nfaw.org

Review of the operation of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 (Cth)

Prepared by: Dr Kathy MacDermott
18 July 2022

Authorisation

This submission has been authorised by the NFAW Board

Professor Helen Hodgson
Chair, Social Policy Committee,
National Foundation for Australian Women

Marie Coleman AO PSM
Advisor, Social Policy Committee

Inquiries about this submission should be directed to Helen Hodgson at h.hodgson@tpg.com.au

Review of the operation of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 (Cth)

This contribution is being made by The National Foundation for Australian Women (NFAW).

NFAW is dedicated to promoting and protecting the interests of Australian women, including intellectual, cultural, political, social, economic, legal, industrial and domestic spheres, and ensuring that the aims and ideals of the women's movement and its collective wisdom are handed on to new generations of women. NFAW is a feminist organisation, independent of party politics and working in partnership with other women's organisations.

NFAW is grateful for the invitation to contribute to the review of the operation of the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth) (**the FW SAJER Act**). We note, however, that 12 months is a short time in which to establish reliable impact data, especially when employment behaviour during that period has also been affected by the national pandemic response.

We understand that the review will take in previous submissions that we have made to inquiries into the FW SAJER Bill and its predecessors. We also understand that, consistent with s. 4 of the FW SAJER Act, the review will address whether the operation of the relevant provisions is appropriate and effective in the current employment and economic conditions; whether the act has had any unintended consequences; and whether amendments are necessary to improve its operation and remove any unintended consequences.

In the analysis that follows, we assume the review team's familiarity with individual provisions of the Act and focus on the issue of outcomes.

Recommendations

If casual employment is to be quarantined to meeting a genuine employer need for flexibility, it will be necessary, firstly, to detach it from the low wage regime, by:

- providing 'same job, same qualifications, same pay' for casuals and non-casuals;
- replacing the current definition of casual employment with one based on an employer's actual practice, *including* authenticated records of the payment of casual loadings so long as leave entitlements are not available;
- examining the scope to develop portable entitlement schemes for Australians in insecure work;
- reviewing award changes that have effectively casualised part-time work;
- significantly strengthening the wage theft regime, including, as we have argued elsewhere, by amending union right of entry provisions in the FW Act to enable them to effectively investigate and respond to member complaints; and
- Including superannuation in the National Employment Standards so that it can be pursued under the wage theft regime.

Secondly, it will be necessary to prevent the simple replacement of casualised employment within the industrial relations framework with other forms of insecure work outside that framework. Broadly, this would entail bringing them into the broader regulatory regime, by:

- making 'job security' a principal object of the FW Act as a whole and of the wage-setting, award review and contractor testing processes;
- enabling the FWC to make decisions relating to entitlements in insecure and casual-like employment (including gig work, labour hire and outsourcing) so that the industrial relations system can continue to rebalance itself;
- regulating to prevent measures to prevent artificial constructs intended to move employees outside the employment framework (including sham contracting and back-to-back fixed term contracts).

The schema of the FW SAJER Act

According to both the original and the revised Explanatory Memorandum (p. ii), the intention of the FW SAJER Act was to 'give employers confidence to create jobs by using casual employment as a flexible employment option'. In fact, the relevant provisions do not address flexible employment options. They specifically target employees whose ongoing and regular work would entitle them to common law rights of permanent employees to sick and holiday leave.

In her Second Reading Speech in support of the casual conversion provisions of the bill, the then Minister for Employment advised that the intention of the legislation was to deliver 'a significant win for casual workers who perform regular patterns of work and deserve the benefits that flow from permanency – if that is what they wish. It is about choice.' This statement to Senate was made immediately after the government accepted amendments that would exclude up to half of all casuals from the right to be offered conversion (canvassed below).

In the light of these comments, we believe it would be more productive to talk about the schema of the Act than to discuss the intentions used to justify it.

Even prior to the passage of the Act, casual employment was not supportive of those undertaking caring responsibilities. While women often need shorter hours of work, most of those seeking such hours also need to know whether and when they will be working. They are the family carers. They have to meet routine commitments such as school or after care opening hours. If shift changes are on the table, they need to be there sufficiently in advance for alternative caring arrangements to be put in place. Carers are not generally benefitted by the 'flexibilities' of short notice, unpredictable rosters, interchangeable weekends and weekdays, and minimum hours that do not justify their travel costs. They need to know the minimum they will earn to ensure that the effective marginal tax rate they pay makes financial sense.

To the extent that casual work supports carers, it does so by offering ongoing and regular work – that is, work that is not actually casual. This is the category of employment the deeming provision of the Act was intended to casualise.

When *Skene* (*WorkPac Pty Ltd v Skene* (2018) 264 FCR 536) and *Rossato* (*WorkPac Pty Ltd v Rossato* [2020] FCAFC 84) found that ongoing and regular workers could have common law rights to sick and holiday leave, the Government introduced the FW SAJER Act to remove those rights. It legislated a 'definition' of casual employment which is effectively a deeming mechanism. Casual employment is now defined by the absence of a firm commitment to ongoing work in the employment offer made by the employer.

The FW SAJER Act was thus designed to enable employers to treat ongoing employees as if they were casual without incurring any financial liability under common law. The effect of these provisions is to license constructive impermanency and the downward pressure on wages demonstrated by casual employment generally. In previous submissions we have provided evidence that:

- casual work is not principally about flexibility, even for employers – the data shows that only about 6% of leave deprived workers are being used flexibly, as a 'narrowly-defined casual', and that the number of 'broadly-defined (variable hours) casuals' is likely to be around only 47% of leave-deprived workers (Peetz 2020, pp. 1 and 17). Data cited by the Parliamentary Library shows that in August 2020 43.8% per cent of leave deprived employees reported variable hours of work;

- the casual loading is not adequate. According to the Fair Work Commission, while it 'notionally compensates for the financial benefits of those NES entitlements which are not applicable to casuals, this does not take into account the detriments which the evidence has demonstrated may attach to the absence of such benefits' ([2017] FWCFB 3541, para 366);

- the casual loading is more often unpaid than paid -- fewer than half of all casual employees receive 'casual loadings' to compensate for loss of leave entitlements (Peetz 2020, p. 7);

- contrary to the assumption that casual workers receive extra wages to offset their insecurity and lack of entitlements, median wages for casual staff are 26% lower than for permanent employees. That is, low-wage casuals receive a wage 'penalty', given their skills, experience and the like, even though the casual loading should have had the opposite effect for those who received it (Laß and Wooden, 2019).

As the Fair Work Commission itself has pointed out, where 'there is no constraint on the employer choosing to engage as casuals persons who equally might readily be engaged as permanent full-time or part-time employees under the terms of the modern award ... the lack of any such constraint creates the potential to render the NES [National Employment Standards] irrelevant to a significant proportion of the workforce' ([2017] FWCFB 3541, para 367). Nevertheless, this is now for all practical purposes the schema of the FW SAJER Act.

In the debate on the Bill the government speakers reiterated a talking point stating that the bill would provide deemed casuals with 'a statutory pathway to permanent full-time or part-time jobs if they wish.' Actually, the wishes of deemed casuals have little to do with it. Those who work in small businesses are excluded from conversion rights altogether. The remaining casuals are able to *refuse* an offer of conversion, but they *cannot compel one*. Employers have the right both to pre-emptively refuse to make such an offer and to refuse to agree to a request for conversion from employees.

There are provisions for pressing employers to reconsider an 'unreasonable' refusal, initially through their own workplace dispute resolution processes and then through FWC conciliation or small claims courts. These provisions, like the rest of the legislation, conspicuously ignore the disabilities of casual employment. Applicants for conversion are by definition subject to termination at the end of any shift. The likelihood of any casual's applying for conversion, bring refused, and then pursuing the unreasonableness of a refusal through their own workplace dispute resolution process and on to the FWC or the court is vanishingly small if what they are seeking in the first place is increased employment security.

According to the AiGroup, under the previous award-based conversion provisions there had been virtually no disputes from employees about the refusal of their requests to convert (pp.17-18).

The operation of the Act

The Act came into effect on the 26th of March 2021. Data on the incidence of casual employment since that time is complicated by three factors. The first is the pattern of lockdowns associated with COVID. The second is the impact of the JobKeeper provisions on casual employment. The third is the deadline set by the Act for employer offers of permanency to existing employees.

COVID-related unemployment broadly took the form of two waves. Initial job losses occurred between February 2020 and May 2020. Between May 2020 and May 2021 there was a progressive recovery and lockdowns were relaxed in most states. The second wave of lockdowns began in May/June of 2021 and lasted through October.

JobKeeper was the first and the most widespread employment measure introduced in response to COVID, and therefore the most likely to influence employer decisions reflected in aggregate data. From the end of March 2020 until the end of March 2021 eligible businesses and not-for-profits were able to receive tapering payments per fortnight per eligible employee to cover the cost of wages. Among casuals, only those employees who had been with their employer on a regular and systematic basis for at least the previous 12 months were eligible for the JobKeeper payment.

In order to be eligible for the first tranche of conversion offers under the FW SAJER Act, ongoing casuals who worked a regular pattern of hours had to have been employed by September 6, 2020. Thanks to JobKeeper, by the September 27, 2021 deadline for initial

offers of conversion, much of the casual workforce who would have qualified were well known to their employers.

Table 1 maps these factors against the nearest available ABS data point on the numbers of casuals employed.

Table 1: Casual employment indexed to pre-Covid levels, COVID waves, JobKeeper, and trigger dates set under the Act

	Employees with paid leave entitlements	Casual employees (2020 Index)	
Nov 2019	99.0	100.0	
Feb 2020	100.0	100.0	
May 2020	97.4	79.4	March 2020 First round of COVID lockdowns 30 March 2020 JobKeeper -- only long term and systematic casuals covered.
Aug 2020	98.5	88.0	6 September 2021 -- cut-off for eligibility for first casual conversion offers under the FW SAJER Act.
Nov 2020	100.1	94.4	
Feb 2021	100.9	95.2	26 March passage of *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth) (**the Act**).
May 2021	101.7	99.1	28 March 2021 -- JobKeeper ceases. May – June 2021 - second round of COVID lockdowns begins
Aug 2021	100.8	92.5	
Nov 2021	103.0	96.3	27 September 2021 -- employer deadline for casual conversion letter to all long-term casuals prior to March 2021 October 2021 Sydney and Melbourne released from lockdown

Feb 2022	104.9	97.7	

Source: ABS, Charts on casual employment, occupation and industry, February 2022

- **Impact on casual employment**

The rapid rebound in casual employment following the first tranche of lockdowns (from May 2020 through May 2021) indicates that structures of precarious employment were quickly rebuilt as the economy began to re-open. In fact, the surge in casual jobs during that period (with over one-half million casual jobs created in 12 months) represents the largest and fastest expansion of casual employment in Australia's history (19.7pp on the index).

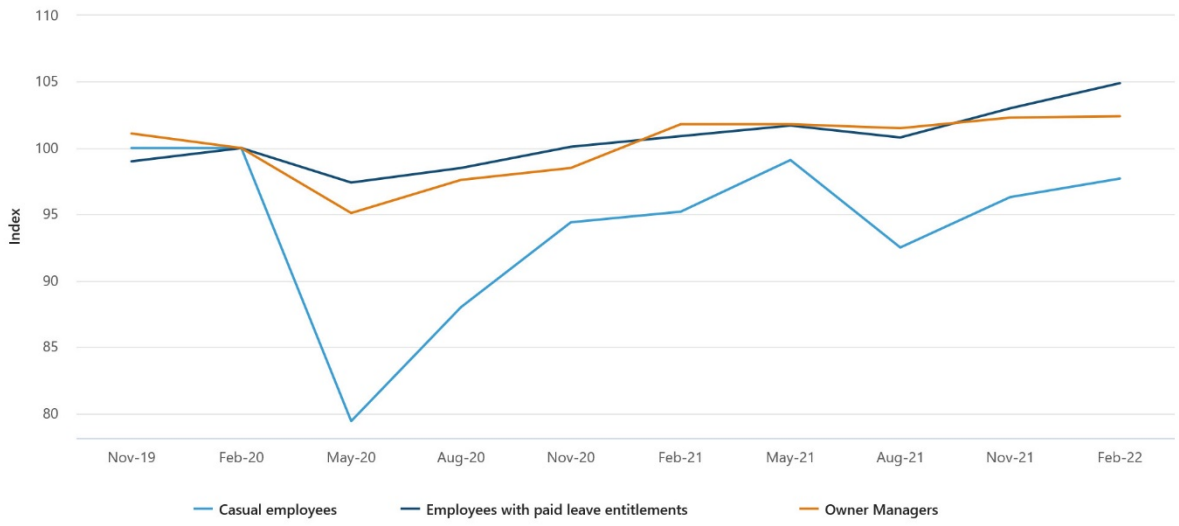
This surge in casual employment largely preceded the FW SAJER Act, and appears to substantially controvert employers' complaints about the employment impact of any legal uncertainty resulting from Skene. By the time the FW SAJER Act had been passed, and prior to the second wave of lockdowns, casual employment was on its way from around 95 percent of pre-covid levels to the May 2021 high of 99.1 per cent.

- **Impact of the conversion provisions**

Under the Act, employers were required to write to eligible employees about whether they would or would not be offered casual conversion by 27 September 2021.

In the Regulatory Impact Statement for original bill, the government had estimated that 540,000 casual employees would be likely to receive an offer of conversion in the initial year. This was roughly a quarter of all casual employees. In the period following the deadline for conversion offers, the number of casual employees grew by .6 of a percentage point on the 2020 index and the number of permanent employees grew by 1.9 percentage points.

Chart 2: Employment index, Status in Employment, Original (Feb 2020 =100.0)



Source: Labour Force, Australia, Detailed, Datacube EQ04

Source: Australian Bureau of Statistics, Charts on casual employment, occupation and industry, February 2022 24/03/2022

There is no indication in the aggregate data what proportion, if any, of the new permanent employees had been converted from casual, as the trend was established before the deadline and was apparently unaffected after it. It is clear, however, that the great majority of the 25 per cent of all casuals eligible for conversion did not change their status as a consequence of the new casual conversion provisions.

There is a broad question as to whether the dubious impact of the conversion provisions resulted from the unwillingness of employees to accept conversion or from the failure of employers to offer conversion.

- *The unwillingness of employees to accept conversion.*

While employers such as the Chamber of Commerce and Industry WA argued in the lead up to the Act that 'most employees [are] preferring to remain casual due to the increased flexibility and the immediate benefit derived from the casual loading', ABS data from 2007 (not subsequently updated) indicates that about half of all casual employees would, on the contrary, prefer to be in regular permanent work if given the choice.

More recently, the United Workers Union (UWU) provided survey findings to the Senate Committee considering the FW SAJER Bill that more than three quarters of hospitality workers wanted a permanent job and (post-pandemic) more than half said permanency was extremely important to them (para 3.30). It is not reasonable to assume that those casual employees eligible for conversion under the FW SAJER Act, being by definition both long term and regular, would be likely to decline conversion in order to sustain a non-existent flexibility.

Given the data cited above that fewer than half of all casual employees receive any casual loading, and given that median wages for casual staff are 26% lower than for permanent

employees, we are equally disinclined to accept employer arguments that most casual employees prefer the wage benefits of casual employment.

- *The failure of employers to offer conversion*

A more likely hypothesis is that employers either did not write to eligible employees about casual conversion by 27 September 2021 at all, or that they exercised their right to issue letters pre-emptively refusing to make conversion offers.

Government estimates of 540,000 eligible casuals in the Regulatory Impact Statement appear to have been based on the numbers of long-term casual employees in regular and ongoing employment. At that stage the bill applied to all businesses. Workplaces of 15 or fewer employees were excluded following a One Nations amendment on the ground that this would 'take the load off small business paperwork'.

The Ai group has clarified that over 51.4% of casuals work for small businesses with fewer than 20 employees. Although the size thresholds do not match, it is clear that the exclusion of employees in businesses with fewer than 15 employees means that a very significant proportion of regular and ongoing casual employees can never expect to receive offers of casual conversion under the provisions of the FW SAJER Act. As these smaller businesses tend to be in the retail and hospitality industries, a significant proportion of the excluded employees are likely to be women.

NFAW has no aggregate data to shed light on the conduct of the remaining employers -- those to whom the conversion provisions actually applied. Undoubtedly a proportion of them did not comply with the legislation due to ignorance of the requirement or unwillingness to act. Given the propensity of some employer groups to blame ongoing underpayment of casuals on ignorance or confusion about award requirements, further ignorance or confusion about casual conversion obligations could be expected. Employers would not, however, have experienced much confusion about which of their casual employees were eligible for conversion, having already identified all of the employees concerned in order to receive JobKeeper support.

Undoubtedly a significant proportion of relevant employers simply exercised their right to issue letters refusing to make conversion offers. Despite the general scarcity of published data on this matter, supporting data is available for from the university sector.

- *Casual conversion in the university sector*

Data on casualisation is difficult to establish in the university sector. WGEA – which counts actual employees rather than FTE -- put it at 44.6 per cent at the close of the 2017-18 financial year, before the impact of COVID.

A recent Senate report on Unlawful underpayment of employees' remuneration has confirmed that in at least 21 of Australia's 40 universities these casuals had been the primary victims of underpayment sufficiently egregious to have made them the subject of a

number of investigations conducted by the Fair Work Ombudsman (Senate Economics References Committee, 2022, para 1.58).

As is commonly the case, university employers had advised the Committee that the systematic underpayment of casuals was the result of confusion in their industrial instrument (para 3.26). According to the NTEU,

> Some of the university submissions claim that the employment arrangements are complex and difficult to administer, yet each of these employers has negotiated them into their own university-specific enterprise agreements. These are not small business cafe owners navigating an industry award. They are large enterprises with sophisticated personnel resources who are claiming an inability to administer clauses they themselves negotiated. That claims just does not stand up. (Senate Economics References Committee, 2022, para 4.18)

Universities were greatly exposed to financial impact of COVID as a consequence of their dependence on overseas students. Universities were also excluded from JobKeeper. A recent Senate report estimated that around 40,000 positions, particularly casuals, had been lost in the sector (Senate Economics References Committee, 2022, para 4.8). By the end of the 2019 financial year WGEA set the percentage of casuals in the industry at 40.7per cent. The persistence of international border closures also meant that the recovery did not embrace universities, meaning that the remaining casuals must have been reasonably core staff.

Such was the situation when universities were required under the provisions of the FW SAJER Act to write to their long-term regular casual employees about casual conversion. According to a subsequent survey conducted by the NTEU, six months after the deadline for the conversion letter less than two percent of casual staff had been found to meet the requirements to be converted to permanency, and as few as 1% of casual staff had actually been converted to permanent roles. At the University of Newcastle, for example, five of 2,300 casual staff had been converted to full-time work.

The underpinning reasons for the mass ineligibility more than a third of the university workforce are unclear. The unions say that universities rely on a casualised and systematically underpaid workforce as part of a business model imposed on them by the underfunding of the sector (Senate Economics References Committee, 2022, pp. 83ff). The universities say that they do not want to undermine the tenure system.

Whatever the drivers of the current levels of casualisation, the technical reasons are that universities can always pre-emptively refuse conversions on the grounds that they do not know whether particular courses will continue to be taught, and/or that trimester-based teaching does not fit the 'ongoing and regular pattern of hours' called for under the FW SAJER Act. At the University of Newcastle, for example, it is reported that 'almost all casual staff' were advised by email that the University:

> would not be making them an offer of full-time or part-time employment because they had not worked the required regular pattern of hours on an ongoing basis for six months, and/or it would have to provide them with duties it didn't need them to perform.

It is extremely difficult to frame a casual conversion entitlement that cannot be avoided by constructive ineligibility. If regular trimester teaching does not fit the definition, all recurrent teaching – indeed, all seasonal work could be eligible for exclusion. Simply swapping shifts between two current ongoing regular casuals in any industry would exclude both from conversion.

The extent of constructive ineligibility for ongoing employment in the Australian labour market has been canvassed at length by recent Senate Select Committee on Job Insecurity. Suffice it to say here that a government institution such as the Productivity Commission found itself able to recommend, in setting the initial framework for the NDIS, that employers 'keep the number of hours worked by employees low to avoid the risk of a casual conversion occurring' (Productivity Commission, 2011, p 327). NDIS data for 2017 shows that, in percentage terms, the permanent growth rate of the workforce was 1.3% per year; the casual growth rate was 26% per year (National Disability Services, 2018, p 14).

Is the operation of the relevant provisions appropriate and effective in the current employment and economic conditions?

In our view, the assumptions underpinning s.4 (2)(a) (the review provision) of the FW SAJER Act are highly questionable.

In the first place, any industrial relations framework that has to be re-legislated in order to respond to changing employment and economic conditions is not fit for purpose. The point of such system is to set a framework within which employers, unions, employees and the Fair Work Commission have the ongoing capacity to respond to such changes.

Secondly, the FW SAJER Act was not itself a response to economic conditions, though it was partly couched as such. Casual employment had altogether rebounded by the time it was passed. In fact, the legislation was a response to the Court's decisions in *Skene* and *Rossato*. That is why there is a mismatch between its claims to enhance flexibility and its targeting of long term and regular employees.

In our view the better question is whether the problem posed by the abuse of casual employment found in *Skene* and *Rossato* is best resolved by making all ongoing and regular employment potentially casual as provided for in the FW SAJER Act. The answer to this question was provided by the Fair Work Commission: where 'there is no constraint on the employer choosing to engage as casuals persons who equally might readily be engaged as permanent full-time or part-time employees under the terms of the modern award ... the lack of any such constraint creates the potential to render the NES [National Employment Standards] irrelevant to a significant proportion of the workforce.'

The alternative to enabling employers to deem regular and ongoing employees to be casual is to contain casual employment to that which is genuinely flexible. This means eliminating the incentive to use casual employment for non-operational purposes, the most pervasive of which is wage suppression. It means undoing the reliance on low wage growth as "a deliberate design feature of our economic architecture" (Cormann, 2019).

S. 4(2)(c) of the review provision: are any amendments required to the Fair Work Act 2009 and the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009, or any other legislation?

Casual employment is one of many insecure employment options. Some, like the new deeming provision, have been deliberately legislated into our in low wage architecture, and some have been constructed to avoid incurring the responsibilities of employment altogether. We have provided lengthy evidence elsewhere about the coincidence of the reduction in the rate of growth of casualisation with the weakening of part-time safeguards in awards and the introduction of outsourcing, gig work, and sham contracting outside them (31ff).

If casual employment is to be quarantined to meeting a genuine employer need for flexibility, it will be necessary, firstly, to detach it from the low wage regime, by:

- providing 'same job, same qualifications, same pay' for casuals and non-casuals
- replacing the current definition of casual employment with one based on an employer's actual practice, *including* authenticated records of the payment of casual loadings so long as leave entitlements are not available
- examining the scope to develop portable entitlement schemes for Australians in insecure work
- reviewing award changes that have effectively casualised part-time work
- significantly strengthening the wage theft regime, including, as we have argued elsewhere, by amending union right of entry provisions in the FW Act to enable them to effectively investigate and respond to member complaints
- Including superannuation in the NES so that it can be pursued under the wage theft regime.

Secondly, it will be necessary to prevent the simple replacement of casualised employment within the industrial relations framework with other forms of insecure work outside that framework. Broadly, this would entail bringing them into the broader regulatory regime, by:

- making 'job security' a principal object of the FW Act as a whole and of the wage-setting, award review and contractor testing processes; and
- enabling the FWC to make decisions relating to entitlements in insecure and casual-like employment (including gig work, labour hire and outsourcing) so that the industrial relations system can continue to rebalance itself;
- regulating to prevent measures to prevent artificial constructs intended to move employees outside the employment framework (including sham contracting and back-to-back fixed term contracts).

References

Cormann, M (2019), Sky News, 7 March.

Laß, I, and Wooden, M (2019), The Structure of the Wage Gap for Temporary Workers: Evidence from Australian Panel Data, *British Journal of Industrial Relations*. doi: 10.1111/bjir.12458.

Peetz, D (2020), *What do the data on casuals really mean?* Centre for Work, Organisation

and Wellbeing, Griffith University
https://www.griffith.edu.au/__data/assets/pdf_file/0024/1212675/What-do-the-data-oncasuals-really-mean-v5.pdf

Productivity Commission (2011), *Disability Care and Support*, Report No. 54, Canberra <https://www.pc.gov.au/inquiries/completed/disability-support/report>

Senate Economics References Committee (2022), *Systemic, sustained and shameful: Unlawful underpayment of employees' remuneration*
https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024434/toc_pdf/Systemic,sustainedandshameful.pdf;fileType=application%2Fpdf

National Foundation for Australian Women	
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?	According to both the original and the revised Explanatory Memorandum (p. ii), the intention of the FW SAJER Act was to 'give employers confidence to create jobs by using casual employment as a flexible employment option'. In fact, the relevant provisions do not address flexible employment options. They specifically target employees whose ongoing and regular work would entitle them to common law rights of permanent employees to sick and holiday leave. In her Second Reading Speech in support of the casual conversion provisions of the bill, the then Minister for Employment advised that the intention of the legislation was to deliver 'a significant win for casual workers who perform regular patterns of work and deserve the benefits that flow from permanency – if that is what they wish. It is about choice.' This statement to Senate was made immediately after the government accepted amendments that would exclude up to half of all casuals from the right to be offered conversion (canvassed below). In the light of these comments, we believe it would be more productive to talk about the schema of the Act than to discuss the intentions used to justify it. Even prior to the passage of the Act, casual employment was not supportive of those undertaking caring responsibilities. While women often need shorter hours of work, most of those seeking such hours also need to know whether and when they will be working. They are the family carers. They have to meet routine commitments such as school or after care opening hours. If shift changes are on the table, they need to be there sufficiently in advance for alternative caring arrangements to be put in place. Carers are not generally benefitted by the 'flexibilities' of short notice, unpredictable rosters, interchangeable weekends and weekdays, and minimum hours that do not justify their travel costs. They need to know the minimum they will

	earn to ensure that the effective marginal tax rate they pay makes financial sense. To the extent that casual work supports carers, it does so by offering ongoing and regular work – that is, work that is not actually casual. This is the category of employment the deeming provision of the Act was intended to casualise. When Skene (WorkPac Pty Ltd v Skene (2018) 264 FCR 536) and Rossato (WorkPac Pty Ltd v Rossato [2020] FCAFC 84) found that ongoing and regular workers could have common law rights to sick and holiday leave, the Government introduced the FW SAJER Act to remove those rights. It legislated a 'definition' of casual employment which is effectively a deeming mechanism. Casual employment is now defined by the absence of a firm commitment to ongoing work in the employment offer made by the employer. The FW SAJER Act was thus designed to enable employers to treat ongoing employees as if they were casual without incurring any financial liability under common law. The effect of these provisions is to license constructive impermanency and the downward pressure on wages demonstrated by casual employment generally. In previous submissions we have provided evidence that: • casual work is not principally about flexibility, even for employers – the data shows that only about 6% of leave deprived workers are being used flexibly, as a 'narrowly-defined casual', and that the number of 'broadly-defined (variable hours) casuals' is likely to be around only 47% of leave-deprived workers (Peetz 2020, pp. 1 and 17). Data cited by the Parliamentary Library shows that in August 2020 43.8% per cent of leave deprived employees reported variable hours of work; • the casual loading is not adequate. According to the Fair Work Commission, while it 'notionally compensates for the financial benefits of those NES entitlements which are not applicable to casuals, this does not take into account the detriments which the evidence has demonstrated may attach to the absence of such benefits' ([2017] FWCFB 3541, para 366); • the casual loading is more often unpaid than paid -- fewer than half of all casual employees receive 'casual loadings' to compensate for loss of leave entitlements (Peetz 2020, p. 7); • contrary to the assumption that casual workers receive extra wages to offset their insecurity and lack of entitlements, median wages for

	casual staff are 26% lower than for permanent employees. That is, low-wage casuals receive a wage 'penalty', given their skills, experience and the like, even though the casual loading should have had the opposite effect for those who received it (Laß and Wooden, 2019). As the Fair Work Commission itself has pointed out, where 'there is no constraint on the employer choosing to engage as casuals persons who equally might readily be engaged as permanent full-time or part-time employees under the terms of the modern award ... the lack of any such constraint creates the potential to render the NES [National Employment Standards] irrelevant to a significant proportion of the workforce' ([2017] FWCFB 3541, para 367). Nevertheless, this is now for all practical purposes the schema of the FW SAJER Act. In the debate on the Bill the government speakers reiterated a talking point stating that the bill would provide deemed casuals with 'a statutory pathway to permanent full-time or part-time jobs if they wish.' Actually, the wishes of deemed casuals have little to do with it. Those who work in small businesses are excluded from conversion rights altogether. The remaining casuals are able to refuse an offer of conversion, but they cannot compel one. Employers have the right both to pre-emptively refuse to make such an offer and to refuse to agree to a request for conversion from employees. There are provisions for pressing employers to reconsider an 'unreasonable' refusal, initially through their own workplace dispute resolution processes and then through FWC conciliation or small claims courts. These provisions, like the rest of the legislation, conspicuously ignore the disabilities of casual employment. Applicants for conversion are by definition subject to termination at the end of any shift. The likelihood of any casual's applying for conversion, bring refused, and then pursuing the unreasonableness of a refusal through their own workplace dispute resolution process and on to the FWC or the court is vanishingly small if what they are seeking in the first place is increased employment security. According to the AiGroup, under the previous award-based conversion provisions there had been virtually no disputes from employees about the refusal of their requests to convert (pp.17-18).
Q2c : What, if anything, would you change about the definition of 'casual employee' under the FW SAJER Act, or any other law?	The question is whether the problem posed by the abuse of casual employment found in Skene and Rossato is best resolved by making all ongoing and regular employment potentially casual as provided for in the FW SAJER Act. The answer to this question was

	provided by the Fair Work Commission: where 'there is no constraint on the employer choosing to engage as casuals persons who equally might readily be engaged as permanent full-time or part-time employees under the terms of the modern award ... the lack of any such constraint creates the potential to render the NES [National Employment Standards] irrelevant to a significant proportion of the workforce.' The alternative to enabling employers to deem regular and ongoing employees to be casual is to contain casual employment to that which is genuinely flexible. This means eliminating the incentive to use casual employment for non-operational purposes, the most pervasive of which is wage suppression. It means undoing the reliance on low wage growth as "a deliberate design feature of our economic architecture" (Cormann, 2019). If casual employment is to be quarantined to meeting a genuine employer need for flexibility, it will be necessary, firstly, to detach it from the low wage regime, by: • providing 'same job, same qualifications, same pay' for casuals and non-casuals • replacing the current definition of casual employment with one based on an employer's actual practice, including authenticated records of the payment of casual loadings so long as leave entitlements are not available • examining the scope to develop portable entitlement schemes for Australians in insecure work • reviewing award changes that have effectively casualised part-time work • significantly strengthening the wage theft regime, including, as we have argued elsewhere, by amending union right of entry provisions in the FW Act to enable them to effectively investigate and respond to member complaints • Including superannuation in the NES so that it can be pursued under the wage theft regime. Secondly, it will be necessary to prevent the simple replacement of casualised employment within the industrial relations framework with other forms of insecure work outside that framework. Broadly, this would entail bringing them into the broader regulatory regime, by: o making 'job security' a principal object of the FW Act as a whole and of the wage-setting, award review and contractor testing processes; and

	○ enabling the FWC to make decisions relating to entitlements in insecure and casual-like employment (including gig work, labour hire and outsourcing) so that the industrial relations system can continue to rebalance itself; • regulating to prevent measures to prevent artificial constructs intended to move employees outside the employment framework (including sham contracting and back-to-back fixed term contracts).
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?	Data about the impact of the Act on the incidence of casual employment and of casual conversions is complicated by three factors. The first is the pattern of lockdowns associated with COVID. The second is the impact of the JobKeeper provisions on casual employment. The third is the deadline set by the Act for employer offers of permanency to existing employees. COVID-related unemployment broadly took the form of two waves. Initial job losses occurred between February 2020 and May 2020. Between May 2020 and May 2021 there was a progressive recovery and lockdowns were relaxed in most states. The second wave of lockdowns began in May/June of 2021 and lasted through October. JobKeeper was the first and the most widespread employment measure introduced in response to COVID, and therefore the most likely to influence employer decisions reflected in aggregate data. From the end of March 2020 until the end of March 2021 eligible businesses and not-for-profits were able to receive tapering payments per fortnight per eligible employee to cover the cost of wages. Among casuals, only those employees who had been with their employer on a regular and systematic basis for at least the previous 12 months were eligible for the JobKeeper payment. In order to be eligible for the first tranche of conversion offers under the FW SAJER Act, ongoing casuals who worked a regular pattern of hours had to have been employed by September 6, 2020. Thanks to JobKeeper, by the September 27, 2021 deadline for

initial offers of conversion, much of the casual workforce who would have qualified were well known to their employers. Table 1 maps these factors against the nearest available ABS data point on the numbers of casuals employed. Table 1: Casual employment indexed to pre-Covid levels, COVID waves, JobKeeper, and trigger dates set under the Act

Employees with paid leave entitlements

Casual employees (2020 Index)

Nov 2019 99.0 100.0 Feb 2020 100.0 100.0 May 2020 97.4 79.4

March 2020 First round of COVID lockdowns 30 March 2020 JobKeeper -- only long term and systematic casuals covered. Aug 2020 98.5 88.0 6 September 2021 – cut-off for eligibility for first casual conversion offers under the FW SAJER Act. Nov 2020 100.1 94.4 Feb 2021 100.9 95.2 26 March passage of Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 (Cth) (the Act). May 2021 101.7 99.1 28 March 2021 -- JobKeeper ceases. May – June 2021 - second round of COVID lockdowns begins Aug 2021 100.8 92.5 Nov 2021 103.0 96.3 27 September 2021 -- employer deadline for casual conversion letter to all long-term casuals prior to March 2021 October 2021 Sydney and Melbourne released from lockdown Feb 2022 104.9 97.7 Source: ABS, Charts on casual employment, occupation and industry, February 2022

- Impact on casual employment

The rapid rebound in casual employment following the first tranche of lockdowns (from May 2020 through May 2021) indicates that structures of precarious employment were quickly rebuilt as the economy began to re-open. In fact, the surge in casual jobs during that period (with over one-half million casual jobs created in 12 months) represents the largest and fastest expansion of casual employment in Australia's history (19.7pp on the index). This surge in casual employment largely preceded the FW SAJER Act, and appears to substantially controvert employers' complaints about the employment impact of any legal uncertainty resulting from Skene. By the time the FW SAJER Act had been passed, and prior to the second wave of lockdowns, casual employment was on its way from around 95 percent of pre-covid levels to the May 2021 high of 99.1 per cent.

- Impact of the conversion provisions

Under the Act, employers were required to write to eligible employees about whether they would or would not be offered casual conversion by 27 September

	2021. In the Regulatory Impact Statement for original bill, the government had estimated that 540,000 casual employees would be likely to receive an offer of conversion in the initial year. This was roughly a quarter of all casual employees. In the period following the deadline for conversion offers, the number of casual employees grew by .6 of a percentage point on the 2020 index and the number of permanent employees grew by 1.9 percentage points. There is no indication in the aggregate data what proportion, if any, of the new permanent employees had been converted from casual, as the trend was established before the deadline and was apparently unaffected after it. It is clear, however, that the great majority of the 25 per cent of all casuals eligible for conversion did not change their status as a consequence of the new casual conversion provisions. There is a broad question as to whether the dubious impact of the conversion provisions resulted from the unwillingness of employees to accept conversion or from the failure of employers to offer conversion. • The unwillingness of employees to accept conversion. While employers such as the Chamber of Commerce and Industry WA argued in the lead up to the Act that 'most employees [are] preferring to remain casual due to the increased flexibility and the immediate benefit derived from the casual loading', ABS data from 2007 (not subsequently updated) indicates that about half of all casual employees would, on the contrary, prefer to be in regular permanent work if given the choice. More recently, the United Workers Union (UWU) provided survey findings to the Senate Committee considering the FW SAJER Bill that more than three quarters of hospitality workers wanted a permanent job and (post-pandemic) more than half said permanency was extremely important to them (para 3.30). It is not reasonable to assume that those casual employees eligible for conversion under the FW SAJER Act, being by definition both long term and regular, would be likely to decline conversion in order to sustain a non-existent flexibility. Given the data cited above that fewer than half of all casual employees receive any casual loading, and given that median wages for casual staff are 26% lower than for permanent employees, we are equally disinclined to accept employer arguments that most casual employees prefer the wage benefits of casual employment. • The failure of employers to offer conversion

	A more likely hypothesis is that employers either did not write to eligible employees about casual conversion by 27 September 2021 at all, or that they exercised their right to issue letters pre-emptively refusing to make conversion offers. Government estimates of 540,000 eligible casuals in the Regulatory Impact Statement appear to have been based on the numbers of long-term casual employees in regular and ongoing employment. At that stage the bill applied to all businesses. Workplaces of 15 or fewer employees were excluded following a One Nations amendment on the ground that this would 'take the load off small business paperwork'. The Ai group has clarified that over 51.4% of casuals work for small businesses with fewer than 20 employees. Although the size thresholds do not match, it is clear that the exclusion of employees in businesses with fewer than 15 employees means that a very significant proportion of regular and ongoing casual employees can never expect to receive offers of casual conversion under the provisions of the FW SAJER Act. As these smaller businesses tend to be in the retail and hospitality industries, a significant proportion of the excluded employees are likely to be women. NFAW has no aggregate data to shed light on the conduct of the remaining employers -- those to whom the conversion provisions actually applied. Undoubtedly a proportion of them did not comply with the legislation due to ignorance of the requirement or unwillingness to act. Given the propensity of some employer groups to blame ongoing underpayment of casuals on ignorance or confusion about award requirements, further ignorance or confusion about casual conversion obligations could be expected. Employers would not, however, have experienced much confusion about which of their casual employees were eligible for conversion, having already identified all of the employees concerned in order to receive JobKeeper support. Undoubtedly a significant proportion of relevant employers simply exercised their right to issue letters refusing to make conversion offers. Despite the general scarcity of published data on this matter, supporting data is available for from the university sector. • Casual conversion in the university sector Data on casualisation is difficult to establish in the university sector. WGEA – which counts actual employees rather than FTE -- put it at 44.6 per cent at the close of the 2017-18 financial year, before the impact of COVID. A recent Senate report on Unlawful underpayment of employees' remuneration has confirmed that in at least 21 of Australia's 40

	universities these casuals had been the primary victims of underpayment sufficiently egregious to have made them the subject of a number of investigations conducted by the Fair Work Ombudsman (Senate Economics References Committee, 2022, para 1.58). As is commonly the case, university employers had advised the Committee that the systematic underpayment of casuals was the result of confusion in their industrial instrument (para 3.26). According to the NTEU, Some of the university submissions claim that the employment arrangements are complex and difficult to administer, yet each of these employers has negotiated them into their own university-specific enterprise agreements. These are not small business cafe owners navigating an industry award. They are large enterprises with sophisticated personnel resources who are claiming an inability to administer clauses they themselves negotiated. That claims just does not stand up. (Senate Economics References Committee, 2022, para 4.18) Universities were greatly exposed to financial impact of COVID as a consequence of their dependence on overseas students. Universities were also excluded from JobKeeper. A recent Senate report estimated that around 40,000 positions, particularly casuals, had been lost in the sector (Senate Economics References Committee, 2022, para 4.8). By the end of the 2019 financial year WGEA set the percentage of casuals in the industry at 40.7per cent. The persistence of international border closures also meant that the recovery did not embrace universities, meaning that the remaining casuals must have been reasonably core staff. Such was the situation when universities were required under the provisions of the FW SAJER Act to write to their long-term regular casual employees about casual conversion. According to a subsequent survey conducted by the NTEU, six months after the deadline for the conversion letter less than two percent of casual staff had been found to meet the requirements to be converted to permanency, and as few as 1% of casual staff had actually been converted to permanent roles. At the University of Newcastle, for example, five of 2,300 casual staff had been converted to full-time work. The underpinning reasons for the mass ineligibility more than a third of the university workforce are unclear. The unions say that universities rely on a casualised and systematically underpaid workforce as part of a business model imposed on them by the underfunding of the sector (Senate Economics References Committee, 2022, pp. 83ff). The universities say that they do not want to undermine the tenure system. Whatever the drivers

	of the current levels of casualisation, the technical reasons are that universities can always pre-emptively refuse conversions on the grounds that they do not know whether particular courses will continue to be taught, and/or that trimester-based teaching does not fit the 'ongoing and regular pattern of hours' called for under the FW SAJER Act. At the University of Newcastle, for example, it is reported that 'almost all casual staff' were advised by email that the University: would not be making them an offer of full-time or part-time employment because they had not worked the required regular pattern of hours on an ongoing basis for six months, and/or it would have to provide them with duties it didn't need them to perform. It is extremely difficult to frame a casual conversion entitlement that cannot be avoided by constructive ineligibility. If regular trimester teaching does not fit the definition, all recurrent teaching – indeed, all seasonal work could be eligible for exclusion. Simply swapping shifts between two current ongoing regular casuals in any industry would exclude both from conversion. The extent of constructive ineligibility for ongoing employment in the Australian labour market has been canvassed at length by recent Senate Select Committee on Job Insecurity. Suffice it to say here that a government institution such as the Productivity Commission found itself able to recommend, in setting the initial framework for the NDIS, that employers 'keep the number of hours worked by employees low to avoid the risk of a casual conversion occurring' (Productivity Commission, 2011, p 327). NDIS data for 2017 shows that, in percentage terms, the permanent growth rate of the workforce was 1.3% per year; the casual growth rate was 26% per year (National Disability Services, 2018, p 14).
Q3c : What, if anything, would you change about the casual conversion provisions under the FW SAJER Act, or any other law?	Without meaningful changes to the definition of casual employment changes to the casual conversion clause are unlikely to provide a balance between the interests of employers and employees.
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	Small business should not be exempt. The current exemption applies to such a large proportion of casual employees, particularly in the female-dominated

differently, to small business employers?	industries of retail and hospitality, as to undermine any concept of a broad statutory path to permanency.
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?	In terms of fairness, the casual off-set provision raises two issues. In the first place, the compensation provision applies to listed entitlements; it does not compensate employees for their exclusion from the safety net of the NES. The Fair Work Commission recognised this when it examined the question of conversion rights for casual employees: Although the casual loading for which modern awards provide notionally compensates for the financial benefits of those NES entitlements which are not applicable to casuals, this does not take into account the detriments which the evidence has demonstrated may attach to the absence of such benefits, particularly for adult long-term casuals who are financially dependent on their casual employment. These include attending work while sick, not taking recreational leave because of concerns about whether any absence from work will endanger future employment, the incapacity to properly balance work and attending to personal and caring responsibilities and commitments, changes in working hours without notice, and potential for the sudden loss of what had been regular work without any proper notice or adjustment payment. Additionally there are other detriments associated with casual employment of this nature, including the lack of a career path, diminished access to training and workplace participation, poorer health and safety outcomes and the inability to obtain loans from financial institutions. ([2017] FWCFB 3541 para 366) Any future amendments to the FWA addressing the compensation of employees misclassified as casual should cover what the FWC has identified as the 'full range of detriments' suffered

	by employees excluded inappropriately from the NES. In the second place, it appears to be the case that many employers who pay a casual loading have already offset the loading by giving casual employees a lower base rate of pay than equivalent ongoing employees. A recent study in a leading international journal found that, in Australia, low-wage casuals received a wage 'penalty', given their skills, experience and the like, even though the casual loading should have had the opposite effect, resulting in a wage 'premium' (Laß and Wooden 2019). This may reflect actual underpayment, but it may also reflect the fact than an employer has legally paid the loading but placed the employee on a lower base pay (perhaps no more than the award rate) than they otherwise would be on. The latter is consistent with, but not proven by, the fact that (amongst non-managerial adult employees) 38% of employer-described 'casuals' are paid only the award rate, while this is the case for just 12% of other employees (Peetz, 2020, p. 5 ; Australian Bureau of Statistics 6306.0). Some of these would have been eligible for compensation. The Bill provides certainty that this will not need to happen. Any future amendments to the FWA addressing the compensation of employees misclassified as casual should include a requirement that the FWC take as its base the rate of pay commonly set for equivalent ongoing employees. In practice, however, the question of compensation will not arise. The new 'exhaustive' definition of casual excludes every claim since the Act has come into effect, regardless of when the misclassification of casual employees is found to have occurred ('New subclause 46(1) provides that the new statutory definition of casual employee in section 15A of the amended Act applies on and after commencement in relation to offers of employment that were given before, on or after commencement') (our emphasis; EM, para 491). That is, the proposed definition pre-empts all claims except those in which the 'casual' employee holds a written contract from their employer containing a firm advance commitment to casual employment which is at the same time intended to be continuing and indefinite work ((EM, para 491; Illustrative example – employment commences on the basis of irregular hours but later develops into a regular pattern of hours, pp. 6-7). The need for any compensation of employees denied access to the NES has been virtually eliminated due to the retrospective application of the exclusionary definition of casual employment in the Act.

Q5c : What, if anything, would you change about set-off of casual loading under the FW SAJER Act, or any other law?	Casual employment is one of many insecure employment options. Some, like the new deeming provision, have been deliberately legislated into our in low wage architecture, and some have been constructed to avoid incurring the responsibilities of employment altogether. We have provided lengthy evidence elsewhere about the coincidence of the reduction in the rate of growth of casualisation with the weakening of part-time safeguards in awards and the introduction of outsourcing, gig work, and sham contracting outside them (31ff). If casual employment is to be quarantined to meeting a genuine employer need for flexibility, it will be necessary, firstly, to detach it from the low wage regime, by: • providing 'same job, same qualifications, same pay' for casuals and non-casuals • replacing the current definition of casual employment with one based on an employer's actual practice, including authenticated records of the payment of casual loadings so long as leave entitlements are not available • examining the scope to develop portable entitlement schemes for Australians in insecure work • reviewing award changes that have effectively casualised part-time work • significantly strengthening the wage theft regime, including, as we have argued elsewhere, by amending union right of entry provisions in the FW Act to enable them to effectively investigate and respond to member complaints • Including superannuation in the NES so that it can be pursued under the wage theft regime. Secondly, it will be necessary to prevent the simple replacement of casualised employment within the industrial relations framework with other forms of insecure work outside that framework. Broadly, this would entail bringing them into the broader regulatory regime, by: • making 'job security' a principal object of the FW Act as a whole and of the wage-setting, award review and contractor testing processes; and • enabling the FWC to make decisions relating to entitlements in insecure and casual-like employment (including gig work, labour hire and outsourcing) so that the industrial relations system can continue to rebalance itself; • regulating to prevent measures to prevent artificial constructs intended to move

	employees outside the employment framework (including sham contracting and back-to-back fixed term contracts).
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?	It would be effective and appropriate of the definition were effective and appropriate. It is not.
Q6c : What, if anything, would you change about the Casual Employment Information Statement under the FW SAJER Act, or any other law?	We would change the clause concerning which information is being provided.
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.	In our view, the assumptions underpinning s.4 (2)(a) (the review provision) of the FW SAJER Act are highly questionable. In the first place, any industrial relations framework that has to be re-legislated in order to respond to changing employment and economic conditions is not fit for purpose. The point of such system is to set a framework within which employers, unions, employees and the Fair Work Commission have the ongoing capacity to respond to such changes. Secondly, the FW SAJER Act was not itself a response to economic conditions, though it was partly couched as such. Casual employment had altogether rebounded by the time it was passed. In fact, the legislation was a response to the Court's decisions in Skene and Rossato. That is why there is a mismatch between its claims to enhance flexibility and its targeting of long term and regular employees.
Q8 : Do you wish to raise any other matters for the independent review to consider?	We have also put our submission to the review committee as a single document. We recommend that it be read and considered as such, since it was cast in order to deliver a consistent and ordered position.
Q9 : Should you wish to provide additional supporting documentation, you may upload an attachment here. Please do not upload any	["Submission FWSAJER Review.docx"]

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.	