



PRODUCTIVITY COMMISSION
WORKPLACE RELATIONS FRAMEWORK REVIEW
SUBMISSION BY
AUSTRALIAN HIGHER EDUCATION INDUSTRIAL ASSOCIATION
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The Australian Higher Education Industrial Association is the registered employer association representing Australian universities, and currently has 31 member universities employing in excess of 90,000 employees.

AHEIA has consulted with its membership regarding issues arising from the Australian Workplace Relations Framework which are having a significant negative impact on the operational efficiency and productivity of Australian universities. Those issues principally centre on the way in which features of the *Fair Work Act 2009* (“the Act”) impose themselves upon the way in which universities are able to deal with workplace relations issues in a flexible and timely manner. As a result of consultation regarding those issues, AHEIA puts forward the following proposed changes to the Act.

This submission is an expansion of the outline of submissions that AHEIA provided to the Productivity Commission on 13 March 2015.

Proposed Changes to the *Fair Work Act 2009*

1. Individual Flexibility Arrangements (“IFAs”)

The availability under the Act of IFAs was meant to ensure there would be “genuine flexibility for both employers and employees” covered by awards and agreements. The requirement that any IFA entered into must result in the employee being “better off overall” provides protection against IFAs being used by employers to diminish employment conditions of individual employees.

Rather than the Act itself being the enabler for an IFA, the Act operates as an enabler for the Fair Work Commission (“the Commission”) to insert IFA provisions into an award and as an enabler for enterprise agreements to contain IFA provisions as a result of bargaining.

The indirectness of these enabling arrangements has resulted in awards and agreements that impose limitations on the subject-matter that can be covered in IFAs. This is particularly evident in agreements entered into in the university sector, where unions have successfully opposed the insertion of IFA provisions that would have provided employees with a wide range of choices as contemplated by the legislation. The ultimate result is that due to these limitations, there are very few university employees who have actually entered into an IFA.

Rather than the parameters for IFAs being narrowed by the terms of awards and agreements, the Act itself should provide that an employee covered by an award or agreement can enter into an IFA by way of departure from that principal instrument, without any limitation on the subject-matter of the IFA (except for unlawful or other terms not permitted in awards or agreements). This would facilitate arrangements being entered into under IFAs that can provide individual employees with employment conditions which are tailored to their individual circumstances. It would also allow individual employers to put more productive arrangements in place during the life of an agreement, whilst at the same time providing that the employees covered by those IFAs are better off overall as a result.

2. Content of Awards and new Enterprise Agreements

2.1 Disciplinary procedures to be a “non-permitted matter”

Arguably the most significant factor that impacts negatively upon the flexibility and operational efficiency of the university workplace relations environment is the complexity of content within the enterprise agreements and their inter-relationship with the dispute-settling, unfair dismissal, and general protections provisions of the Act.

This complexity has arisen as a by-product of previous awards of the federal tribunal, and it is very difficult for universities to negotiate this subject-matter out of their agreements.

The existence in agreements of complex procedures governing disciplinary processes has a threefold dimension:

- (i) The procedures themselves are time-consuming to apply;
- (ii) The application of these procedures can be disputed through the dispute-settling provisions of enterprise agreements, and these and other delays (e.g. the requirement to investigate allegations of bullying which are increasingly being made when disciplinary provisions are implemented) all contribute to the slow timeframes involved; and
- (iii) The fairness of processes used to determine whether a dismissal is justified is currently able to be argued about both in dispute-settling procedures before the Commission (e.g. regarding a pending dismissal), and again before the Commission under the unfair dismissal jurisdiction (with [University of Newcastle \[2013\] FWCFB 3369](#) being a case in point) or the general protections provisions of the Act.

These difficulties could be overcome by making disciplinary procedures a “non-permitted matter”. This would avoid pre-dismissal disputes over disciplinary processes being taken to the Commission, preserve the integrity of the Commission’s unfair dismissal jurisdiction, and avoid multiplicity of proceedings, overlap and confusion between the Commission’s unfair dismissal jurisdiction, the general protections provisions and the dispute-settling jurisdiction.

2.2 Restrictions on modes of employment to be a “non-permitted matter”

Universities are highly constrained in their employment decisions by significant restrictions on the availability of fixed-term employment as a mode of employment.

These restrictions were imposed by a sector-specific award of the federal tribunal that pre-dated enterprise bargaining. They were then incorporated in university enterprise agreements at a time when Federal government regulations mandated that agreements had to be “closed and comprehensive”, which led to an incorporation of all award matters into agreements.

The restrictions have subsequently proved very difficult for universities to remove through the bargaining process, despite regular attempts to do so. The difficulty is obviously further compounded by the existence of such restrictions in the safety net awards applying in the sector.

Much greater flexibility would exist for universities if such restrictions were removed as matters permitted for inclusion in agreements and awards, with universities thus able to gain access to wider choice of forms of employment consistent with their changing needs.

2.3 Restrictions on use of independent contractors to be a “non-permitted matter”

Consistent with the removal on restrictions on modes of employment, the use of independent contractors should not be restricted by awards and agreements, leaving employers free to choose the appropriate mix of hires to fit their own particular circumstances.

2.4 Matters pertaining to the relationship between an employer and an employee to be a “non-permitted matter”

The delivery of productivity benefits is a stated key objective of the Act (per section 171). However section 172 permits the subject matter of agreements to extend to matters pertaining to the relationship between employers and employee organisations, and these do not deliver productivity benefits.

Such matters include union claims for the provision of time off for training and conferences for union members and delegates, for the provision of offices and ancillary services, and for the provision of salaries of employee representatives, which do very little, if anything, to increase employee productivity.

It would be preferable and consistent with the objects of the Act, if the subject-matter of agreements was confined to the terms and conditions of employment and to matters directly pertaining to the employment relationship.

3. Enterprise Agreements - voting

The case of [Swinburne University of Technology \[2014\] FWCFB 9023](#) illustrates the difficulties faced by employers in determining who should be provided with the opportunity to vote upon a proposed enterprise agreement, particularly with respect to persons who have been employed on a casual basis. As in that case, this can become a point of issue when the outcome of the vote is challenged after the voting has occurred. The Full Bench endorsed the approach taken by Swinburne University of Technology to include sessional (casual) academics who had been employed at some time in the preceding 12 months, but also indicated that a different approach might be necessary for a vote taken at a different time of the year. That endorsement came in December 2014, with prospective effect; nearly 10 months after the agreement received a majority vote in favour by the employees who voted upon it.

This case maintains the dilemma of uncertainty for any employer in properly determining which casual staff should be included in a vote. The Productivity Commission should therefore give consideration to the Act providing more certainty on this point so as to avoid unnecessary delay in the approval of enterprise agreements (or, indeed, the non-approval of an agreement), particularly as this may occur many months after the agreement has been the subject of a majority vote in favour by employees.

4. Industrial Action

4.1 Restrictions to be placed on the availability of protected action ballot orders

Currently, a protected action ballot order can be authorised by the Commission even if bargaining between the parties has not commenced, as confirmed by the Federal Court of Australia in [JJ Richards & Sons Pty Ltd v Fair Work Australia \[2012\] FCAFC 53](#).

This does nothing to discourage an early resort to industrial action with resultant loss of productivity, including in circumstances where the employer and a majority of employees do not wish to commence bargaining.

This problem could be overcome if protected action ballot orders were only available after it was established that (i) bargaining had commenced and the Commission is satisfied that negotiations have stalled; or (ii) if an employer refuses to negotiate after it has been established that a majority of employees who would be covered by the proposed agreement support bargaining, and a Majority Support Determination has been made by the Commission.

4.2 Enable employers to properly respond to partial work bans

Currently, employers may choose to respond to partial work bans by either refusing all payment or by making partial deductions from pay. The *Fair Work Regulations 2009* specify that a partial deduction must be “a percentage of the employee’s usual hours of work for a day” - Reg 3.21.

This allows unions to place bans on work that takes little time to perform but has a very high effect on operational efficiency and customer needs. Bans such as a limitation on processing student assessment results, which may take a mere matter of minutes to apply, can have a major effect on an educational institution. In such circumstances, a reduction of payment by a very small percentage will have no proportionality to the effect of the industrial action.

This could be remedied by providing employers with the option of making a 4-hour pay reduction where partial work bans are imposed, as an alternative to the other options available.

5. Dispute-settling limitation

The Act has carefully and deliberately defined those persons who have access to its unfair dismissal jurisdiction and hence will have the potential to be reinstated following dismissal. A person who has not been “dismissed” (s 385(a)) does not have such access. This therefore excludes a fixed-term employee whose contract has expired due to the effluxion of time. This has been confirmed by case law under the current legislation ([Drummond v Canberra Institute of Technology \[2010\] FWAFB 5455](#)), at common law ([Victoria v Commonwealth \[1996\] HCA 56](#)), and under the *Workplace Relations Act 1996* ([Department of Justice v Lunn \[2006\] AIRC 756](#)).

It is therefore illogical and inconsistent for the Act to allow general dispute-settling powers that may be conferred by an enterprise agreement on the Commission (or another third party) to extend to making an order that a new fixed-term contract be entered into; including in cases where a previous fixed-term contract was entered into contrary to the terms of the enterprise agreement. This wide interpretation of the dispute-settling jurisdiction was

taken by the Full Bench in [NTEU v University of Wollongong \[2004\] AIRC 365](#), 13 April 2004 under previous legislation and by Commissioner Roe under the current Act in [NTEIU v the University of Melbourne \[2012\] FWA 1202](#), although the Commission declined to make such an order in both instances. Indeed, the power to create a contract of employment, or to order that such a contract be created, is not a power held by the courts - [NTEIU v University of Wollongong \[2002\] FCA 31](#), per Branson J.

This contradiction would be overcome by the Act making it clear that dispute-settling powers conferred by an agreement do not extend to creating, or ordering the creation of, an employment contract where no such contract exists. This outcome would be entirely consistent with the limitation on the Commission's power to reinstate an unfairly dismissed employee, which is confined to reinstatement within an existing contract of employment.

6. Unfair Dismissal Claims - probationary exclusion to be re-introduced

Under previous legislation, a probationary employee was unable to access the unfair dismissal jurisdiction if, inter alia, their probationary period was of a reasonable duration and had been determined in advance. This exclusion should be re-introduced.

The exclusion was particularly important for universities, where the nature of academic work reasonably requires an extended period of time (sometimes up to five years) for the university to be able to properly assess the capacity of the employee to undertake proper research. The reasonableness of this extended period of probation was confirmed by the Commission (see [Kocsis v Charles Sturt University \[2001\] AIRC 516](#)) and on appeal [\[2001\] AIRC 1242](#)).

The abolition of this exclusion under the current Act has resulted in universities becoming subject to the unfair dismissal jurisdiction, notwithstanding that the academic employees concerned are engaged on a probationary basis for a period of time that is reasonable having regard to the particular nature of their employment. This situation needs to be remedied.

7. General Protections - definition of workplace rights

The recent decision in [Evans v Trilab Pty Ltd \[2014\] FCCA 2464](#), with its analysis of the inconsistent judgments of the Federal Court of Australia and the Federal Circuit Court of Australia regarding the meaning of "complaint or inquiry" under section 341 (1) (c) of the Act, illustrates the different approaches that have been taken by the courts in interpreting this provision.

Whether or not *Evans v Trilab* represents a correct interpretation of section 341 (1) (c) and a proper analysis of previous cases, the Act needs to be amended to make it clear that for a complaint or inquiry to constitute the exercise of a workplace right, the subject-matter of the complaint or inquiry must be one that could be the subject of an order of a Court or tribunal. An underpayment claim, such as in [Murrihy v Betezy.com.au Pty Ltd \[2013\] FCA 908](#), would fall within this scope (irrespective of to whom the complaint or inquiry is directed), whereas a complaint by an employee about their dislike of the employer's general approach to decision-making would not, consistent with [Harrison v In Control Pty Ltd \[2013\] FMCA 149](#).

8. Workplace Bullying

8.1 Priority to be given to removing named respondents from applications where they clearly fall outside the anti-bullying jurisdiction (e.g. where they are no longer in the workplace).

The Commission's anti-bullying jurisdiction is directed to preventing a worker being bullied by a named person or persons in the workplace. It is trite to state that being labelled a "bully" in Commission proceedings can be very stressful to any individual, particularly when the complaint is ill-founded. This stress can cause a risk to that person's health and safety, in the same way that an applicant's belief that they have been bullied (and that the bullying will continue) can create a risk to that person's health and safety.

Accordingly, the Commission should be required to give priority to removing respondents from anti-bullying applications where those respondents are clearly outside the scope of the anti-bullying jurisdiction, such as where they are no longer employed. This is even more pertinent given that individuals named as respondents may be required to look after their own interests (including arranging for individual representation), which is unlike other Commission proceedings where the employer is the respondent to claims made under the Act by individual employees.

8.2. Internal processes to be followed first

The Commission should not deal with an anti-bullying application if the Commission is satisfied that the employee has access to a proper internal process that the employee should pursue in the first instance.

Universities (like many other large or otherwise industrially sophisticated employers) have detailed and robust procedures in place for dealing with bullying complaints. The Act currently requires the Commission to have regard

to internal processes at the time of considering the making of an order to stop bullying. This consideration should occur much earlier in the process, and it would enable the Commission to ensure that appropriate internal procedures are followed, (unless there is good reason to the contrary), before the Commission entertains the substance of the application. Such an approach would enable employers to deal with claims and allegations of bullying behaviour in a more timely manner, and as close as possible to their point of origin. It would also lead to a more effective utilisation of Commission resources.

9. Costs of Court Proceedings

Unlike other court proceedings, standard costs orders are not generally available in relations to Commission proceedings, such as general protections applications brought under the Act. The non-availability of such orders can lead to court applications being made that applicants would otherwise be more cautious about to taking to court if there was the prospect of a general costs order being made against them if their application is unsuccessful. The availability of general costs orders for court proceedings under the Act would therefore deter adventurous applications, including those by self-represented applicants, which currently place an inappropriate drain on court resources.

10. Commission filing fees - for unfair and unlawful dismissal applications, general protections applications and anti-bullying applications

Filing fees should be increased to act as a form of deterrent to claims that have no reasonable prospect of success.

The United Kingdom has introduced reasonably significant unfair dismissal filing fees (£250 and a further £950 if the matter proceeds to a hearing). The introduction of a similar fee (which could be reimbursed if the application was successful or otherwise found to be reasonable) would deter frivolous or vexatious claims and/or claims from employees hoping to get a “commercial settlement” from their employer.

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