NTEU Fightback Bargaining Notes no. 2: Casual Conversion

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Recent history in Australia demonstrates that workers and our unions can overturn employment models based on casual labour. This should be of great interest to workers in higher education where the majority of teaching, and a growing number of professional roles, are casualised.

There are several types of enterprise agreement clauses which legally bind the employer to provide more secure jobs. These include maximum ratios of casual to continuing labour, conversion clauses, and mandated creation of non-casual jobs.

Enterprise agreements, the legally binding documents which govern our work conditions and wages, are being renegotiated across the country from mid 2021. This gives us a window in which to build industrial power, take legally protected strike action, and win life-altering changes in our conditions of employment. To achieve this, we need many active unionists to have a clear idea of the actual clauses we can win to ensure more secure jobs.

This document is a starting point for that project. While a lot of what's below is relevant for casual professional staff, and for fixed term employees of all sorts, we discuss some particular measures aimed at academic casuals. Future Bargaining Notes documents from NTEU Fightback will look at fixed term employment, the specifics of casualised professional roles, and many other issues facing workers in higher education.

1) Casual ratios

Clauses prescribing a maximum ratio of casual to continuing employment are some of the best measures available to reverse casualisation.

Workers in warehousing have transformed casualised work arrangements in recent years by winning ratios. For instance, workers at the Polar Fresh (Coles) distribution centre in Melbourne won a clause in their 2016 enterprise agreement stating: "The Company will ensure a consistent ratio of 80% permanent labour (as a combination of full and part time hours worked)". This prevents the employer from endlessly casualising their workforce: if they want the job done, they have to employ people in ongoing roles.

The only ratios clause we know of in higher education in Australia was in the Swinburne enterprise agreement of 2009, which states:

> *The University agrees it shall not increase overall usage of casual staff above the levels for the twelve month period ending 31 March 2009 which based on Swinburne Payroll figures were 21.5% FTE for academic staff.*

This was the subject of a dispute in 2012 which resulted in 30 staff being converted to ongoing employment, and 30 (without PhDs) converted to fixed term employment. These were teaching-focused jobs, though other clauses enabled conversion from teaching-focused roles to jobs with a substantial research fraction at a later point.

2) Clauses mandating permanent employment

There are many enterprise agreements with clause after clause of meaningless, unenforceable verbiage, that for instance management will use its "best endeavours" to employ people in continuing roles.

However, some clauses have proven to have teeth, much to the surprise of management. One is at RMIT:

> *41.1 … The University will … not use casual employment in circumstances which require significant numbers of hours per week for the conduct of long term regular and systematic work.*

This clause was used to secure back pay and ongoing work for one worker last year. It has now been used in a dozen or more cases to win more secure employment. There's no reason that an identical clause can't be inserted into enterprise agreements at other institutions.

3) Mandated creation of permanent positions

For most of the past decade, the main approach taken by the NTEU to challenge casualisation has been to bargain for a definite number of permanent teaching positions to be created. These positions have titles like Early Career Teaching Fellow, Early Career Development Fellow, or Scholarly Teaching Fellow.

These positions demonstrate that it's possible to win EA clauses which force management to create definite numbers of non-casual roles. These positions give ongoing work, increments, payment all year round and - in theory at least - the possibility of transferring to an ongoing position with a standard research fraction.

However, the results of several bargaining rounds pushing for these positions have fallen far short of what is required. There are several weaknesses:

a) The numbers of positions won are quite small. The NTEU bargaining round of 2012-2015 set out to achieve a 20% reduction in casualisation, with Teaching Fellow positions being the main tool to achieve this. In fact, only 854 positions were created around the country.

The current RMIT EA, for instance, mandates 80 Early Career Development Fellows being created over the three years of the EA, which is one of the better results in current EAs. RMIT has a casual and fixed term workforce of 8,293 staff (2,984 FTE) according to the latest annual report. So it would take around a century of this sort of result to really "flatten the curve" of casualisation.

b) Often these roles are for fixed terms, meaning workers can be taken off the casual merry-go-round for a few years, but then dumped back on it again unless there is a strong conversion clause backed with strong enforcement. RMIT's conversion clause to ongoing after three years is relatively strong, but this is not always the case at other universities.
c) These positions are often "teaching heavy". Though ECDFs at RMIT have a standard academic workload allocation, the equivalent "Academic Fellow" positions at Sydney have up to a 70% teaching fraction. A massive and exhausting teaching load is added to a large unpaid workload for staff who need to publish to stay employable.
d) There is usually a clause stating that a Teaching Fellow must perform work which would otherwise be done by a casual. However, there is often a suspicion that management create Teaching Fellow positions *rather than* proper ongoing positions with a full research fraction. One manager told researchers:

> *…we would not have created or appointed these STFs unless there was a requirement. …, we would have created … normal 40:40:20 positions which would be at lecturer level or associate lecturer level.*

Without a ratio of permanent staff to casual staff, it is pretty difficult to tell whether the net result of Fellowship positions is to reduce casual work, or to shift the balance of academic employment away from positions with a research fraction, or a bit of both.

4) Casual conversion after a set period

Enterprise agreement clauses can mandate conversion after a set period of time. For instance the pattern CFMEU agreement from 2011 has a "Casual Labour" clause which states:

> *an Employee engaged by the Company pursuant to this clause, on a regular or systematic basis for a sequence of periods of employment for more than six weeks shall not be a casual Employee and shall be entitled to all the conditions of a permanent Employee.*

There are four factors which make this a very strong clause:

a) Eligibility is universal. Apart from being employed for six weeks, the worker doesn't have to meet any other qualifications to achieve conversion.
b) There are no grounds for rejection by the employer. Eg, conversion can't be refused by the employer on "reasonable business grounds" or any other reason.
c) There is no application or selection process: conversion happens automatically. This is important because management can often create a culture where workers are strongly

discouraged from demanding their workplace rights. Requiring precarious employed workers to put their hands up to demand conversion in these circumstances is a serious obstacle.

d) Conversion is to permanent employment, not to some half way house employment category with lesser rights.

Assessed according to these four criteria, conversion clauses in higher education agreements are a very mixed bag, as shown by a brief survey of some agreements.

A fine example of a pretty much totally ineffective clause is **RMIT** 2010 EA (p. 61-62). Eligibility is hard to pin down. For example, applicants must "demonstrate via previous teaching and research experience that they have appropriate expertise", whatever that means. And then management has very wide grounds for rejection: "may refuse a formal application for conversion on reasonable grounds", which are totally undefined. As far as anyone at RMIT can remember, pretty much no one was converted under this clause.

The **University of Sydney**'s current conversion clause is also ineffective. The current EA made it easier to apply for conversion compared with the previous 2013-17 EA. A requirement that casuals had to be employed on a fraction of at least 0.5 in order to qualify was abolished; so was a requirement that the casual must have been employed through "a transparent and competitive process" – many casual teaching positions simply aren't filled in this way. Under the current EA, any casual academic who had been employed this way for 24 months or more could apply for conversion.

However, the current Sydney Uni agreement also includes wide leeway for management to refuse conversion. One of these is if "there is insufficient revenue or funding streams to provide continuing support for the staff member's employment". The problem here is that departments can always claim to have "insufficient revenue" to allow conversion. This is because ongoing academic staff are more expensive to employ than casuals – they have to be paid through university breaks, they get increments, they can apply for promotion rather than being stuck on a mid A level hourly rate, they often get paid for research time as well as teaching, and they get better super. So, unsurprisingly, there have been only a handful of conversions under this clause.

Especially in the current climate, any conversion clause which gives an "out" to management on financial grounds will be hard to enforce. So we're interested to see how the soon-to-be-tested conversion clause in the current **University of Melbourne** agreement goes. There are not many "reasonable grounds" on which management can refuse conversion, but one of these is:

> *circumstances where it is demonstrable that Conversion would require significant adjustment resulting in an unreasonable or unsustainable financial effect (with exception to employer superannuation contributions) on the composition of the workforce required by the University.*

Some clauses don't have these wide grounds on which management can refuse conversion, and are therefore stronger. The current Swinburne EA, for instance, has relatively narrow grounds for management to reject conversion, so long as the worker has taught at least 72 hours in three of the past five years.

However, there are caveats. Conversion in at Swinburne is to an "Academic Tutor" position which seems to have zero research fraction, though there are increments and the possibility of applying for promotion.

So to sum up: a strong conversion clause can work well to limit casualisation, but there aren't great examples of them in higher education. Eligibility, grounds for management rejection and the question of what position the worker is being converted to are all crucial.

5) Increased casual loading

The 25% loading paid to casual workers is meant to compensate for irregular work and lack of annual leave, sick leave and other entitlements. But there is nothing set in stone about 25%: it's quite possible to bargain for a higher rate as a disincentive for management to casualise their workforce.

Anti union laws targeting the construction unions have effectively outlawed the sort of "hard" casual conversion clause quoted above in the construction industry. Instead, unions are inserting clauses which mandate a tripling of the casual loading if there is no conversion after six weeks.

Probuild 2016 EA Annexure A, 13.4 (c):

> *Casual Employees, other than irregular casual Employees, who have been engaged by Probulld for a period of employment in excess of six weeks shall hereafter have the right to request to have his or her contract of employment converted to permanent employment if the employment is to continue beyond the conversion process. If the casual employment continues after 6 weeks, the casual loading will increase to 75%.*

6) Minimum staffing numbers and staff/student ratios

It's possible to bargain over minimum staffing levels. There are industrial facilities with minimum staffing established in EAs (eg here clause 19.1, here 10.7, 17, appendix C). Teachers have won staff/student ratios in government schools. Nurses in Victoria have won ratios per patient, varying according to what sort of ward they are in.

So in theory at least, it is quite possible to bargain over the minimum number of positions doing particular jobs in a library or a department.

In a higher education setting, staffing ratios are sometimes written off as too hard. However some disciplines, including Veterinary Science and Psychology, already have staff to student ratios due to accreditation requirements set by the relevant professional bodies.

It is also possible to bargain over these matters. For instance the Victoria University 2011 EA contains this clause:

> ***46 Ratios***
>
> *46.1 Over the life of the Agreement the University intends to progressively work towards improving the student staff ratio on an annual basis (according to DEST method excluding casuals, as reported in the annual institution assessment framework portfolio data), with the aim of improving on the 2003 reported ratio of 29.65.*

This clause has loose wording which makes it an unenforceable, "best endeavours" statement. Nevertheless, it indicates that it is possible to bargain over the ratio of permanent staff to students.

7) Controls on outsourcing

One way that employers cut wages, entrench insecure work and reduce union power is by outsourcing work to a separate employer. Work can be "outsourced" to a company fully owned by the parent entity, with an inferior EA. For instance, Qantas created wholly owned subsidiaries to do baggage handling, catering and other essential functions, and now "outsources" work to these entities at lower rates and with less secure work.

Clauses with a blanket prohibition on outsourcing have been found to be a breach of the Fair Work Act, which limits the subjects of bargaining to "matters pertaining" to the employment relationship. However, many EAs have terms which strongly discourage outsourcing, for instance by insisting that all work covered by the enterprise agreement must be carried out under wages and conditions at least the equal to EA rates. So a Woolworths distribution centre agreement in Melbourne states:

> *The Company agrees that work performed by persons who are not directly employed by the Company and would otherwise usually be covered by this Agreement will only be accepted by the Company if those persons who perform the work receive wages and conditions no less favourable than that provided for in this Agreement.*

Because we haven't had clauses like this in higher education EAs, there has been nothing to stop universities from contracting out essential work including cleaning, security and IT to companies which pay inferior rates to a casualised workforce.

We should at least insist on the minimum protections of a "site rates" clause, and start campaigning to insource this work. For an example of a long running "insourcing" campaign, which ultimately succeeded, see NTEU Fightback's forum featuring Feyzi Ismail discussing the insourcing fight at London's School of Oriental and African Studies. Feyzi's article celebrating the win is here.

8) Award protections

The vast majority of academic and professional staff in Australian universities are employed on enterprise agreements, which give better wages and conditions than the legal minimums prescribed in industrial awards. However, it's still important to keep the underlying awards updated. Because EAs must leave each worker “better off overall” compared to the award, conditions in awards have an influence on what is seen as an acceptable minimum standard in EAs.

In particular, most of Australia’s 122 Modern Awards have recently been updated to insert a casual conversion clause. The Higher Education Industry (General Staff) Award is one of these. This is not the strongest conversion clause in the world, but it’s worth having. Workers can apply to convert after a year on at least half of full time hours, or two years. The employer can refuse the application on “reasonable business grounds” which unfortunately are not tightly defined. Though the clause is far from watertight, refused applicants can go through the disputes process in the Award.

Strangely, the award for academic staff has not been updated with a casual conversion clause. Updating this award would not be a panacea, but it’s one step that the NTEU should take to create a minimum standard for the conversion of academic staff.

9) Other clauses which help address casualisation

Information is crucial. One common management tactic which makes it hard to campaign against casualisation is to simply not publish the information about how many staff are employed as casual or fixed term, and where. So it’s important to win clauses which mandate the provision of comprehensive information about the staffing mix to the union.

We’ll publish a further document to kick off discussion on EA clauses which make working life easier for casuals including access to email addresses, the library, work spaces, and grievance processes.

One measure we’ll highlight for now though is union inductions. Union inductions are common in industries from construction to call centres to government schools. A personal meeting on paid time between a union rep and each worker, every time they are employed, can be crucial in making sure that workers are aware of their rights, including correct payment and conversion.

Putting the clauses together

Of course, there’s no need to choose just one or two of the measures above to address casualisation. Outside of higher education, the Polar Fresh distribution centre agreement we cited above is a good example of using multiple clauses to restrict casualisation. The EA’s clauses on casual work (mainly 14.4.9) provide for:

- A ratio of 80% permanent labour.
- A fixed number and timeline for conversion from casual to permanent, and from permanent part time to full time.

- This conversion clause on the basis of seniority, so the workers who have been casual for the longest get converted first.
- Outsourced labour must be paid at site rates (14.5.1).
- No worker to be made redundant while labour hire is performing any role performed by (currently or previously) by a directly employed worker.
- Regular information to the union about the staffing mix (Attachment 1).
- Union inductions (35.4) and regular meetings on paid time for all workers (35.7).

This EA was won through an open ended, mass participation strike which shut down all production with mass pickets. Management folded after three days.

Conclusion: conversion clauses and industrial power

None of the clauses discussed in this document have succeeded to turn the tide on casualisation in higher education. The most important reason for this is not some inherent flaw in the drafting of the clauses, or the approach they take. Rather, the problem is a lack of industrial power which is reflected in relatively weak clauses.

There is nothing necessary or eternal about this state of affairs. Tertiary education is a crucial, multi billion dollar industry which in the past 30 years has been one of Australia's biggest export earners. Even today workers who keep the entire industry functioning have very substantial industrial power. In recent years, unionists in higher education in the UK and the US have demonstrated that it is quite possible to have unions which wage effective strikes.

To reverse a decades-old, entrenched employment model in Australian universities will need serious mass strikes. The model of Chicago Teachers Union and other unions in the US, which have managed to turn around moribund or mediocre unions and build industrial strength, are models Australian unionists can follow.

In the months to come, NTEU Fightback will continue to promote discussion of the clauses that can win dignity and secure jobs. We'll discuss the strikes which can win these clauses and turn around the public discussion on funding for higher education. And we'll continue to promote the organising methods which can build up to these strikes.

Generalised discontent about insecure work needs to be organised into industrial power and serious strikes to win secure jobs. For this to happen, the orientation of the NTEU needs to be shifted, from bottom to top, to organising for strikes rather than offering concessions.