

NTEU SUBMISSION TO THE ATTORNEY-GENERAL INTO THE STATUTORY REVIEW OF CASUAL EMPLOYMENT LEGISLATION

SUMMARY

The minority senate report¹ on the FW SAJER Bill asked the question: **Does the legislation create secure jobs with decent pay? From the NTEU's experience in the past 12 months the answer is no.**

Introduction

Thank you for the opportunity to provide a submission into the Statutory Review of Casual Employment Legislation. National Tertiary Education Industry Union (NTEU) represents the industrial and professional interest of some 28,000 people in higher education and research, including those employed at universities, vocational education and other institutions.

Australia's higher education sector employs over 220,000 individuals. Those individuals, working in the cutting edge of Australia's knowledge economy, are *largely employed insecurely*. The 2021 figures from the Department of Education (Selected Higher Education Statistics Series) show that, conservatively, **fifty percent of higher education staff are employed on a casual basis, in addition to the nearly 20% employed on short-term contracts.**² From 2000 to 2019, the proportion of casually employed knowledge workers grew by 10%, is growth in share only subsiding recently due to mass layoffs of tens of thousands of casual workers – these employees being the first to go during Covid.³ This vast proportion of insecure employment exists in the sector despite the work being performed by casual staff largely being consistent, predictable, and needed on an ongoing basis.

NTEU recommends that the Government amend the *Fair Work Act*, as outlined below, to ensure that workers in higher education, and all industries, enjoy the dignity of secure work.

¹ [Labor Senators' dissenting report – Parliament of Australia \(aph.gov.au\)](https://aph.gov.au)

² See Selected Higher Education Statistics – 2021 Staff data, Department of Education, <https://www.dese.gov.au/higher-education-statistics/staff-data/selected-higher-education-statistics-2021-staff-data>

³ Department statistics show that up to 28,686 casual staff left the sector between March 2019 and March 2020

The operation of the FW SAJER Act is *not* appropriate or effective in the context of Australia's changing employment and economic conditions

The FW SAJER Act has been an utter failure.

According to a survey conducted of its 25 university, the Australian Higher Education Industry Association informed NTEU that of 39,408 casual staff members (a figure as at 30 June 2021) employed across 19 universities, a total of 243 offers of conversion from casual employment were made. Those offers were made as a result of the requirement of s.66A of the Fair Work Act. That is, ***less than 1 % of casual workers were offered more secure forms of work as a result of the FW SAJER Act.*** This translates to only 17 academic casuels being offered more secure work in 19 universities that employ almost 40,000 casual employees.

The University of Sydney, not included in those 19 universities, identified a total of 4,173 casual staff members to offer conversion.⁴ Sixty-nine offers were made. Of those, only five academics were converted to more secure work. The University of Sydney posted a surplus of more than \$1 billion in the same year.⁵

The only Fair Work Commission decision dealing with a casual conversion dispute under the new legislation involved an NTEU member, Toby Priest.⁶ Toby is employed as a “casual tutor” at Flinders University. He has taught the same Physical Education, Health and Sport courses in the same pattern since 2011.

In September 2021 Toby was advised that his employment would not be converted to ongoing employment. NTEU initiated a dispute with the University, claiming he should be offered ongoing employment. The Fair Work Commission found that he was eligible for conversion, but nevertheless found that the University had sufficient discretion under the legislation to deny the conversion.

NTEU submits that the changes to the Fair Work Act have therefore not been effective.

In contrast to many other sectors, most higher education employers are well placed to offer secure forms of work because they employ thousands of staff members, are well-resourced, publicly funded, and are in a position to plan their work and workforces based on a very stable operating model. Instead, universities are, in the main, indolent and simply not willing to employ thousands of individuals on a secure basis to perform work that is pre-planned and ongoing in nature. Not even a statutory-mandated review and obligation to make offers of secure employment had any impact on university practices.

Inadequate provisions of the *Fair Work Act* combined with exploitative casual employment practices by universities means long-term casual staff who are eligible for conversion will nevertheless remain casual. The good news that casual academic staff meet the eligibility test for conversion is negated by the bad news that the only mechanism by which the conversion can be enacted under the Act is through management benevolence. Sector statistics on casual conversion rates show there is a dearth of this, and it is entirely inappropriate for it to be the premise on which an industrial framework turns.

⁴ “Sydney University denies full-time work to thousands of casuels”
<https://www.theage.com.au/business/workplace/sydney-university-denies-full-time-work-to-thousands-of-casuals-20210909-p58qc1.html> The Age, September 9, 2021

⁵ University of Sydney Annual Report 2021, June 2021

⁶ *Priest v Flinders University of South Australia* [2022] FWC 478.

There are *unintended consequences* of the FW SAJER Act

The laws are a false promise of job security.

The Toby Priest case above shows that universities *could* convert casual workers to permanent work, but that they *choose* not to. This is because of the 'reasonable grounds' clause upon which employers can rely to refuse to offer permanent work. In the Priest case, the university argued they wanted to keep casuals in low pay, wanted to limit access to career advancement and did not want to pay Priest for all the work he performed for the institution. Under the operation of the FW SAJER Act, the Fair Work Commission could accept those arguments. Underlining this position, was the offensive 'form letter' provided by University of Melbourne to its casual staff, which stated, in rejecting an offer of conversion:

"The university has assessed the hours that you have worked for us over the last 12 months and has determined that you meet the eligibility criteria for conversion...However <REASON> the university has determined that this is reasonable grounds (in accordance with the legislation) not to offer to convert your role to a permanent position."

The laws also provide a perverse incentive to offer less work to casual staff members. NTEU member Paul Morris, who has worked at the University of Newcastle on casual contracts for 20 years said, *"In addition, formalised conversion criteria potentially provides management impetus to ensure casual work contracts are even more insecure than before to avoid the slightest hint of providing 'a regular pattern of hours'",* one of the requirements for conversion. All university management need to do is to only offer work to casuals in a single semester (around 5 months), and that worker will never be eligible for conversion, and their job insecurity will deepen.

NTEU recommends the following *legislative change* to improve the operation of the FW SAJER Act

1. Repeal the changes made to the Act under the FW SAJER Bill.
2. Clearly define casual employment (in the NES or in Modern Awards) to work occurring on an *ad hoc* basis, covering a short-term absence or where the work cannot practically be organised other than on a casual basis.
3. Do not allow casual employment to be defined exclusively by an employer, including through its own rostering arrangements.

Further information

NTEU refers the Review to the following detailed submissions we have made to other secure work inquiries:

1. [NTEU Submission to the Senate Select Committee on Job Security, 2021](#)
2. [NTEU Submission on unlawful underpayment of employees' remuneration \(Wage Theft\) to the Senate Economics References Committee, Select Committee on Job Security, 2020](#)

National Tertiary Education Union	
Question	Response
Q2a : Do you or your organisation consider the amendments regarding the definition of 'casual employee' under the FW SAJER Act are appropriate and effective?	No
Q2ai : Why do you or your organisation consider the amendments appropriate and effective?	
Q2b : What concerns do you or your organisation hold about the definition of 'casual employee' provided by the FW SAJER Act?	It means that ongoing work in our sector is easily defined by the employer as casual work. 1000s of ongoing staff have been employed for periods of up to 20 years in our industry as "casual" - nothing has changed after the changes to the Act 12 months ago.
Q2c : What, if anything, would you change about the definition of 'casual employee' under the FW SAJER Act, or any other law?	<p>NTEU recommends the following legislative change to improve the operation of the FW SAJER Act</p> <ol style="list-style-type: none"> 1. Repeal the changes made to the Act under the FW SAJER Bill. 2. Clearly define casual employment (in the NES or in Modern Awards) to work occurring on an ad hoc basis, covering a short-term absence or where the work cannot practically be organised other than on a casual basis. 3. Do not allow casual employment to be defined exclusively by an employer, including through its own rostering arrangements.
Q3a : Do you or your organisation consider the amendments regarding casual conversion are appropriate and effective?	No
Q3ai : Why do you or your organisation believe the amendments regarding casual conversion are appropriate and effective?	
Q3b : What concerns do you or your organisation hold about casual conversion under the FW SAJER Act?	See attached submission
Q3c : What, if anything, would you change about the casual conversion provisions under the FW SAJER Act, or any other law?	See attached submission
Q4a : Do you or your organisation consider that there should be a different approach to casual	Not Applicable

conversion for employees of small business employers?	
Q4ai : Why should the casual conversion provisions under the FW SAJER Act apply differently, to small business employers?	
Q4b : In your view, how should the casual conversion provisions under the FW SAJER Act apply to small business employers?	
Q5a : Do you or your organisation consider the amendments regarding set-off of casual loading are appropriate and effective?	No
Q5ai : Why do you or your organisation consider the amendments regarding set-off of casual loading are appropriate and effective?	
Q5b : What concerns do you or your organisation hold about set-off of casual loading?	-
Q5c : What, if anything, would you change about set-off of casual loading under the FW SAJER Act, or any other law?	-
Q6a : Do you or your organisation consider the Casual Employee Information Statement is appropriate and effective?	No
Q6ai : Why do you or your organisation consider that the Casual Employee Information Statement is appropriate and effective?	
Q6b : What concerns do you or your organisation hold about the Casual Employment Information Statement?	This seems to be a mechanism for employers to label ongoing employees as casual.
Q6c : What, if anything, would you change about the Casual Employment Information Statement under the FW SAJER Act, or any other law?	-
Q7a : Please provide any additional views regarding the operation of the amendments to the FW SAJER	-

Act, particularly in the context of Australia's employment and economic conditions.	
Q8 : Do you wish to raise any other matters for the independent review to consider?	The definition of ongoing regular pattern of employment has been difficult for our sector - it does not take into account regular patterns over a period of years with holiday breaks, e.g the teaching schedule.
Q9 : Should you wish to provide additional supporting documentation, you may upload an attachment here. Please do not upload any attachments that contain personal data (including names, addresses or personal financial information). The review will only consider matters relevant to the scope of this review.	NTEU Submission