Submission by the National Tertiary Education Industry Union (“NTEU”)

regarding

Improving protections of employees’ wages and entitlements: strengthening penalties for non-compliance

This submission is made in response to the request for public submissions made by the Attorney General’s Department in September this year. NTEU welcomes the opportunity to make this submission.

NTEU represents the industrial and professional interest of some 28,000 people working in tertiary education and research, including at universities, vocational education and training, adult education, with private providers and at research institutions.

As a general introductory comment, NTEU notes that the offence of larceny in the State of NSW carries a maximum prison term of up to five years, but the offence of larceny as a servant carries a prison term of up to ten years. Whatever one thinks of that distinction, it indicates that the law considers that the employment relationship involves special obligations.

Yet the conscious and permanent denial of the property of employees – larceny as a master - is considered a relatively minor civil offence. It might even be thought that there was one law for the powerful, and another who gain their living by their own exertions.

Endorsement of ACTU Submission

This submission is brief not because the issue of penalties for “wage theft” is not important to the tertiary education sector. Its brevity reflects the fact that the NTEU endorses the recommendations and arguments set out in the submission by The Australian Council of Trade Unions (ACTU).

Impediments to the discovery and remedying of wage theft in tertiary education

Despite their public purpose, universities are by no means immune from commercial pressures and management temptations to pay employees other than in accordance with their entitlements under enterprise agreements.

The experience of the NTEU is that, in the public universities at least, employees in ongoing salaried employment are overwhelmingly paid at the correct salary set out in their enterprise agreements. However, ongoing employees are only about one-third of employees, and are outnumbered by casual hourly-paid employees, who are much more vulnerable to wage theft.

The current regime of right-of-entry laws prevents limits the NTEU’s capacity to uncover unlawful behaviour. Vulnerable employees (such as those employed by the semester) are often reluctant to raise the issue of their underpayments by lodging any type of complaint, for fear of losing their employment or not being engaged for further work. The interpretation of the adverse action provisions by the Courts (for example in Board of Bendigo Regional Institute of Technical and Further Education v Barclay [2012] HCA 32 ) now means that the NTEU in many circumstances cannot in good conscience advise members in precarious employment to pursue underpayments, given the incapacity of the law to protect them from victimisation.

This is exacerbated by the current right-of-entry laws, which for the reasons explained by the ACTU, might as well have been designed with the intention of ensuring that in most circumstances wage-theft cannot be uncovered by union investigation.

Instances of wage theft in tertiary education

Despite the difficulties described above, NTEU has been able to pursue some significant cases which indicate that public universities, and in particular private providers of tertiary education, engage in systematically underpaying employees, especially those engaged on so-called casual contracts.

In recent months, NTEU has uncovered instances of large-scale underpayments in public universities. For example, some hundreds of casual academic employees in a whole Faculty of a large university have not been paid for the marking of students work, contrary to the terms of the relevant enterprise agreements for over six years.

Just this month, at a public university, the NTEU has pursued underpayments of over 50 employees who had arbitrarily had their classes “reclassified” as not being tutorials. The NTEU has recovered over $50,000 in back-pay.

NTEU has also been active among some private providers of tertiary education. For example, in recent months NTEU has successfully recovered about $2 million on behalf of members who have been underpaid at one private provider and is actively pursuing similar claims at another.

This sector (private providers) has worked very hard to ensure low union density, and it is probable that for every case of large-scale wage theft which is uncovered, there are many others which act with impunity.

Moreover, the scale of underpayments uncovered at individual employers suggests that underpayment is not an occasional oversight, but rather a key part of the business model driving profits.

The specialist knowledge which union access brings

One important and distinct aspect of the issues which is perhaps not captured in the ACTU Submission, is that understanding and enforcing the particularity of wage and remuneration structures in tertiary education, requires a degree of specialist knowledge about what questions need to be asked.

For this reason, despite their general skills, it is improbable that inspections by the Fair Work Ombudsman’s staff would be able to identify wage theft, even if they were to carry out regular inspections.

This problem underlines the critical importance of union officials having proper access to employee records, as suggested by the ACTU. If the Government were serious about addressing wage theft, this more than any other single measure, would address the problems in tertiary education.

Further information

While the primary thrust of this submission is to endorse that of the ACTU, the NTEU is available to provide further information or advice if that is required. In the first instance, the Department should contact Ken McAlpine in our National Office **[Redacted personal information]**

National Tertiary Education Industry Union

25 October 2019