

# Submission

to

Senate Employment, Workplace Relations and Education  
References Committee

## **Inquiry into the provisions of the Higher Education Legislation (Workplace Relations Requirements) Bill 2005**

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## Introduction

The National Tertiary Education Industry Union (NTEU) represents the industrial and professional interests of nearly 28,000 staff employed in connection with tertiary education in Australia, and is the largest union representing staff in universities.

The NTEU welcomes the opportunity to make submissions to the Senate on the Inquiry into the provisions of the *Higher Education Legislation Amendment (Workplace Relations Requirements) Bill 2005* (hereafter referred to as the Bill).

The NTEU is party to Certified Agreements made under the *Workplace Relations Act 1996* at all universities. NTEU is currently involved in the negotiations that are occurring in anticipation of the Higher Education Workplace Relations Requirements (HEWRRs), which will be given effect by the passage of the Bill. As such, the NTEU is uniquely placed to comment on the Bill's actual purposes and likely effects.

The NTEU advocates that the Senate reject the Bill for a number of reasons outlined below including that it:

- gives the Minister for Education, Science and Training unprecedented power over the process of collective bargaining between universities and their staff,
- gives effect to the HEWRRs, which fail to address the real workplace issues being faced by Australian universities,
- creates uncertainty and confusion and as such is provoking industrial disharmony at Australian universities,
- lacks appropriate accountability and lack of Parliamentary scrutiny, and
- is in breach of Australian's international obligations in relation to institutional autonomy, the status of higher education staff, and basic industrial rights of workers.

The real agenda behind the introduction of the Bill is to give force to the government's objective to reduce conditions of employment and collective bargaining rights for university staff, most notably by requiring the offering of Australian Workplace Relations (AWAs). It is important to note that the HEWRRs do not form part of the proposed legislation. However, it is the impact of the HEWRRs on Australian universities and their staff that are at the heart of NTEU's objections to this Bill and these are discussed in more detail below.

## Ministerial Power

The effect of the Bill is to give unlimited power to the Minister for Education, Science and Technology. The Bill virtually allows the Minister to dictate the terms and conditions for staff in Australian higher education by making Commonwealth funding to Australian universities conditional on meeting the HEWRRS. The funding under threat are Commonwealth Grants Scheme (CGS), loadings of 2.5% in 2005, 5% in 2006 and 7.5% in 2007 on the Commonwealth Government's contribution for government-supported university student places. This amounts to over \$280m per annum by 2007 in Commonwealth funding. The effect of the Bill is to add additional requirements on universities receiving this funding through the introduction of the Higher Education Workplace Relations Requirements (HEWRRs) which form part of the CGS Guidelines.

The majority of Australian universities are established as autonomous institutions under State and Territory legislation. The Australian Industrial Relations Commission has determined that universities are not 'agencies of the state', rather universities are

defined as independent constitutional corporations. Despite this Australian Universities and their staff have not resiled from meeting accountabilities that relate specifically to their roles as providers of higher education as required by the relevant legislation and other agencies including the Department of Education, Science and Training (DEST) and the Australian Universities Quality Agency (AUQA).

### **The Minister can change the HEWRRs at any time**

By contrast with the *Skilling Australia's Workforce Act 2005* (Section 12), which sets out certain industrial requirements within the legislation itself, the structure of the proposed Bill is to make funding conditional on meeting the HEWRRs. The proposed Bill gives the Minister the legislative power to change the HEWRRs at any time, allowing him/her to "move" the policy "goal posts". This can be done and imposed on universities even after the parties have completed their enterprise bargaining and reached agreement. Therefore, it is possible that if the Minister is unhappy about certain conditions contained within Agreements, that at the time of signing were compliant with HEWRRs, he/she could change the HEWRRs to rule out these provisions, therefore making it necessary for the parties to alter their Agreements before the nominal expiry date to ensure they have access to future CGS loadings funding. The legislation does not constrain the Minister in any way about how often, for what purpose, and in what manner, the HEWRRs can be altered.

### **Administration of the HEWRRs lacks public accountability**

The process the Government has established for the introduction of its HEWRRs has caused considerable, costly and unnecessary confusion in the minds of employers, staff and unions in higher education. The process has already provoked industrial disharmony where it did not exist before and is likely in the end to provoke industrial disputation where it would not otherwise occur.

The Government announced the HEWRRs on 29 April 2005. The HEWRRs themselves are not legislative instruments in that firstly they are not yet enacted or proclaimed, and secondly, even when they are proclaimed, universities do not have to meet the Requirements *per se* but must meet them "*to the satisfaction of the Minister for Education, Science and Training*". During a period where universities and unions are trying hard to negotiate new Agreements or re-negotiate existing Agreements to comply with the HEWRRs on very tight timelines (August – November 2005) interpreting exactly what this means has been problematic.

Correspondence from the Minister has advised the parties that they, in effect, need to comply with the "spirit" of the HEWRRs not just the letter. It is the NTEU's experience that advice DEST officials have given to the parties about certain provisions in proposed Agreements is highly contestable and tendentious. While they have suggested that certain provisions are not likely to comply with the HEWRRs, they disavow any capacity to advise the parties that the terms of their proposed Agreements will meet with Ministerial approval. This is testified to by the latest addition to DEST's HEWRRs website<sup>1</sup> which states:

*.. the decision on whether a higher education provider has complied with the HEWRRs (so as to be eligible for increased Commonwealth Grant Scheme funds)*

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<sup>1</sup> Refer to

[http://www.dest.gov.au/sectors/higher\\_education/programmes\\_funding/programme\\_categories/professional\\_skills/hewrrs/qanda.htm](http://www.dest.gov.au/sectors/higher_education/programmes_funding/programme_categories/professional_skills/hewrrs/qanda.htm)

*will be made by the Minister for Education, Science and Training. In providing these Questions and Answers, DEST in no way represents that the Minister will or will not make any particular decision in relation to the provider's compliance with the HEWRRs.*

This process is completely unacceptable and simply sows confusion and uncertainty into the current Agreement-making arrangements.

The *Workplace Relations Act 1996* has a series of procedural requirements that properly must be met before an Agreement will be certified. On the other hand, the HEWRRs have a compliance date - 30 November 2005 in some cases, or 31 August 2006 in others – by which Certified Agreements in place at institutions must comply. Universities, unions, and the staff who will be voting on Agreements, must therefore literally guess in advance whether an Agreement - which must go through a four-week approval, signing, notice ballot and certification process - is going to meet with the Minister's approval.

In relation to the institutions with a compliance date of 30 November 2005, they will not know whether they will receive 5% of their CGS loading for 2006 until sometime after this date, which is almost at the beginning of the new academic year.

The NTEU does not necessarily allege that the Government's policy agenda was to sow confusion, uncertainty and disputation, however, it is hard to imagine a process better designed to achieve these outcomes.

#### **Lack of effective parliamentary scrutiny**

As discussed above, the Minister can alter the HEWRRs on any terms he or she sees fit by altering the CGS Guidelines. While the CGS Guidelines are disallowable instruments under Section 238-10 of the *Higher Education Support Act 2003*, any such a disallowance would effectively mean a cut in existing appropriations for 2006 and/or 2007. The motive for any disallowance motion would most likely be that Higher Education Providers should not be subject to the objectionable elements of the HEWRRs. The consequence of the disallowance however, would be that institutions lose their CGS funding, which is the same outcome as having a non-compliant Agreement. This in effect means Parliament has no practical opportunity to scrutinise or disallow the HEWRRs without threatening the financial viability of Australia's universities.

### **Higher Education Workplace Relations Requirements (HEWRRs)**

While the HEWRRs are Guidelines under the Bill, their imposition on universities and their staff is the prime purpose of the Bill. It is therefore appropriate and necessary to comment on the HEWRRs themselves when assessing the merits of the Bill.

While it is reasonable that institutions receiving Government funds are accountable in a broad sense for the outcomes of their teaching and research, the HEWRRs constitute micro-management of and excessive interference in, the workplace relations arrangements of universities. In effect, the Minister wants to make significant funding of universities dependent on a number of important matters which not only constitute unreasonable interference in the day-to-day operations of universities but also threaten the quality of education offered and the basic industrial and professional rights of our members. The more objectionable of these provisions and the NTEU opposition to them are outlined below.

Also the HEWRRs requirements undermine standards enunciated in the UNESCO *Recommendation concerning the Status of Higher-Education Teaching Personnel* (1997). In particular, they contravene Article 17 (*Institutional Autonomy*) and Article 40 (*Entry into the academic profession*).

Article 17 is one of the central principles contained within the Recommendation, and states:

*“The proper enjoyment of academic freedom and compliance with the duties and responsibilities listed below require the autonomy of institutions of higher education. Autonomy is that degree of self-governance necessary for effective decision-making by institutions of higher education regarding their academic work, standards, management and related activities consistent with systems of public accountability, especially in respect of funding provided by the state, and respect for academic freedom and human rights”*

This is important since institutional autonomy is critical in protecting and defending the academic freedom rights that underpin the best universities across the world.

Article 40 (Entry into the academic profession) provides that:

*“The employers of higher-education teaching personnel should establish such terms and conditions of employment as will be most conducive for effective teaching and/or research and/or scholarship and/or extension work and will be fair and free from discrimination of any kind.”*

The fact that the Government has moved to impose a strict set of requirements on the ability of Australian universities to employ their staff according to the educational and organisational objectives of the institution makes clear that they do not value the important role played by institutional autonomy, academic freedom, and professional standards in sustaining universities in their core functions of teaching, learning, research and community engagement.

### **HEWRR Requirement 1: Choice in Agreement Making**

*Institutions must offer Australian Workplace Agreements (AWAs) to all new staff employed after 29 April 2005, and to all existing staff by 31 August 2006.*

The Government is looking to extend the reach of AWAs in universities. University Enterprise Agreements currently allow university managements to offer AWAs to staff in accordance with the *Workplace Relations Act 1996*. This new requirement means universities will have to actively promote and offer AWAs to all university staff. Universities have been able to offer AWAs under the *Workplace Relations Act 1996* for many years but have elected either not to do so or to offer them only to small groups of senior staff. Therefore, the HEWRRS will effectively penalise universities that continue their preferred approach to the utilisation of HEWRRs.

*Institutions must include a clause in Agreements that expressly allows AWAs to operate to the exclusion of the Enterprise Agreement.*

Under the *Workplace Relations Act 1996*, AWAs cannot override the conditions in the underlying Agreement during its nominal life. The effect of these HEWRRs requirements would be to enable AWAs to undercut Agreement conditions at all times.

ILO Convention 154 *Collective Bargaining Convention* sets out the international best practice in relation to collective bargaining. Article 5, states that States have a positive responsibility to promote collective bargaining while Article 8, states “*measures taken with a view to promoting collective bargaining shall not be conceived or applied as to hamper the freedom to collective bargaining.*”

NTEU agrees with Gernigon *et al*<sup>2</sup> who summarise the ILO’s perspective on best practice in collective bargaining where they state:

*“The framework within which collective bargaining must take place if it is to be effective is based on the principle of independence and autonomy of the parties and the free and voluntary nature of these negotiations; it requires the minimum possible level of interference from public authorities in bipartite negotiations and gives primacy to employers and their organizations and workers’ organizations as the parties to the bargaining.”*

Through the introduction of this requirement the Government is not promoting collective bargaining but rather constraining it. It is not putting into place mechanisms in support of collective bargaining rather it is promoting an employment form (AWAs) that is directly opposite to the spirit of collective bargaining. Therefore, the HEWRRs contravene the specified sections of ILO C154 *Collective Bargaining Convention*.

These restrictions are not part of the general industrial laws covering other sectors of the Australian economy. The NTEU accepts that it is not inconsistent with the idea of university autonomy that the general industrial laws should apply to universities. However, in this case, the Government is seeking to dictate to universities matters not required of any other employers outside its own direct area of responsibility.

Many industrial relations issues are local, or even where they reflect sectoral issues they take local forms. The HEWRRs in any case do not address, or will make somewhat worse, the existing real issues facing universities as outlined below.

Clearly the requirement to offer all staff AWAs limits the ability of collective agreements to influence institutional policies that impact upon all employees as group rather than as individuals, such as the regulation of workloads. NTEU fears that one of the consequences of the HEWRRs is that it will allow universities to offer AWAs to new employees to circumvent such regulations.

Figure 1 shows student:staff ratios at Australian universities increased by almost 40% between 1995 and 2003. Figure 2 shows that research outputs<sup>3</sup> per teaching and research staff member have increased by over 60% over the same period. These increasing workloads have been addressed in the latest round of enterprise bargaining. These rapid increases in the number of students per staff member and research output have occurred in a period of real cuts in government expenditure per student in higher education. As a consequence staff are faced with increasing workloads and stress levels in order to maintain the quality education and research undertaken at circumvent these conditions. Clearly, workloads are a collective as

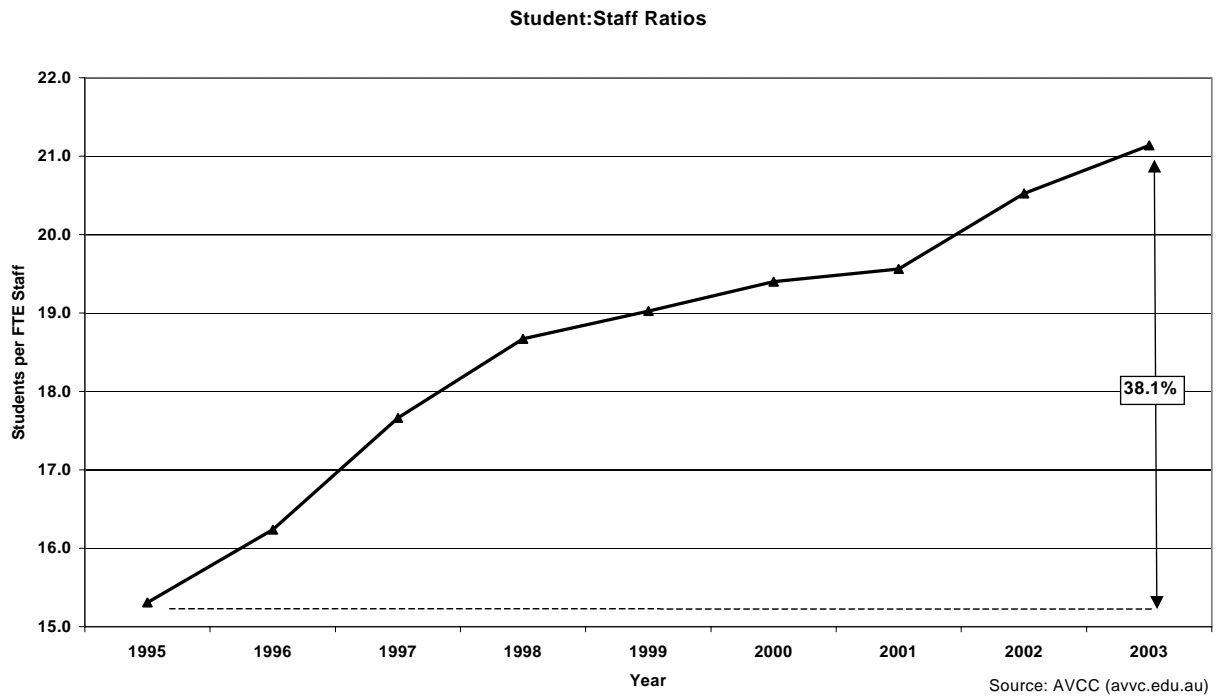
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<sup>2</sup> B. Gernigon, A. Otero, and H. Guido (2000) *ILO principles concerning collective bargaining* International Labour Review, Vol. 139 No. 1

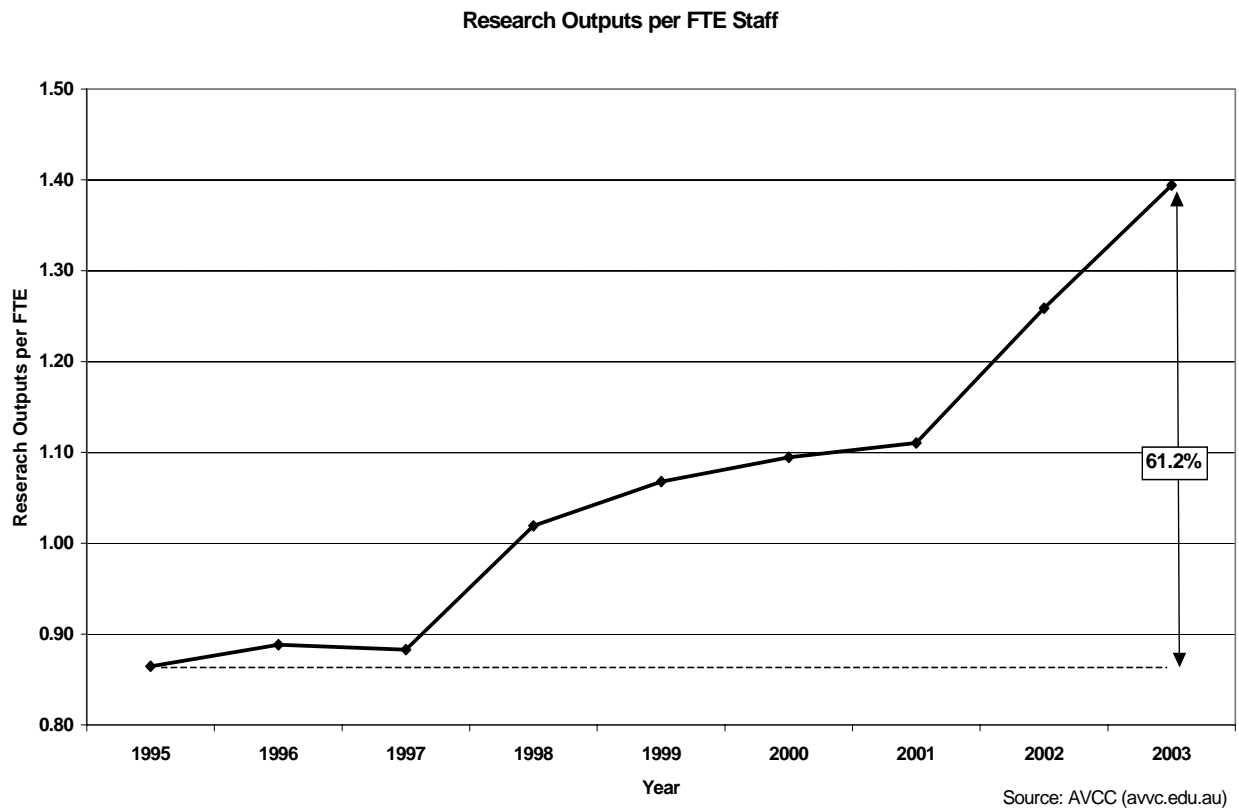
<sup>3</sup> Research outputs include books, book chapters, and refereed journal and conference articles or papers.

well as individual issue and therefore, collective Agreements are needed if workloads are to be effectively regulated. Unregulated workloads constitute one of the greatest threats to the quality of higher education offered by Australian universities.

**Figure 1: Student to Staff Ratio 1995 to 2003**



**Figure 2: Research Outputs per Full-Time Equivalent Staff Member 1995 to 2003**





### **HEWRR Requirement 2: Direct relationships with employees**

*Agreements, policies and practices must provide for 'direct relationships with employees'.*

The Government wants to exclude the Union from having a role in consultative processes for staff in university Agreements. 'Third party' involvement must only occur at the request of an affected employee, not by right.

This requirement contravenes ILO Convention C135 *Workers' Representatives Convention*. In particular, Article 2 which provides for the following

*"Such facilities in the undertaking shall be afforded to workers' representatives as may be appropriate in order to enable them to carry out their functions promptly and efficiently."*

It also contravenes Article 5, which states:

*"Where there exist in the same undertaking both trade union representatives and elected representatives, appropriate measures shall be taken, wherever necessary, to ensure that the existence of elected representatives is not used to undermine the position of the trade unions concerned or their representatives and to encourage co-operation on all relevant matters between the elected representatives and the trade unions concerned and their representatives."*

The UNESCO *Recommendation concerning the Status of Higher-Education Teaching Personnel* refers to the responsibilities of institutions to ensure that trade unions are represented in the general consultation and negotiation process as part of institutional accountability. Article 22 suggests, in part, that:

*"Higher education institutions should endeavour to open their governance in order to be accountable. They should be accountable for:...*

*(k) the creation, through the collegial process and/or through negotiation with organizations representing higher-education teaching personnel, consistent with the principles of academic freedom and freedom of speech, of statements or codes of ethics to guide higher education staff in their teaching, scholarship, research and extension work; "*

Similarly, Articles 26 and 27 speak to the importance of the rights pertaining to academic freedom, including the freedom to participate in professional or representative academic bodies.

### **HWERR Requirement 3: Workplace Flexibility**

*Agreements, policies and practices must not limit or restrict the university's ability to make decisions and implement change in respect of course offering and associated staffing requirements.*

*Agreements, policies and practices must not place limitations on the forms and mix of employment arrangements, and must be simple, flexible and principle-based, avoiding "excessive detail and prescription".*

These requirements derogate the substantial rights that accrue to individual employees and to the representative trade unions under existing collective agreements made in Australian universities. In particular, current collective agreements contain managing change clauses that provide for consultation over

significant changes to the program of universities, such as the closure of a particular field of studies, such as nursing (University of Sydney) or engineering (Monash University). In these cases, the process of consultation under existing collective agreements ensured that the employment rights of those staff employed in these areas was dealt with justly because of the involvement of the trade union working co-operatively with the institution.

Perhaps more significantly, these requirements mandate that there are to be no restrictions on the mix of employment arrangements. This is aimed particularly at excluding current restrictions on the offering of fixed term contract and casual (hourly paid) employment. Australian higher education unions were successful in gaining restrictions in these areas of employment through the current *Workplace Relations Act*, and they remain allowable under this Act. We consider that these restrictions are essential to maintain the high quality of teaching and research, since fixed term contract and hourly paid staff are not, understandably, always able to participate fully in the work of their department, or have the time to meet with students outside formal working hours. This is particularly true for hourly paid casual staff.

In essence, these requirements excessively favour the institution making decisions with no responsibility to involve, consult and negotiate with the staff affected by change, and their representative organisations. The result is that staff, and their representative organisations have their *rights* substantially derogated, while university managements have their collegial *responsibilities* reduced.

Article 46 of ILO UNESCO *Recommendation concerning the Status of Higher-Education Teaching Personnel* (1997) (Security of employment) underscores the importance of security of employment to maintaining high quality higher-education teaching personnel. In part it states:

*“Security of employment in the profession, including tenure or its functional equivalent, where applicable, should be safeguarded as it is essential to the interests of higher-education teaching personnel. It ensures that higher education teaching personnel who secure continuing employment following rigorous evaluation can only be dismissed on professional grounds and in accordance with due process”*

The greatest impact of this HEWRR requirement is that it is likely to result in an increase in use of casual and contract employment. Table 1 shows the share of full-time equivalent (FTE) employees at Australian universities by the type of work contract. While the data shows that the proportion of employees engaged on a casual basis has increased significantly over the period from 11.5% in 1995 to almost 15% in 2004, this actually under represents the importance of casual employees in the higher education. The data is for full-time equivalent employees and not the actual number of employees. While data on the actual number of casuals is not available, estimates have suggested that at least half of the actual numbers of people who work at Australian universities are engaged on a casual basis

**Table 1: Share of FTE Employees by Work Contract**

Year	Full-Time %	Permanent Part-time %	Estimated Casual %	Total
1995	79.7%	8.9%	11.5%	100%
1996	78.7%	9.0%	12.3%	100%
1997	77.1%	9.7%	13.2%	100%
1998	76.3%	10.3%	13.3%	100%
1999	75.7%	10.0%	14.3%	100%
2000	74.8%	9.7%	15.5%	100%
2001	73.7%	10.6%	15.7%	100%
2002	73.5%	11.0%	15.5%	100%
2003	74.2%	10.4%	15.5%	100%
2004	74.4%	10.7%	14.9%	100%

Source: DEST Higher Education Selected Statistics ([www.dest.gov.au](http://www.dest.gov.au))

Of equal concern to the NTEU is the potential effect that HEWRRs will have on the use of fixed-term contracts. Table 2 shows that about one-third of all university employees are on fixed-term contracts. It also shows that this proportion has declined steadily since 1995, primarily as a result of the *Higher Education Contract Employment (HECE) Award*, which effectively restricts the categories of employees that can be covered by fixed-term contracts of employment. Table 3 shows that the impact of this has been greatest amongst female employees. In 1997 (the year before HECE was introduced) 41.7% of all female employees were on fixed-term contracts and this had fallen to 30.4% by 2004. The HEWRRs legislation will lift the restriction of the use of fixed-term contracts and NTEU is concerned that universities will be making increased use of fixed-term individual contracts to new employees, which based on past patterns is likely to have greatest impact on female employees.

**Table 2: Proportion of Non-Casual Employees (FTE) by Term of Contract**

Year	Tenure	Fixed Term Contract	Other
1995	63.6%	34.6%	1.8%
1996	62.4%	35.9%	1.7%
1997	60.4%	37.9%	1.7%
1998	58.8%	40.7%	0.5%
1999	65.5%	34.2%	0.3%
2000	69.4%	30.3%	0.3%
2001	70.3%	29.4%	0.3%
2002	70.5%	29.2%	0.3%
2003	70.5%	29.2%	0.3%
2004	70.1%	29.6%	0.3%

Source: DEST Higher Education Selected Statistics ([www.dest.gov.au](http://www.dest.gov.au))

**Table 3: Term of Contract by Gender 1997 and 2004**

	Males	Females	All
Tenured			
1997	23,770	18,900	42,670
% Share	63.8%	56.5%	60.4%
2004	27,076	27,766	54,842
% Share	71.0%	69.3%	70.1%
Fixed Term			
1997	12,827	13,956	26,783

% Share	34.5%	41.7%	37.9%
2004	10,944	12,198	23,142
% Share	28.7%	30.4%	29.6%
Other Term			
1997	633	595	1,228
% Share	1.7%	1.8%	1.7%
2004	96	110	205
% Share	0.3%	0.3%	0.3%
<b>TOTAL</b>			
1997	37,230	33,451	70,681
% Share	100.0%	100.0%	100.0%
2004	38,116	40,074	78,189
% Share	100.0%	100.0%	100.0%

Source: DEST Higher Education Selected Statistics ([www.dest.gov.au](http://www.dest.gov.au))

#### **HEWRR Requirement 4: Productivity and Performance**

*Agreements, policies and practices must include performance management systems which reward high performing staff and “efficiently manage” poor performing staff.*

This requirement mandates that workplace agreements (both collective agreements and individual contract based Australian Workplace Agreements), policies and practices must support organisational productivity and performance. Little detail is provided in the HEWRRS to define this objective, except that additional conditions specify that there must be arrangements through the performance management system to reward high performing staff and for the management of poor performing staff. It is important to understand that Australian Universities do not have ‘tenure’ in the way that it is understood in other countries. Staff are offered continuing employment subject to the procedures for dismissal on the grounds of serious misconduct or unsatisfactory performance and like other employees can be declared redundant.

The NTEU would point out that existing collective agreements specify in detail the agreed performance management system, in particular how the institution will deal with unsatisfactory performance and serious misconduct. In addition, existing collective agreements in no way prohibit salary payments, bonuses, or loadings being paid above the rates contained in these agreements. Many institutions currently pay well above the minimum rates in order to reward high performing staff or to attract teaching and research staff in areas of labour shortage, such as certain professional areas, or to attract international appointments, particularly in research. Currently, the Government funds the Federation Fellows Scheme, which targets Australian researchers working overseas who have established high level international reputations to return to work in Australia. The salaries paid under this scheme are set at \$250,000, whereas a comparable researcher working under the collective bargaining rate would be paid around half of this level

#### **HEWRR Requirement 5: Freedom of Association**

*Agreements, policies and practices must be consistent with the freedom of association principles contained in the Workplace Relations Act 1996.*

This has been interpreted by the Government as meaning universities may not include provisions in Agreements that encourage union membership or which fund or support the Union in any way.

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## Recommendations

### Senate should reject the Bill

For the reasons set out above, the NTEU recommends that the Senate should reject the *Higher Education Legislation Amendment (Workplace Relations Requirements) Bill 2005*.

While this is far and away the NTEU's preferred outcome, if the Senate were minded to not reject the Bill, the NTEU would urge that amendments be moved to give effect to the following.

### Genuine choice in Agreement-making

The Bill should be amended so that any Higher Education Workplace Relations Requirements made pursuant to the Commonwealth Grants Guidelines will require that all employees, including all applicants for positions, be given a genuine choice in the form of employment contract they offered. At the very minimum all employees should be guaranteed a choice between an AWA or being covered by the terms and conditions of a certified Enterprise Agreement.

### Mix of employment

The Bill should be amended to require that any Higher Education Workplace Relations Requirements made pursuant to the Commonwealth Grants Guidelines *not* limit the terms on which the parties to Agreements may regulate types of employment.

### Disallowance

The Bill should be amended to provide that in the event that the Commonwealth Grants Scheme Guidelines are disallowed, Higher Education Providers will nevertheless receive the specified increases in Commonwealth Grants Scheme funding.

These changes might be given effect by the following amendments to the changes to the Bill.

Insert new item 1A in Schedule 1, to read:

1A Paragraph 33-15

Add new sub-section 1A to read as follows:

- 33-15 (1A) Despite sub-section (1);
- (a) The Higher Education Workplace Requirements shall impose on any Higher Education Provider a requirement not to make the acceptance of any Australian Workplace Agreement a condition of any offer of employment, promotion or transfer;
  - (b) The Higher Education Workplace Requirements shall not impose on any Higher Education Provider any restriction on its capacity to include in any certified Enterprise Agreement any conditions regulating the types of employment;
  - (c) If the Commonwealth Grants Scheme Guidelines are disallowed, Higher Education Providers basic grant amounts are increased under this section.

