven bargaining system. Employers are able to choose which form of bargaining best suits the advancement of their preference as to bargaining outcomes, and are limited in this capacity only by the latent or manifest power of unionised employees in some workplaces. Even in those workplaces, under the current Act the formal equality of the right of either party to take industrial action to secure preferred bargaining outcomes does not do justice to the real situation, as the employer's tactical options extend to promoting de-unionisation by initiating individual or non-union collective 'bargaining'.

Critics of the present system usually cite AWA's in this context, and certainly an AWA is, in our experience, rarely a product of genuine bargaining and invariably an ever-present de-unionisation option during bargaining rounds. The Bill's proposal to allow AWA's entered into despite there being an extant collective agreement to prevail over that agreement is simply a way of undermining collective bargaining and of achieving the employer's preferred bargaining outcome. However, the NTEU has greater experience of the use of employer-initiated ballots for a non-union collective agreement under Section 170LK of the Act, although we will return to the issue of AWA's in this context.

3.2 Section 170LK – Ballot Procedures

On a number of occasions, employers who have been negotiating with the NTEU for some time have sought to use this Section to obtain a non-union collective agreement by obtaining a "valid majority" in a ballot of staff. Fortunately, few of these attempts have succeeded. Nevertheless, the defects and problems with this should be highlighted.

There is no requirement for a secret ballot, an independent returning officer, for a union to be allowed to scrutinise the electoral roll, for the employer to provide as part of the explanation required by Sub-Section 170LK(7) of the

Act any comparison between the proposed agreement and either the Award or the previous agreement, or for the employer to circulate Yes and No case material with the ballot papers. Further, there is no obligation on the employer to give relevant unions notice of intention to conduct a ballot for a non-union agreement. The 14 days notice specified under Section 170LK(2) does not suffice for this purpose because it does not mean that employees have 14 days to consider the proposed agreement and arguments for and against before voting. It simply means that voting does not conclude until 14 days later, but employees can complete and return the ballot paper upon, or a day or so after, receiving the ballot paper together with the agreement. The employer is therefore able to 'spring' both a non-union ballot and a proposed agreement on a union, thereby limiting its opportunities to campaign. The reference to 'meeting and conferring' in 170LK(8) is of little value, because in practice the conferring is over an agreement the terms of which have already been determined by the employer, and the agreement itself has been sent out along with ballot papers.

Other tactics available to the employer to limit campaigning against the employer's proposed agreement include using Right of Entry provisions to restrict access to the workplace and denying on-site meeting space to union representatives, eg. instructing staff responsible for booking lecture theatres to refuse bookings from the NTEU during the ballot period.

The Act should be amended to require the employer to provide a copy of the agreement and notice of intention to conduct a ballot under 170LK fourteen days before voting commences, with provision for either an objecting union or group of employees to seek Orders from the Commission on the conduct of the ballot. The price of an effective 28 day period for ratification of an agreement would be worth paying to allow time for campaigning and fair and democratic ballot procedures.

3.3 Section 170LK – Negating a Democratic Vote

The current Act also allows an employer who initiates a ballot on a non-union agreement, and loses, to persist with his or her preferred bargaining outcome by fragmenting the electorate or by promoting codification of that outcome in the form of AWA's.

In 1997 La Trobe University, after a period of negotiation with the NTEU, initiated a 170LK ballot of its academic and general staff to achieve its preferred bargaining outcome through a non-union agreement. The majority of voters rejected the proposed agreement. The management of the University concluded that they might have a greater prospect of success if the same agreement was submitted to a general staff only ballot. This never eventuated due to last-minute negotiated changes to the agreement, but it is possible to do this under the current Act.

The management of Holmesglen TAFE, after losing a vote of its general staff on an Institute wide basis, submitted the same proposed agreement to several separate ballots of staff in particular units of organisation within the Institute, selected presumably because of management's assessment of where staff supporters of the proposed agreement were concentrated. These ballots succeeded from the management point of view, but the resultant agreements were not certified by the Commission, which questioned whether the organisational units concerned were 'part of a single business' within the meaning of the Act. Other Commission cases, notably a Full Bench decision on 13 August 1999 in respect of Boroondara City Council, suggest that these words in the Act are open to an interpretation more favourable to employer use of this tactic.

The essential point is that the Act should be amended to preclude the employer from fragmenting the electorate in the wake of losing a ballot.

Reinforcing the point made earlier about the present system being employer-driven because of employers' tactical options on the form of bargaining, Holmesglen's next step was to offer the same terms in the form of AWA's, and in this tactic the management was successful. There comes a time when, after voting down an agreement, after seeing the Commission overrule employer manipulation of the Act's provisions for agreements to pertain to part of a single business, after receiving the same offer on an individual basis and seeing others accept the AWA's, employees conclude that acceptance of the employer's terms is the only way to receive a wage increase. The Holmesglen saga is attached as a Case Study to this submission, and it should be noted that new employees were engaged on the basis that acceptance of an AWA was a condition of employment.

The Act should be amended to preclude the offering of AWA's where an employer loses a non-union ballot.

3.4 Fragmenting Bargaining Power

Amendments of the kind recommended above, while a step forward, would not necessarily deal with the heart of the problem – the capacity of the employer to advance his or her preferred bargaining outcomes and promote de-unionisation by fragmenting employee bargaining power at the enterprise level. Why wait to see if one wins or loses an enterprise-wide non-union ballot when it is possible to start the bargaining process by breaking-up what was previously an enterprise-wide collective process?

The Bill proposes to clarify s.170LB(3) and other relevant provisions of the Act by removing any technical basis for opposition to 'part of a single business' agreements. Instead amendments should be made with the opposite effect, to limit such agreements to a geographically distinct part of a single business or a distinct and autonomous operational or organisational unit within a single business. Moreover, the Commission should be empowered to refuse such a 'part of single business' agreement where previously employees in that part were covered by a broader collective agreement, unless special circumstances exist.

3.5 Arbitration and Bargaining: Section 170N

Earlier in this submission the point was made that the present system did not promote collective bargaining 'underpinned by relevant award standards'. This was not just a reference to the issues of allowability or to minimalist interpretation of the concept of a safety-net award. The NTEU has had experience of Section 170N of the Act being invoked to prevent arbitration by the Commission on an award matter which was allowable.

Section 170N of the Act provides that (with the exception of a safety-net wage adjustment variation to an Award) the Commission is not to arbitrate on a matter which is "at issue" between the parties in enterprise bargaining, while there is a bargaining period in place.

Prima facie the aim of this provision is to ensure a party engaged in bargaining cannot 'forum shop' by using arbitration as a second "bite of the cherry".

However, the provision is clearly open to abuse. Any employer who refuses to conclude a certified agreement, and whose employees lack the industrial power to force an agreement upon it, can avoid arbitration at any time by opening a bargaining period and serving a log of claims on the union which includes claims to which the union would be unable to agree.

The essential point is that there should be no blanket prohibition, as per 170N, on arbitrating. It should be a matter for the Commission to exercise its discretion, having regard to the Objects of the Act, which include the promotion of bargaining. This should suffice for the purpose of stopping forum shopping.

3.6 Consequences of Industrial Action By Employees

A bargaining-centred industrial relations system cannot be equitable unless employees enjoy the right to withdraw their labour without undue repercussions. The present system has the effect, because of interpretation of 187AA, that not only would an employee lose a full days pay for a 24-hour strike but also could lose a full days pay for the imposition of a ban or a limitation on the performance of only one of her or his duties. Under this arrangement, the penalty imposed on the employee is disproportionate having regard to both the extent to which labour is withdrawn and, in most cases, the consequences of the ban for the employer's activities. Paradoxically, the effect of 187AA is likely to be greater industrial conflict and disruption, as employees (including those traditionally averse to strike action because of concern as to its effects on other people for whom they have a professional responsibility) are left with no alternative but strike action and prolonged strike action at that.

The Government wishes to amend the Act to uphold the prevailing interpretation of 187AA. Instead, an appropriate amendment would be to prescribe a 10% pay reduction for the imposition of bans and limitations, with provision for employers to seek an Order from the Commission to increase

that percentage to the level proportionate to the effect of the industrial action on the employer's activities.

3.7 Ballots for Industrial Action

The proposed procedures for ballots to authorise industrial action are complex, costly and unnecessary. Given the primacy of bargaining and certified agreements in regulating terms and conditions of employment, employees and unions must have a reasonable capacity to take industrial action to further their claims.

The proposals for ballots contained in the Bill is likely to make it all but impossible for employees to take protected action.

The proposed provisions in relation to the effect of the ballot (clause 170NBDD) require not only 50% of those who vote to vote in favour of industrial action but also that at least 50% of eligible voters actually cast a vote. In the absence of compulsory voting, the purpose of this is to significantly raise the bar for industrial action to be authorised and protected. If applied to those countries which have voluntary voting in their political system, in many cases no government could be legitimately formed. It should be noted, in order to get a sense of the logistics involved, that at many universities the NTEU Branch has over 1000 members and at one university, 2000 members.

Moreover, the absurdity of the ballot process is evident from the fact that any employee who votes in such a ballot <u>against</u> industrial action is not bound to take such action even if a majority of employees vote to take action, yet an employee who votes <u>for</u> such action is legally bound <u>not</u> to take such action if the majority vote against taking action. Even if the Parliament were to adopt this cumbersome, unnecessary and expensive proposal, it could only be fair if all those who voted were deemed to have participated in the industrial action, and that the employer could not discriminate between employees who participated in the ballot as to whether wages were paid or not.

Currently the decision about whether to take industrial action is an individual choice. To the best knowledge of the NTEU, there has never been a single case of coercion, or of an employee being disadvantaged, for taking industrial

action in any area where the NTEU has any interest or knowledge. To coerce or disadvantage in this way is strictly prohibited already.

The evidence as to whether industrial action is supported by employees is therefore whether or not such employees participate in the industrial action.

The NTEU submits that the proposed ballot procedures be entirely withdrawn.

4. Unfair Dismissal

The present Act and regulations exclude most persons employed on probation (those with a probation period of less than 3 months or a period considered "reasonable") and persons engaged on a contract for a specified period of time from the operation of the unfair dismissal provisions.

Academic staff appointments often provide for three or even five-year probation periods. Certified Agreements in the higher education industry generally set down processes for probation – review, involving assessments over time of teaching performance, research output and other relevant factors.

However, if the employer breaches these procedures and arbitrarily dismisses the employee, the employee may have no remedy, despite the fact that he or she may have been an employee for up to five years.

The following example shows what a blunt instrument the existing provisions relating to probationary employment are. An NTEU member had been a medical practitioner engaged in private practice. In order to take up a medical education position, for which she had successfully applied, she gave up a lucrative private practice position. Her contract of employment provided for termination on two weeks notice (limiting her common-law rights) and also provided for 6 months probation. What she did not know, and was not advised of, was that an in-principle decision had already been made before her appointment to abolish her position. Therefore she was told within one month after commencing, that she was to be made redundant only three months after commencing. Of course, she was excluded from challenging her dismissal or seeking compensation for it.

In relation to fixed-term contracts, the position is even more unfair. Following the introduction of the *Higher Education Contract of Employment Award 1998* the use of

fixed-term contracts in higher education is limited to particular circumstances such as the engagement of replacement employees or the engagement of employees on specific projects of limited duration. In areas where the *Higher Education Contract of Employment Award 1998* does not apply fixed-term contracts are still used in respect of ongoing work for employees who have been often been employed for a number of years. Despite their length of service, such employees are excluded from challenging a non renewal of contract; or a dismissal within the period of the contract, no matter how arbitrary or unfair.

The Act should be amended, at least:

- to allow access to the unfair dismissal for probationary employees where the dismissal was contrary to an Award or Agreement, or where other special circumstances (such as a probationary period of some years) can be demonstrated;

- the definition of termination at the initiative of the employer, or termination of employment, should be expanded to include the non-renewal of a fixed-term contract of employment where the work performed by the employee continues to be required after the expiry of the contract; and

- the existing exclusion of employees engaged for a fixed-term or for a specified task should be repealed.

5. Obligations of Non-Unionists

The Act outlaws compulsory unionism, which has not in any case been a feature of employment in tertiary education. But a distinction should be made between compelling someone to join a union, and requiring a contribution from that person because of benefits obtained by a union for that person and an associated duty of fair representation borne by the union.

Currently the NTEU represents about sixty percent of employees in most workplaces where it negotiates certified agreements. By comparison with other countries, Australia gives non-unionists a free-ride in relation to the negotiation of certified agreements.

The NTEU expends large resources in negotiating agreements from which non-unionists benefit in exactly the same way as unionists.

The NTEU submits that upon the certification of an Agreement, a registered organisation should be able to apply to the Commission for orders that all employees who are covered by an Agreement pay to the union 50% of the amount that they would be required to pay if they were members of the union, and that this amount be deducted from salary by the employer and paid to the organisation where such an order were made.

The organisation would have to provide representation to non-members in relation to matters covered by the Agreement, on the same basis and to the same extent, as it provides such representation to members (other than the right to participate in the affairs of the union).