



Fair Work  
Commission

## Modern Awards Review 2023-24 (AM2023/21)

### Submission cover sheet

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(Please provide the name of the person lodging the submission)

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(If this submission is completed on behalf of an organisation or group of individuals, please provide details)

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## Background

1. The National Tertiary Education Industry Union (**NTEU**) is the union that represents workers in the higher education sector. The higher education sector is marked by high levels of insecure work, both casual and fixed-term..<sup>1</sup>
2. Workers in the higher education sector are covered by two main awards, the *Higher Education Industry – Academic Staff - Award 2020* and the *Higher Education Industry – General Staff - Award 2020* (together **the HE Awards**).
3. The *Higher Education Contract of Employment Award 1998 (HECE Award)* introduced restrictions on the use of fixed-term employment for respondents to that Award. Those restrictions remained in the Awards during the modernisation process in respect of those employers who were respondents to the HECE Award.
4. Some of those restrictions that are contained in the Awards permit fixed-term contracts for a period greater than two years.
5. The impact of the introduction of Division 5 of Part 2-9 of the *Fair Work Act 2009* (Cth) as a consequence of the *Fair Work (Secure Jobs, Better Pay) Act 2022* (Cth) (**SJBP Act**), means that the HE Awards are no longer meeting the modern award objective of improving access to secure work in the higher education sector when compared to the broader economy and it is necessary to amend the HE Awards to achieve that objective.<sup>2</sup>
6. These submissions are primarily focused on Question 3 contained in the Fair Work Commission's *Modern Awards Review 2023-24 Discussion Paper – Job Security*. That question asks:

*Are there specific award provisions that are not consistent with the new modern awards objective? If so, parties are asked to address whether it is relevant and necessary to vary any awards to amend or remove that specific award provision.*

NTEU submits that the answer to that question is 'yes' and identifies clauses 11.2(b)(ii) and (v) of the Academic Staff Award and 11.3(b) and (d) of the General Staff Award as clauses which require amendment in order to ensure that the Awards meet the modern award objectives following the passage of the *SJBP Act*. NTEU's specific proposal is addressed below.

7. The NTEU proposes further amendments below to the HE Awards in order to ensure that the Awards meet the modern awards objectives.

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<sup>1</sup> See Department of Education [statistics](#) which show that 22% of employees in the sector are engaged on fixed-term contracts, while 40% of employees are engaged as casual employees on a headcount basis.

<sup>2</sup> *Fair Work Act 2009* (Cth) s 134(1)(aa).

8. These submissions also briefly address Question 2 contained in the Discussion Paper. That question asks:

*Are there any additional specific award provisions that are consistent with the new modern awards objective? If so, parties are asked to consider and address whether it is relevant and necessary to vary any awards to include that or those specific award provision(s).*

9. NTEU identifies clause 12.1(d) of the *Educational Services (Post-Secondary Education) Award 2020* as a specific award provision which is consistent with the modern award objective, and briefly outlines a proposal to amend the HE Awards to incorporate this provision as modified in proposals below.
10. NTEU has read and agrees with the submission of the ACTU and agrees that the review is not confined to the seven more commonly used awards identified in the Discussion Paper, noting p. 9 of the ACTU submissions: *‘...we are at odds with the statement that there are “seven modern awards the subject of this review” on page 108 of the discussion paper. Having reviewed the President’s Statements concerning this review, the contents directed to the scope of the job security stream disclose no desire to impose such a limitation, as distinct from the comments made concerning proposals to improve the “ease of use” of modern awards. Limiting this stream of the review to the seven identified awards risks failing to address the needs of the remaining 47% of award reliant workers’*. NTEU submits it is relevant and necessary to amend the Awards to respond to the amended object of the FW Act set out in s. 3(a) (“...promote job security..”) and to meet the amended modern award objective set out in section 134(1)(aa) (“...the need to improve access to secure work across the economy..”).

## Insecure Work in the Higher Education Sector

11. The higher education sector is marked by high levels of insecure work. Since 2000, the number of fixed-term and casual staff in the sector has increased by 89 percent, while the number of continuing staff has increased by only 49 percent. In 2018, only just over one in three workers employed in the sector were engaged in continuing employment, with 43% of all workers employed on a casual basis and 22% employed on fixed-term contracts on a headcount basis.<sup>3</sup>
12. This level of insecurity has severe negative impacts on the sector. Insecure work of all types undermines academic autonomy and freedom of intellectual inquiry because workers in insecure employment are less likely to express ideas that are controversial or unpopular, which is a key element of academic freedom,<sup>4</sup> for fear of losing their livelihoods. Security of work in the form of tenured positions is key to the concept of academic freedom and the discovery of knowledge.<sup>5</sup> This core ideal of the higher education sector is undermined by the

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<sup>3</sup> NTEU, *The Flood of Insecure Employment in Australian Universities*, 2018, p1, 3.

<sup>4</sup> The Hon Robert French AC, *Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers*, 2019, 114.

<sup>5</sup> Ibid 116.

current levels of insecure work in the sector, which undermines the modern award objective of promoting the productive performance of work.<sup>6</sup>

13. Further, the nature of insecure work means that casual academic staff are vulnerable to having their wages stolen by their employers. That is so because unlike other workers in the economy who perform work on-site for their employers, casual academic workers perform much of their work off-campus and are subjected to illegal limits on the time they can claim for performing that work. A recent NTEU report showed that more than 97,000 university staff had had \$159 million stolen from them by over 30 employers, and these number are likely to only be the tip of the iceberg.<sup>7</sup> The precarity of the work contributes to this problem because workers are reluctant to raise concerns about wage theft when they are reliant on their employer renewing their contract every teaching period for their income.
14. Any assertion that insecure work is the product of casual workers' desire for flexibility can be safely disregarded. A 2019 survey of 6000 casual workers in the higher education sector showed that only 18% of casual workers were happy with their mode of engagement and two-thirds preferring ongoing employment. Further, any contention of casual academic work being 'flexible' for casual workers is likely more apparent than real. That is so because of the nature of academic work which requires a casual academic staff member to deliver scheduled classes with no ability to refuse that work without a realistic expectation that it will negatively impact the prospect of further work with their employer.
15. NTEU's submissions below are made in the context of the severe negative impact that insecure work has on workers in the higher education sector.

## Response to Question 2 – specific award provisions that are consistent with the new modern awards objective

16. Question 2 in the Discussion Paper asks

*'Are there any additional specific award provisions that are consistent with the new modern awards objective? If so, parties are asked to consider and address whether it is relevant and necessary to vary any awards to include that or those specific award provisions(s)*

NTEU submits that the answer to that question is 'yes' and identifies clause 12.1(d) of the *Educational Services (Post-Secondary Education) Award 2020* as such a provisions.

17. Clause 12 of the Post-Secondary Award deals with sessional employment. Sessional employment applies to teaching staff members and is a type of employment where the employee is engaged to work on a full-time or part-time basis for a specified period or periods of not less than 4 weeks or not more than 40 weeks in a calendar year.
18. Clause 12.1(d) states that

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<sup>6</sup> Fair Work Act 2009 (Cth) s 134(1)(d).

<sup>7</sup> NTEU, *Wage Theft Report*, November 2023, p3.

*'Subject to the employee's satisfactory conduct and performance, where an equivalent position exists at the expiry of the employee's period of engagement, the employer will offer a further engagement to the employee'.*

This clause is consistent with the new award objective because it requires an employer to provide further work to an employee where that work remains required by the employer subject to the employee's satisfactory conduct and performance, thereby improving access to secure work for those employees. NTEU submits that a similar clause should be inserted into the General Staff Award and the Academic Staff Award with a minor change to make it appropriate for casual work in the higher education sector.

19. NTEU submits that the following text should be inserted into a new clause 12.4 in both the Academic Staff Award and the General Staff Award:

*Where a casual employee has been engaged for a period of 6 months and the work that they have been performing continues, they will be entitled to be offered further work subject to satisfactory conduct and performance.*

20. Inserting the above clause into the Awards will improve access to more secure work for employees to whom the Awards apply, and would likely flow on to enterprise agreements for employees who are covered by the Awards. That is so because it would provide an enforceable right to be provided with further work where the work continues to be required and where the employee has been performing the work successfully.
21. In the above proposed clause NTEU has made a minor amendment to the text of clause 12.1(d) to focus on the *work* as opposed to the *position*. This is in recognition of the way that workers are engaged to perform casual work in the sector and the difference between sessional work under the Post-Secondary Award and casual work under the General Staff Award and Academic Staff Award.
22. While the proposed clause is not a panacea to the problems of casual employment in the higher education sector that are described above, it would better achieve the new modern award objective by improving access to more secure work and is therefore relevant and necessary to amend the Awards to include the above proposed provision.

### Response to Question 3 – meeting the modern award objective

#### *Fixed-Term Employment and the operation of Division 5 of Part 2-9*

23. Division 5 of Part 2-9 contains the restrictions on the use of fixed-term employment introduced by the *SJBP Act*. Those restrictions broadly prohibit the use of fixed-term employment beyond a two-year period, subject to certain exceptions.
24. Section 333F contains the exceptions to the prohibitions in s 333E. One of those exceptions, contained in subsection (h), is where a modern award that covers the employee includes terms that permit any of the circumstances in subsections 333E(2) – (4) to occur.
25. The circumstance provided for in s 333E(2) is a fixed-term employment contract for an identifiable period greater than two years.

26. The (possibly unintended) consequence of the interaction between ss 333E and 333F is that where a modern award applies to an employee and permits, *inter alia*, a fixed-term contract greater than two years in duration, *none of the restrictions on the use of fixed-term employment contained in Part 2-9 of Division 5 will apply to that employee*. That is so because of the way that s 333F(1)(h) is drafted. That section relevantly states that subsection 333E(1) (which provides for the restrictions on the use of fixed-term contracts) *does not apply* in relation to a contract of employment if a modern award that covers an employee includes terms that *permit any of the circumstances mentioned in subsections 333E(2) to (4) to occur*. This drafting means that the exception does not apply only to those circumstances that are permitted by the award, but operate to completely exclude the operation of subsection 333E(1) in relation to any employee covered by an award that allows for any of the circumstances in subsection 333E(2)-(4) to occur.
27. Clauses 11.2(b)(ii) and (v) of the Academic Award and clauses 11.3(b) and (d) of the General Staff Award permit employees to be engaged on fixed-term contracts with identifiable periods of greater than two years.
28. As a result, none of the restrictions contained in s 333E apply to any employee covered by the Awards. The way the provisions are drafted, this is true even where an employer was not a respondent to the HECE Award, meaning that the restrictions on the use of fixed-term employment do not apply to them.<sup>8</sup>
29. The effect of these provisions is that the higher education sector has moved from having the greatest level of restriction on the use of fixed-term employment to being far more permissive than the rest of the economy which is subject to the restrictions contained in s 333E.
30. NTEU submits that this is unacceptable and means that the Awards will not meet the Modern Award objective at s 134(1)(aa) and ‘.the need to improve access to secure work across the economy’. Further, the Awards will not improve access to more secure employment in the higher education sector when compared with the rest of the workforce in Australia, particularly in circumstances where there are high levels of insecure employment in the higher education sector.
31. Perversely, the restrictions on the use of fixed-term employment that have existed in higher education awards since the HECE Award have become an *obstacle* to access to more secure employment in circumstances where their historical objective was to do the opposite. NTEU submits that these restrictions remain appropriate for the higher education sector however they should be slightly modified to ensure the proper operation of s 333E in relation to employees covered by the Awards.

#### *Further amendments to meet the modern award objective*

32. NTEU proposes amendments to improve clarity, protections against successive contracts which would otherwise be proscribed by the restrictions in 333E, ensuring that some casual workers have an entitlement to further work where the work that they have been performing continues to be required by the employer and ensuring contracts reflect the job security objectives of 33G (1) of the Act.

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<sup>8</sup> See cl 11.2(a) of the Academic Staff Award and 11.2 of the General Staff Award.

33. NTEU proposes adopting a modern award provision which meets the secure work objective to improve access to secure work for casual employees.

## Proposals

34. NTEU proposes the following changes to the Awards in order to ensure that they meet the Modern Award Objectives following the passage of the *SJBP Act*.

35. In the tables below the original text of the Awards are included with amendments identified *in italicised and underlined text*. Text which NTEU submits should be deleted is identified by ~~strikethrough text~~.

Table 1 - Academic Staff Award

Item	Clause No.	Proposed Change	Commentary
1.	8.1	<p>8.1 A person under this award must be engaged in one <i>or other</i> of the following categories:</p> <p>(a) <del>full-time (fixed-term or continuing)</del> <i>continuing (full-time or part-time)</i>;</p> <p>(b) <del>part-time (fixed-term or continuing)</del> <i>fixed term (full-time or part-time) ; or</i></p> <p>(c) casual.</p>	This amendment is necessary to clarify to readers that an employee will be employed as either a continuing or fixed term or casual employee,
2.	New <u>8.3(c)</u>	<i><u>Permits the use of fixed-term employment other than in the circumstances outlined in s 333E of the Act</u></i>	This amendment is necessary to clarify to readers that, for example, clause 8.4(c) (which deals with probation for fixed-term employees), does not permit the use of rolling fixed-term contracts as contemplated in subs 333E(4) and (5).
3	11.2(b)(ii)	<b>Research</b> means work activity by a person engaged on research only functions <del>for a contract period not exceeding 5 years.</del>	This amendment is necessary to ensure that the exception contained in s 333F(h) is not enlivened, thereby depriving employees covered by the Academic Staff Award of the protections provided by s

			333E. Where the work is genuinely fixed-term and funded from research funding, employers may be able to rely on the exception contained in subsection 333F(1)(f) while maintaining the benefit of the restrictions for other employees covered by the Academic Staff Award.
4	11.2(b)(v)	<p><b>Pre-retirement contract</b></p> <p>Where a full-time or a part-time <i>continuing</i> employee declares that it is their intention to retire, a fixed-term contract expiring on or around the relevant retirement date may be <del>adopted</del> <i>agreed by the employee</i> as the appropriate type of employment, <del>for a period of up to 5 years.</del></p>	<p>For the reasons outlined above this amendment is necessary in order to provide the benefit of the restrictions on the use of fixed-term employment contained in s 333E to employees covered by the Academic Staff Award.</p> <p>The Expert Panel cited in paragraph 26 of the Discussion Paper discusses the capacity of employees to enter into work which may be characterised as secure.</p>
5	New 11.3	<p><i>If an employee is employed under a contract of employment with an employer in contravention of the restrictions on the use of fixed term employment set out in this clause.</i></p> <p><i>_____ (a) the term of the contract that provides that the contract will terminate at the end of an identifiable period is taken to have no effect; and</i></p> <p><i>_____ (b) the contravention is taken not to affect</i></p>	<p>This amendment is necessary to enhance access to secure work and ensure fixed term contracts reflect the job security objectives of 33G (1) of the Act.</p>



		<u>the validity of any other term of the contract.</u>	
6	New <u>12.4</u>	<u>Where a casual employee has been engaged for a period of 6 months and the work that they have been performing continues, they will be entitled to be offered further work subject to satisfactory conduct and performance.</u>	This amendment adopts and modifies a provision of the <i>Educational Services (Post-Secondary Education) Award 2020</i> , enhancing the capacity of casual employees to gain access to further work when available.

Table 2 – General Staff Award

Item	Clause No.	Proposed Change	Commentary
1.	8.3	8.3 A person under this award must be engaged in one <b>or other</b> of the following categories:  (a) <del>full-time (fixed-term or continuing)</del> <u>continuing (full-time or part-time)</u> ;  (b) <del>part-time (fixed-term or continuing)</del> <u>fixed term (full-time or part-time)</u> ; or  (c) casual.	This amendment is necessary to clarify to readers that an employee will be employed as either a continuing or fixed term or casual employee,
2	New <u>8.3(c)</u>	<u>Permits the use of fixed-term employment other than in the circumstances outlined in s 333E of the Act.</u>	This amendment is necessary to clarify to readers that, for example, clause 8.4(c) (which deals with probation for fixed-term employees), does not permit the use of rolling fixed-term contracts as contemplated in subs 333E(4) and (5).
3.	11.3(b)	<b>Research</b> means work activity by a person engaged on research only functions <del>for a contract period not exceeding 5 years.</del>	This amendment is necessary to ensure that the exception contained in s 333F(h) is not enlivened, thereby depriving employees covered by the General Staff Award of the

			<p>protections provided by s 333E. Where the work is genuinely fixed-term and funded from research funding, employers may be able to rely on the exception contained in subsection 333F(1)(f) while maintaining the benefit of the restrictions for other employees covered by the General Staff Award.</p>
4.	11.3(d)	<p><b>Pre-retirement contract</b></p> <p>Where a <i>continuing</i> full-time or a part-time employee declares that it is their intention to retire, a fixed-term contract expiring on or around the relevant retirement date may be <del>adopted</del> <i>agreed by the employee</i> as the appropriate type of employment for a <del>period of up to 5 years.</del></p>	<p>For the reasons outlined above this amendment is necessary in order to provide the benefit of the restrictions on the use of fixed-term employment contained in s 333E to employees covered by the General Staff Award.</p> <p>The Expert Panel cited in paragraph 26 of the Discussion Paper discusses the capacity of employees to enter into work which may be characterised as secure.</p>
	New 11.4	<p><u><i>If an employee is employed under a contract of employment with an employer in contravention of the restrictions on the use of fixed term employment set out in this clause.</i></u></p> <p><u><i>(a) the term of the contract that provides that the contract will terminate at the end of an identifiable period is taken to have no effect; and</i></u></p> <p><u><i>(b) the contravention is taken not to affect the validity of any other term of the contract.</i></u></p>	<p>This amendment is necessary to enhance access to secure work and ensure fixed term contracts reflecting the job security objectives of 33G (1) of the Act.</p>

5.	New <u>12.4</u>	<u>Where a casual employee has been engaged for a period of 6 months and the work that they have been performing continues, they will be entitled to be offered further work subject to satisfactory conduct and performance.</u>	This amendment adopts and modifies a provision of the Educational Services (Post-Secondary Education) Award 2020, enhancing the capacity of casual employees to gain access to further work when available.

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5 February 2024

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