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Senate Education and Employment Legislation Committee
via email eec.sen@aph.gov.au

8 March 2019

Dear Committee Members

Re: Submission to the Senate Education and Employment Legislation Committee Inquiry into the Fair Work Amendment (Right to Request Casual Conversion) Bill 2019

Thank you for the opportunity to provide this submission to the Senate Education and Employment Legislation Committee Inquiry into the Fair Work Amendment (Right to Request Casual Conversion) Bill 2019 (**'the Inquiry'**).

Over a considerable period of time the National Tertiary Education Union (**'NTEU'** or **'the Union'**) has demonstrated a commitment to both industrial and policy advocacy to improve the conditions of work and job security for irregular, casual and contract-based higher education workers. As a prominent and persistent advocate against insecure employment in the tertiary education sector, we welcome the opportunity to make a submission in response the inquiry.

In summary, the NTEU supports the concept of a worker's right to convert from casual employment to ongoing employment. However, the NTEU holds various concerns with respect to the Fair Work Amendment (Right to Request Casual Conversion) Bill 2019 (**'the Bill'**), which are set out herein.

We also support the submission made by the Australian Council of Trade Unions to the Committee on 1 March 2019.

Introduction

The NTEU represents over 27,000 staff employed in tertiary education in Australia. Tertiary education includes Higher Education, Vocational Education and Training (VET) and Further Education. Tertiary education covers a wide range of institutions that deliver post-secondary education, including universities, TAFEs and other education providers. The Union's coverage also includes research centres and institutes that drive Australia's national innovation, research and development effort.

The workers who make up our sector are diverse. They include academics across all disciplinary areas, world-renowned experts and public intellectuals, laboratory technicians and librarians, staff who work for student unions, as well as staff who work at student centres. The NTEU has exclusive coverage of academic staff, and complete coverage of general staff. From industry experts to postgraduate tutors these workers fall within the NTEU's coverage.



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Job insecurity affects workers across the entire tertiary education sector. While this submission broadly addresses job insecurity amongst general and academic staff in universities (where the majority of our members work), the particular circumstances and extreme magnitude of the insecurity in academic work in Australia merits special attention.

Australian universities are insecure workplaces

Amongst the major industry groups, tertiary education is characterised by one of the highest levels of precarious employment in Australia. According to the latest Department of Education and Training data, the NTEU estimates that less than one in three (32%) of all university employees have ongoing secure employment. The excessive use of these levels of casual and limited term employment does untold damage to the lives of thousands of Australian workers, as well as significant damage to the quality of provision of education, and to the public interest.

Taking one small part of the problem as an example, there will thousands of PhD graduates seeking an academic career earning as little as \$10,000 a year in precarious teaching-only employment. This is a waste of human talent and of the public resources which have gone into their education. In addition, as compensation for the delayed entry into the job market, due to the years of tertiary study, needed to be ready for the job, 17% employer superannuation contributions are the industry norm. Casual academics, despite sharing the same employment preparation of more than seven years post-secondary study only receive the legislative minimum super contributions.

The nature of casual employment in tertiary education is often characterised by staff employed on a semester-by-semester or seasonal basis, resulting in a long break of no paid employment in the periods from the end of second semester to the start of first semester the following year. In relation to casual employment for academic staff, the term 'sessional' employment is often used interchangeably with the term 'casual' to describe long-term casual engagement, which can frequently be over many years.

Where an academic employed on a continuing basis will contribute to the university through a wide range of teaching, research and other activities, casual and sessional academics are paid to deliver specific outcomes, most commonly limited to teaching-related tasks such as tutoring, marking assignments and engaging with students.

Examples of casual or sessional academics include staff employed to deliver lectures and tutorials during semesters, and casual general staff employed as library assistants usually for nine months of the year during peak periods of the week. This can result in an employment relationship with one tertiary institution that can be long-standing and regular, characterised by a break in service between semesters over the Summer period or long breaks during non-peak work periods.



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In the experience of NTEU members:

- Only a small minority of casual employment in universities is genuinely 'casual' in nature at all as it regular and systematic in teaching periods. Casual employment is used primarily to deny people employment rights, to create a compliant workforce, and to cut costs. It is not a function of the nature of the employment itself;
- The effect on casual employees' health and welfare is significant. Many casual workers report feeling isolated and removed from the university community and cite lack of support networks, and can often lead to prolonged levels of heightened stress.
- The long periods of casual employment experienced in the sector have an impact on academics or general staff to enter the property market as a result of being perceived as subject to financial instability.
- Casual workers in the higher education sector face limited access to professional development, and also, unlike in other sectors, can be paid different rates of pay depending on the work they perform, for the same employer at the same time. For instance, a casual worker is paid differently if they are teaching or if they are marking. In addition, the casual higher education worker is required to inform their employer of research publications, despite being performed entirely in their own time. Universities will often exploit this and pass the work off as if it were their own.
- Due to the precarious nature of their employment, casual academics are unable to raise grievances and participate in controversial but necessary debates that challenge ideas, a vital function of academic work.
- The expansion of a large pool of casually-employed academic teachers facilitates less collegial and more exploitative relationships, signified in the documentation of limited access of casual and sessional academics to faculty meetings and minutes, as well as basic resources such as an office, email address and phone line.¹
- In the case of academic employment, precarious employment is not consistent with one of the defining characteristics of university education – intellectual freedom. Intellectual freedom only exists when it is supported by both the culture of the institution *and* enforceable rights which give employees redress against breaches of intellectual freedom.

Research on attitudes to Australian university employment have consistently indicated that both casual and fixed term contract staff want greater employment security, and that job security is a building block for regenerating a precariously-positioned academic workforce.²

Amongst the approximately 1,400 casual academics and early career researchers who responded to the 2017 NTEU university staff survey job security was the priority issue. 88.2% of casuals thought job security was important or very important to their own

¹ A. Percy and R. Beaumont (2008) 'The casualisation of teaching and the subject at risk.'

² H. Coates and L. Geodegebuure (2010) *The Real Academic Revolution*; R. May (2011) 'Casualisation; here to stay'; E. Bexley, R. James, and S. Arkoudis (2011) *The Australian academic profession in transition*.



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employment. These were the most important issues for the survey group. Other results of the 2017 survey included that:

- 43.5% of casual academics had worked in their current casual position for more than five years;
- Less than 1 in 10 said their job felt secure; and
- 64% said they would change jobs for improved job security.

The NTEU's primary position is that job security is paramount to a productive workforce that serves the health and happiness of workers. The NTEU supports a principle of the primacy of permanent or ongoing work to normalise and institutionalise this type of employment engagement. The NTEU supports there being few exceptions to the primacy of secure work, notably, where there is a genuine need for supplementary labour. In progress of that position, the NTEU supports the principle of a right for casual workers to convert to permanent work.

Overview of the Bill

The Bill introduces a right for certain casual employees to request their employer convert their employment from casual to ongoing, in certain circumstances. The new right will be a part of the National Employment Standards.

According to proposed section 66A, the right would apply to award-free employees, employees to whom an award applies, but which does not contain a casual conversion clause, or employees to whom an enterprise agreement applies, but which does not contain a casual conversion clause (or it does not comply with the provisions of proposed section 205A).

Proposed section 66B would enable an employee with 12 months' service to convert from casual employment continuing employment on either a part-time or full-time basis. However, in order to qualify for the entitlement, an employee must be 'designated' as a casual by the employer, and must have worked a "regular pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to work".

Proposed section 66D provides the grounds on which the employer may refuse a request.

Section 66G provides for a capacity to dispute the operation of the entitlement, if an award or enterprise agreement does not contain a dispute settlement procedure.

In addition, proposed section 205A specifies that a casual conversion clause will be a mandatory term of an enterprise agreement.

The Bill if introduced will apply to some but not all higher education workers:



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- Academic employees who are employed at workplaces without a casual conversion clause in the applicable enterprise agreement; but not
- Academic and general/professional staff employees to whom an enterprise agreement applies that contains a casual conversion clause (so long as it is compliant with the requirements contained in the Bill); or
- General or professional staff employees who are already entitled to access a casual conversion right because such a clause is contained in the *Higher Education (General Staff) Award 2010*.

Concerns in relation to the Bill

The NTEU holds specific concerns in relation to the Bill. While the NTEU supports a universal right to casual conversion, that right must be exercisable in a meaningful way.

Definition of casual employee

The proposed Bill does not define casual employee. The absence of a definition of casual employee is significant, in light of the decision of the Full Federal Court in *Workpac v Skene* [2018] FCAFC 131. There, the Court applied an objective test to determine whether an employee is a casual or not, and therefore whether entitled to annual leave pursuant to the National Employment Standards.

The Bill, in its current form, the NTEU submits, is an unacceptable departure from that test. This is because proposed section 66B(3) operates to entitle employees who are “designated as a casual employee by the employer”. It would allow employers to decide how employees are to be treated, rather than by an objective test like the one set out in *Workpac v Skene*. That definition is an undesirable intrusion into the establishment and continuation of the employment relationship.

Moreover, the Bill only entitles casual employees who have “in the period of 12 months before giving the request to the employer, worked a regular pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to work” (emphasis added). The NTEU takes issue with this qualification in two respects.

First, it is unclear how the 12 months requirement interacts with service requirements. Does this operate to require an employee to be engaged *continuously* for 12 months before reaching eligibility? Do intermittent, but regular breaks from work displace the ability to seek the right? If so, the right to conversion will not operate to ‘fill the gap’ as identified by the Minister for Women and Minister for Jobs and Industrial Relations in the Second Reading Speech. Because many casual academic employees are engaged on a sessional, or semester-basis, those employees would be unable to ever meet the 12-month threshold.

Second, the requirement of working “a regular pattern of hours on an ongoing basis” also does not appreciate the nuances of casual work in the higher education sector. A casual academic worker might be engaged to work the same number of hours per week, give or



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take, for each semester every year, year-on-year, but not be considered “ongoing” for the purposes of the Bill. The fact that they might work that pattern but not be considered a “regular” pattern because the days and times which they are engaged to perform that work differ from semester to semester.

The lack of clarity in those matters, the NTEU submits, must be rectified or thousands of higher education workers will be deliberately excluded from the Bill’s application. The NTEU supports a definition consistent with the objective test outlined by the Full Federal Court.

Grounds to refuse request

The NTEU submits that the grounds employers may rely upon to refuse the request are too broad. The higher education sector is characterised by cyclical short-term uncertainty, but long-term stability. Particularly in the case of universities, the NTEU anticipates universities relying on each, or almost all, of the matters identified in proposed section 66D(2). The breadth of the grounds to refuse render the right to request conversion essentially otiose. Further, the breadth of the matters set out give employers the ability to rely on unspecified future considerations in order to refuse the request. It breeds opportunity for employers to avoid appropriate workload planning which would otherwise ensure consistent and ongoing work for employees. This is the experience of many NTEU members who are regularly engaged at the last minute as a result of poor planning. The NTEU considers that allowing employers to rely upon such broad grounds of uncertainty to refuse a person permanent employment, would lead to similar considerations being made at the point of an employee’s engagement, potentially leading to an escalation of the casualised workforce.

The NTEU recommends that the grounds to refuse the request be confined to much more limited grounds. If the employee satisfies the high threshold tests in proposed clause 66B(3), there should be quite limited grounds to refuse that request.

Lack of civil remedy provision

Proposed clause 66F(3) states that an “employee must not be engaged and be re-engaged (or not be re-engaged), or have their hours of work reduced or varied, in order to avoid any right or obligation under this Division.” An employer who attempts to, or does, engage in conduct which would avoid the employee’s entitlement to the right to conversion ought to be liable for a civil remedy.

The NTEU considers that proposed clause 66F(3) ought to be a civil remedy provision.

Recommendations

The NTEU makes the following recommendations in relation to the Bill:



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- remove the requirement for casual employees to be ‘designated’ by employers in order to qualify for the entitlement in proposed section 66B(3)(a);
- clarify employees’ service requirements or continuous service requirements may include may include non-working periods for the purposes of section 66B(3)(b);
- remove the requirement for a “regular pattern of hours” and broaden it to simply any regular pattern of work, without the need for it to be ongoing in proposed section 66B(3)(b);
- limit the grounds in proposed section 66D on which the request can be refused to reasonable grounds;
- make contravention of section 66F(3) a civil remedy provision; and
- supports the recommendations set out in the ACTU submission dated 1 March 2019.

Conclusion

The NTEU is a strong proponent of secure work. Job security promotes financial stability for employees, broadens an employee’s right to important conditions such as unfair dismissal and superannuation, and creates a healthier and happier workforce. For the reasons outlined herein, the NTEU supports the principle of a right to request conversion from casual to permanent employment, but holds serious concerns in relation to the Bill as presently drafted.

Yours sincerely,

Matt McGowan
General Secretary
National Tertiary Education Union