



Australian Higher Education
Industrial Association

Head Office
Level 8
170 Queen Street
Melbourne
Victoria 3000
Tel: (03) 9670 9522
Fax: (03) 9602 5831

Postal Address
GPO Box 775H
Melbourne Victoria 3001

Suite 1
210 Clarence Street
Sydney 2000
Tel: (02) 9370 6635
Fax: (02) 9370 6638
Internet: www.aheia.edu.au

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Higher Education Review Secretariat
Department of Education, Science and Training
Location 701
GPO Box 9880
CANBERRA ACT 2601

Dear Sir

Please find attached a further submission to the Higher Education Review on behalf of the Australian Higher Education Industrial Association. This submission specifically addresses issues of workplace and industrial relations dealt with in the discussion paper "Meeting the challenges – the governance and management of universities".

Yours sincerely

A handwritten signature in black ink, appearing to read 'Ian Argall', with a stylized flourish at the end.

Ian Argall
Executive Director

one attachment



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Submission by the Australian Higher Education Industrial Association in response to the “governance and management” paper

Introduction

These further submissions on behalf of the Australian Higher Education Industrial Association (AHEIA) are restricted to those aspects of the discussion paper “Meeting the challenges – the governance and management of universities” (the governance paper) that deal with industrial and workplace relations issues.

Many of the practical implications of the current review for workplace and industrial relations in universities will become evident only after basic policy decisions about the Australian higher education system are determined. However, some of the imperatives for university staffing and workplace relations are already evident at this stage.

University governing bodies

The governance paper raises issues of the role and composition of university governing bodies that have significance for how those institutions conduct their industrial relations. In particular, mention is made of the distinction between the roles of trustees and delegates (para 103) and the requirement that members of those governing bodies recognise that they are not elected delegates or representatives of particular sectional interests.

This becomes an issue in workplace relations when, as the University of Western Sydney submission suggests, elected representatives are seen by their constituencies as “a funnel through which industrial issues may be raised above the level of the normal negotiation processes” (para 108). There have been other instances of pressure being brought to bear on those responsible for the management of industrial negotiations during enterprise bargaining in or by their governing bodies. This has often been to the detriment of universities achieving what they want to from the bargaining process.

The possibility of this happening is even greater in those few cases in which State enabling Acts provide for direct nomination by or representation of unions on governing bodies. As an example, the *James Cook University Act 1997* provides for the president of the staff association to be an official member of the Council of that institution.

The distinction between 'governance' and 'management' made at para 7 of the governance paper is important and, in developing guidelines about the role of members of governing bodies, it is important that the implications for industrial relations be kept in mind.

Flexibility

Increased flexibility in employment profile

The importance of flexibility in the employment profiles of universities is acknowledged in the governance paper, as is the apparent opposition of the NTEU to such flexibility (para 196). To AHEIA, flexibility in employment profiles means both resisting additional restrictions on existing categories of full-time, part-time, fixed-term and casual employment, and also ensuring maximum variety in their application. Universities are already constrained in their use of ongoing employment by overly-prescriptive award and agreement provisions and in their use of fixed-term employment by the *Higher Education Contract of Employment Award 1998* (HECE Award).

The current applications in the Australian Industrial Relations Commission (AIRC) in relation to casual employment are referred to in the governance paper and are of great concern to AHEIA member institutions. There may be a part for the Commonwealth to play in the AIRC proceedings about casual employment.

A variety of different employment arrangements, at institutional and individual level are vital to ensure appropriate flexibility.

The governance paper rightly points to the need to properly cater for the aspirations of those university staff not seeking traditional academic employment (para 206). While US style employment arrangements may not translate well to Australian circumstances (for reasons to do with the smaller size of the Australian higher education system and different traditions, as much as with differing systems of industrial regulation) the sorts of differing approaches to the employment arrangements of university teaching staff at paras 208 – 210 of the governance paper are well worth further consideration.

The connection between university teaching and community outreach is one of growing importance. Also worthy of consideration are ways of encouraging this connection.

Single set of awards, classifications or not

The governance paper quotes the ATEM submission (para 142), in its argument for greater recognition of university managers, on the fact that academics and administrators are divided by being covered by "separate industrial awards". At paras 201 –204 the governance paper discusses the traditional dichotomy between academic and general staff and areas of "overlap" and "blurring of ... boundaries" between the work of these groups. The paper (at para 204) suggests that "Most institutions still have separate academic and general staff agreements".

Though it is the case that around half of the institutions in question now have a single enterprise agreement covering both groups of staff distinctions in classification structures are largely maintained in them.

The overlap in academic and general staff work can be, and often is, overstated. It does occur in some areas of administration (as ATEM says), among "professionally qualified general staff becoming involved in teaching and research functions" (para 201) and in relation to the employment of specialists in, for example, "instructional design" as referred to in the Northern Territory University submission (quoted at para 203).

A further and important consideration is that academic and general staff are usually drawn from different labour markets. This is a point that arose last year in proceedings in the AIRC concerning an award based general staff award classification and salary structure. In his Decision of 21 November 2002, Senior Deputy President Duncan concluded:

[56] I am convinced by the evidence brought by AHEIA and the separately represented universities that there is not a national labour market in general staff except possibly at the highest award level. [AIRC PR911627]

Academic staff, on the other hand, participate in a national, and sometimes international labour market.

There are also further reasons not to promote a single salary and classification structure for academic and general staff, even within single enterprise agreements. There has been a general tendency to "average up" conditions of employment in the alleged interests of seeing staff as a unity. This has led, in a number of instances, to increases in labour costs and in the complexity of administrative arrangements. Typical of this has been the tendency to flow on complex procedures in relation to unsatisfactory performance, misconduct and redundancy, originally premised on the special needs of academic staff, to general staff. It would be detrimental to universities if other academic conditions – particularly those arising from the lack of regulation of hours and leave – were simply to be flowed on to general staff.

A preferable approach to the issues highlighted by ATEM may lie in that taken by QUT in providing for separate industrial arrangements for senior staff with management responsibilities, whether academic or general, in a distinct senior staff industrial agreement. The interests of good management in universities would be better served by encouraging academic managers to think of themselves as managers rather than by encouraging general staff managers to think of themselves as academics.

Cost saving/revenue raising

Under the heading of cost saving/revenue raising (paras 144-148), suggestions are made that are likely to have industrial relations implications. In particular, a number of QUT suggestions in relation to access over extended hours and the possibility of a third semester are quoted at para 147.

Clearly, such matters are likely to involve negotiations with unions over issues of ordinary hours and workloads. Some universities have already made advances in these areas that may be able to serve as models. It is also possible that the provision of service over extended hours and weeks may not necessarily translate simply to extending existing staff coverage over those areas, nor in just increasing staffing levels. There may be innovative ways to use technology to provide better access to university services in ways that are also beneficial to staff.

Performance management

Performance management and discipline

The issue of performance management of university staff has been a predominant issue in government involvement in university employment relations since the late 1980s. However, the discussion of this issue and the ways in which it is dealt with by all parties is sometimes confused.

While the NTEU is right in saying that universities already have comprehensive staff appraisal/performance management schemes (para 219), the level of dissatisfaction expressed in university submissions to the review and of government in its comments in the governance paper, is a clear indication that the schemes that exist are not meeting the needs of the universities.

This is primarily because those schemes – largely derived from award based provisions for dealing with unsatisfactory performance or misconduct by academic staff – are not enabling provisions, but constraints on the capacity of university managers to deal with performance issues.

The most common complaints by universities about such provisions is that they are, in the words of the UTS submission quoted at para 220, "complex and long, and appear designed more to intimidate academic managers from commencing the process rather than to achieve a just result for all concerned". This may be because

the origins of the provisions in industrial negotiations and their history as award and agreement provisions ensures that much of the communication between managers and staff over performance issues takes place in an industrial relations context that necessarily involves the adoption of an adversarial and disputatious stance. While there may be some justification in terms of staff protection to such arrangements at the point where dismissal is being considered, there is less justification in circumstances where it would be better to deal with the issues as ones of communication and counselling. There is still a strong argument for the dismantling or simplification of these award and agreement based provisions.

Performance management and rewards

The issues of differential reward for performance are related but different ones. It is possible that government and the public are unaware of the extent to which market related loadings and performance pay arrangements are already being used in the higher education sector. This is because such arrangements typically take place in the over-award or over-agreement area and the details of such arrangements are not commonly dealt with in awards and agreements.

Submissions to the first "Crossroads" paper suggest that universities would benefit from a greater capacity to provide better rewards for good performers, and the issue of performance management in universities would benefit from a greater emphasis on rewarding good performance than on dealing with poor performance. The overwhelming majority of industrial awards and agreements are expressed so as to provide for minimum payments and very few have technical restrictions on such additional payments.

Most often universities are restricted in their capacity to offer performance bonuses simply because they do not have the money left over to do so after paying negotiated common increases as a result of enterprise bargaining. There is therefore considerable attraction the idea of a specific "performance pay pool" suggested in the governance paper (para 223). Given the different needs of an increasingly diverse sector, it would seem counterproductive though, for such funding to be dependent upon adoption of a single, uniform, performance management scheme. Put simply, different institutions will want to reward different types of good performance – for example, one trying to extend its research profile might want to reward exceptional researchers, while another aiming to expand its overseas teaching might want to concentrate on rewarding developments in that area.

A better approach would be to leave the specifics of such a scheme to individual institutions, providing that the money was used to reward particular performance that furthers institutional objectives and subject to some form of audit of outcomes. Any such scheme would, if it is to be viable and not perpetuate some of the problems associated with the Workplace Reform Program (AHEIA's first submission to the Review provides details of those problems), ideally have the following characteristics:

1. an uncoupling of the agenda from enterprise bargaining;
2. an outcome rather than process orientation; and
3. discretion for individual institutions to define the performance objectives they want to reward.

The way in which any additional funding became available would, of course, affect how it could be applied. Any scheme in which fresh application for funds had to be made each year could not support any permanent increase in the base salary of staff, but would have to be applied to "one-off" performance bonuses.

Development of management capacity

Part of the encouragement universities need to better manage institutional staff performance can come through management training. At para 140, the governance paper points out that this is already done to some extent. Specific training in award (and now agreement) based provisions for dealing with unsatisfactory performance and misconduct has also been provided for some time by officers of AHEIA. AHEIA would be pleased to contribute to any further management training initiatives in this regard.

Pattern bargaining

Framework for bargaining

The NTEU has suggested:

"That the Government convene a roundtable conference of key industrial stakeholders in the sector to explore the possibility of establishing an agreed framework to guide the next bargaining round". (para 172)

The NTEU's reasoning is based on assertions that there are advantages to the higher education system in maintaining commonality of salaries and conditions and that otherwise "regional and less prestigious universities" would be disadvantaged in a competitive labour market (paras 168 & 169). On the other hand, many of the university submissions argue strongly against the subordination of such objectives to "the particular circumstances of an institution" (QUT submission quoted at para 174.)

At paras 175 – 177, the governance paper itself puts the case in favour of the need for enterprise bargaining to be responsive to the individual and differing needs of universities.

There are good reasons based on experience to believe that the sort of "agreed framework" about the next round of enterprise bargaining suggested by the NTEU would be detrimental to enterprise bargaining outcomes that address those differing needs. The fact that the NTEU is committed to the maintenance of system-wide

uniformity in employment matters and restrictive regulation of the widest range of employment matters itself suggests that such a suggestion ought not be supported. AHEIA does not believe this suggestion should be taken up.

In particular, it is important to ensure that a diversity in outcomes in relation to the NTEU's four main issues - "casual employment, workloads, job security and competitive salary rates" – is able to result from bargaining. This is less likely to happen within a "bargaining framework".

Faculty level bargaining

The issue of faculty level bargaining has been rejected in several submissions. Furthermore, the governance paper rightly reports on the restrictions on sub-enterprise bargaining imposed by the *Workplace Relations Act 1996*.

There are, however, a number of sub-institutional agreements already in the sector – for example, applying to particular types of work such as ELICOS teachers; or classes of staff, such as managers. There may be value to such sub-institutional agreements if they are sensitive to the particular circumstances of the workplace involved.

Early commencement

The value of early preparation and commencement of enterprise bargaining is rightly emphasised in the governance paper. A number of universities have already begun this process and are already engaging in planning for the next round of bargaining.

AHEIA has been active in encouraging its member institutions to prepare for bargaining. It commenced a series of activities designed to encourage its members to do so earlier this year. AHEIA enterprise bargaining initiatives have included:

- a survey of member priorities when it comes to enterprise bargaining
- a comparative analysis of existing enterprise agreements
- an information session based on this comparative analysis on 10 April 2002
- a National Forum on Enterprise Bargaining for member institutions on 12 July 2002
- specialist sessions both at the AHEIA Annual Conference in April 2002 and at the National Forum on 12 July 2002 on particular topics of relevance to bargaining
- briefing sessions at individual member universities by invitation

AHEIA proposes further activities to assist members in preparing for enterprise bargaining over the next several months.

Industrial action & bargaining periods

The governance paper reports on the difficulties caused by industrial action and the disinclination of universities to do anything likely to exacerbate it. The governance paper also canvasses the provisions of the *Workplace Relations Act 1996* in relation to industrial action under enterprise bargaining (paras 178 – 182).

It is correctly pointed out (at para 180) that, while the most common form of industrial action faced by universities in bargaining, is in the form of partial work bans (often on the transmission of examination results), universities have been reluctant to cease all payment in such circumstances. It is suggested that this is partly due to the nature of academic work and ideals of collegiality and, as Curtin University has suggested, a general desire to maintain harmonious industrial relations (para 181). There are important other reasons for this as well.

Even though examination bans are damaging to universities, staff engaging in those bans are still typically contributing to other important university functions. Many of those functions relate to the ongoing and largely immutable timetables by which universities operate. Taking action that will cause disruption that might later lead to further harm to students is, understandably, something that universities strongly wish to avoid.

Section 170 MW of the Workplace Relations Act 1996

AHEIA believes legislative change providing greater guidance to the AIRC on the exercise of its discretionary power to suspend or terminate bargaining periods is justified in the face of the continued use by unions of bans on the transmission of student examination results as a preferred form of industrial action. Clarification that would make it easier for the AIRC to recognise that such action is both a threat to the welfare of affected students and of harm to Australia's economic interests would be of assistance in enterprise bargaining in higher education.

Section 170MW of the *Workplace Relations Act 1996* provides the AIRC with power to suspend or terminate bargaining periods in certain circumstances. The suspension or termination of bargaining periods has two consequences:

1. Any industrial action that then takes place is thereby rendered "unprotected" industrial action and those participating may be subject to civil litigation. In practice, this is not a significant factor for most employers who do not consider it viable to sue their employees for damages suffered by their businesses. In the case of universities, however, the possibility of individual academics as well as the institutions themselves being sued by dissatisfied fee-paying students is possibly more real; and

2. More significantly, section 127 of the *Workplace Relations Act 1996* by which the AIRC can order cessation of industrial action can be utilised.

The circumstances in which the AIRC will order suspension or cancellation of bargaining periods are constrained by s170MW. Most significantly for universities, are the provisions that allow for such an order if industrial action:

- (3) ... is threatening:
 - (a) to endanger the life, the personal safety or health, or the welfare, of the population or of part of it; or
 - (b) to cause significant damage to the Australian economy or an important part of it.

It is these provisions that the University of Wollongong successfully used, arguing that damage to students caused by the withholding of exam results represented a threat to the welfare of that part of the population represented by the graduating students (see table on page 34 of the governance paper). The governance paper also makes reference to an unsuccessful attempt by the University of New England to use this section – though UNE also argued damage to a significant part of the Australian economy and, in the event, did not proceed with its application after receiving a recommendation from the AIRC.

The University of Western Sydney was unsuccessful in arguments very similar, and in circumstances very similar, to those applying in the University of Wollongong case. In the UWS case, it was pointed out that the exercise of this power is a discretionary one and that recent Federal Court cases suggested that such discretion should be exercised only in exceptional cases. Legislative change aimed at broadening the concept of danger to the welfare of the part of the population, and/or at guiding the discretion of the AIRC in such matters, could ensure that universities have greater certainty about the remedies available to them in the face of this type of industrial action.

Equally important though is the sort of public support for universities, and condemnation of such industrial action, in those circumstances that government can provide through clear and unequivocal public statement.

Consultation and change

As the governance paper points out, "Most university enterprise agreements contain detailed procedures that commit to union involvement in a range of ongoing workplace management issues, including change processes and outsourcing which require consultation and communication with unions prior to management decision-making" para 213).

Consultation with staff in institutions is clearly an important thing and at the heart of good personnel management practice. However, the involvement of unions in

such processes and the ways in which they and staff have reacted to proposals for change has often made this appear not to be the case.

It has been the experience of many universities that consultation processes in enterprise agreements have been used by unions to frustrate and delay any change, regardless of its merits. Rather than being an occasion to familiarise staff with proposed changes and allay their concerns, the processes have been used by unions to cause alarm amongst staff and threaten managers with a view to causing them to abandon change proposals. This has been a most unfortunate development for the sector.

The problem is only partly a result of the consultation provisions agreed to in enterprise agreements, though many of them could beneficially be streamlined. It is also important for universities to develop strategies that do not allow for necessary change to be frustrated and for these strategies to be supported. AHEIA is continually advising its members on these matters and finds that the AIRC is often of help in cutting through procedural matters to underlying issues. Further support for universities in meeting these challenges is important and again the Commonwealth may be able to take a more active role when such disputes do come before the AIRC.

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