Other – Not-for-profit Research Organisation	
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?	1) An employer-controlled definition In general, the enactment of a clear statutory definition that defines casual employees is of vital importance to the effective regulation of employment. However, rather than confirming the common law position, provided for in WorkPac Pty Ltd v Skene [2018] FCAFC 131 and WorkPac Pty Ltd v Rossato [2020] FCAFC 84, this definition empowers employers only to determine whether or not an employee is a casual employee, based solely on the 'offer of employment and the acceptance of that offer, not on the basis of any subsequent conduct of either party' (s 15A(4)). It is not difficult to imagine situations where employees are engaged casually, and then immediately after accepting the position, are provided with a pattern of work that mirrors permanent employees. The regulation as it stands does not allow for any classification of work that incorporates the nature of the work, the regularity of work, the spread of hours or the essential nature of the position. In short, the operation of employment is considered unrelated to the classification of employment, and instead the initial offer of employment is the sole basis for classification. Furthermore, the implications of this definition, read with pt 2.2 div 4A, means that employees must wait at least 12 months to request or be offered conversion to permanency. Even when their pattern of work is currently, and likely to continue, mirroring permanent employees. There is little recourse under the current regulations to adequately contest the classification prior to this 12 month conversion review, and there is large scope for abuse of the system as the regulations currently stands. Therefore, we consider the definition as it stands to be ineffective and inappropriate for the regulation of casual employment. 2) More casuals with less security and lower wages Over the past 40 years, casualisation has increased from 15.8% of workers in 1984 to 22.5% of workers in August

	2021. This has been exacerbated by successive crises across the 21st century, starting with the Global Financial Crisis of 2007 and further extended by the COVID-19 pandemic. At the beginning of the pandemic, between February and May 2020, hours worked by casual employees fell 27.6%, compared to 6.1% for permanent employees. This decline continued throughout the lockdowns that were enacted across the Eastern states between May and August 2021, where hours worked by causal employees fell by an additional14.2%, compared to 3.1% for permanent employees. Almost all Modern Awards of the Fair Work Commission specify that casual employees should receive a 25% casual loading. This means that in exchange for giving up paid leave, predictable or regular hours, and the right to notice prior to termination, casual employees are supposed be paid 25% more than permanent employees doing the same job. However, research on casual loading indicates that the full 25% rate is very rarely applied. In 2018, the Centre for Workplace Leadership at the University of Melbourne used Australian Bureau of Statistics data to demonstrate that casual loading actually paid averages between 4% and 5%. Of the occupations examined, only schoolteachers came close to a 25% loading rate, at 22%. While this in itself is cause for alarm, the experience of precarity that accompanies the insecure employment that casual work entails has profound gendered implications, as analysis of ABS labour force data shows that women are far more likely to be employed casually. Ultimately, the assertion that employees choose to be casual because of the additional loading is much less likely than the alternative: they accept the position because they have less bargaining power than their employers.
Q2c : What, if anything, would you change about the definition of 'casual employee' under the FW SAJER Act, or any other law?	We believe that the Act should be amended to allow casual employees to request conversion after three months of employment where they can demonstrate a regular and systematic pattern of work and, based on facts that are known, or reasonably foreseeable, at the time, where employers are unable to show that it is likely or necessary for this pattern to change. Additionally, we believe that there should be an inclusion of language that defines the conditions under which casual employment should be offered. The employer should need to demonstrate why the use of casual work is necessary, and justify its use in place of permanent work at the time of the employment offer, not just at the review stage.
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?	1) Loophole in conversion provisions A stronger definition of casual work and the right for casuals to request conversion to ongoing, permanent employment has long been called for by the workers and their unions, the nature of the reform as it stands has done nothing to reduce or relieve the experience of precarity that casual work causes. While the amendment has provided an opportunity for casual conversion from worker to employer, the provision rests on an ill-defined justification of the 'reasonable grounds' by which employers would be exempt from making the offer. Whilst the Act provides for some examples of what might be deemed reasonable grounds (s 66C(2)), this list is not exhaustive. There is significant uncertainty regarding the interpretation of the 'reasonable grounds' that employers can invoke when not offering a long-term casual worker a permanent role. This uncertainty places the onus of responsibility back onto the employee to challenge the reasons given, and by extension back into the realm of caselaw and the debates they create. Further, the benchmark of regular hours for a pattern of six months is easily avoidable by employers – that is, in order to avoid offering conversion, the employer can simply ensure that a worker's hours are sufficiently varied across shifts in the eligible period. The Act does not require employers to file documents with the FWC to prove they are offering permanent roles when they should, and there is no penalty for employers who repeatedly underestimate their need for permanent workers and continually renew casual contracts. Ultimately, the onus of responsibility is placed on the employee to track their hours and prove that they have been working regularly, if their employer fails to offer conversion. At its worst interpretation, the new definition and conversion clause could encourage employers to offer casual employment to all new employees, giving them a year of 'try before you buy' employment for all employees, regardless of the eventual hours worked, or the regularity and predictability of work available. 2) Casual employment isn't a more desirable option for workers or the economy We accept there are some seasonal changes that affect some businesses in certain industries, creating a genuine need for extended casual contracts – yet this is not a default certainty across all industries and in all enterprises. The idea that workers performing the same job for the same hours for 12 months or more, may prefer casual

	contracts to permanent employment, that includes leave entitlements, is a myth. In August 2020, 63.7% of casual employees had been with their employer for more than 12 months, but it is a logical fallacy to confuse correlation with causation. We know that a majority of casual workers have worked more than 12 months with their employers, but we cannot infer that this is their preference. Indeed, when trying to assess their preference our only reliable measure is longitudinal studies of attitudinal data. There is no evidence to suggest that workers prefer casual work, and the data available suggests precisely the opposite. According to the latest ABS data, the majority of young people (76% of employees aged 15 to 19 years and 41% of employees aged 20 to 24 years) are casual workers, and they also comprise the majority of all casual workers. Yet, the attitudinal data collected from the Life Patterns longitudinal study of Australian youth found that consistently young people want work that is 'secure' (62%), 'full time' (43%) and 'well paid' (39%). Conversely, 'Flexible hours' was only listed as desirable by 24% of respondents. Therefore, we can only infer that young people don't have much choice when it comes to accepting casual work, and that they are accepting it despite their overwhelming preference for secure, full time work. While we need to accommodate the smaller percentage of the workforce that sees flexible work as desirable, making the vast majority engage in flexible work against their preference and their economic interest, is inadequate and inappropriate. 3) Small business employers exempt from offer requirements Another key exemption relates to small businesses (employing fewer than 15 employees), who are under no obligation to offer casual conversion. As there are no reporting requirements, there would be no administrative burden on small businesses, rather than a requirement to make occasional offers to their small cohort of employees. The small business exemption affects a large part of Australia's workforce. From 2018-2019 5.7 million jobs (28.3%) were with small businesses (less than 20 employees). Then in 2020-21, compared to 2019-20, the small business sector experienced significant growth, with employment in this sector of the economy increasing by 18.3%. Given that nearly half of workers (46.6%) are employed by small businesses, this exemption is not only inadequate but has significant ramifications for ongoing economic prosperity. 4) Consent needed to arbitrate disputes Under s66M, if a dispute arises under part 2.2 division 4A (offers and requests for casual conversion) the Fair Work Commission may deal with the dispute by arbitration only

	if the parties notify the FWC that they agree to the FWC arbitrating the dispute. If employers do not agree the only option left for employees in a dispute is to pursue the dispute in the small claims court of the Federal Circuit and Family Court. A costly and time-consuming endeavour, that places all the financial and emotional burden on insecure workers with very little economic stability.
Q3c : What, if anything, would you change about the casual conversion provisions under the FW SAJER Act, or any other law?	We believe that section 66H(2) (refusal of requests) and 66C(2) (when employer offers not required) should be amended to set out the 'reasonable grounds' as an exhaustive list, excluding any further grounds for exemption. Further, Part 2.2 div 4A, should be amended to include reporting requirements for businesses showing that offers had been made and penalties to apply for employers who fail to comply with s 66B and 66G. Additionally, section 66M(5)(b) should be amended so that, following an unsuccessful resolution at the workplace level, the FWC must arbitrate the dispute if they deem it appropriate and upon request from a single party, rather than requiring both parties to consent to arbitration.
Q4a : Do you or your organisation consider that there should be a different approach to casual conversion for employees of small business employers?	No
Q4ai : Why should the casual conversion provisions under the FW SAJER Act apply differently, to small business employers?	For reasons discussed in above question, section 66AA (Subdivision does not apply to small business employers) should be reviewed, as a blanket exemption for small business has a significant impact for a large portion of casual workers. Small business employers should be required to offer conversions as the additional administrative burden is minimal in the overall context of employment regulation, and this exemption needs to be reviewed.
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?	As we argued in our original submission to the amendment, this offset mechanism is intended to end the so-called practice of 'double dipping', a practice that was identified as problematic by employer groups during the case of WorkPac vs. Skene; however, previous research by Per Capita into the issue of 'double dipping' proved that such a practice does not exist under current workplace laws (Dawson, Lewis, & Smith, 2019, pp. 5–6). In the WorkPac vs. Skene decision, the Court did not decide that casual employees could claim both the 25% loading and the annual leave entitlement. In fact, the Court found that the company had not paid Mr. Skene a casual loading at all. It said (emphasis added): "Like the contract under consideration in MacMahon (see at [67]), Mr Skene's contract did not allocate any part of the rate of pay to a casual loading or as monies in lieu of paid annual leave". The Court decided that Mr. Skene was wrongly categorised as a casual employee, and thus was entitled to an accrued annual leave payment. The Court did allow WorkPac to offset the cost of back-paying Mr Skene his annual leave entitlements against any casual loading they had paid him. The problem for WorkPac was that they were unable to show that they had paid Mr. Skene a casual loading, as his contract did not specify that his flat hourly rate included a casual loading amount. The Court dealt explicitly with the 'double dipping' argument and rejected it as fallacious. In the words of the Court, "no 'double dipping' is possible" under our current workplace laws.
Q5c : What, if anything, would you change about set-off of casual loading under the FW SAJER Act, or any other law?	As we previously argued, the reasoning behind the offset mechanism is without basis and as such should be removed entirely.
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?	We would support any requirement on employers to provide additional easy to understand information about the rights of casual employees, employer obligations and how conversion offers, and requests, occur. In this sense it is 'appropriate'. However, as we have outlined in previous responses in this submission, we have concerns about the casual conversion sections and the definition of casual employee in the Act. There is no way to know whether it is 'effective' at this stage, as the definitions are inadequate in their current form.
Q6c : What, if anything, would you change about the Casual Employment Information Statement under the FW SAJER Act, or any other law?	The Statement would need to be updated to reflect the amendments we suggest in previous sections.
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.	N/A
Q8 : Do you wish to raise any other matters for the independent review to consider?	N/A
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.	