From: Linda Gale [mailto:lgale@nteu.org.au]
Sent: Wednesday, 8 June 2016 11:44 AM
To: Chambers - Johns C; Chambers - Ross J
Cc: Catherine Pugsley; Pill, Stuart; Anthony Odgers; David Colley; Mark Perica; Nicole den Elzen; Nick Ruskin; Renee Veal; Susan Kenna; Joel Butler; chin@5wentworth.com.au; kate.pennicott@minterellison.com; Lesage, Annabelle
Subject: MA000006 AM2014/229, MA000007 AM2014/230, MA000075 AM2014/224: NTEU further submissions re Exposure Drafts published 3 June 2016

NTEU submits that all the changes indicated in the exposure drafts published on 3 June 2016 properly reflect the discussions between the parties, with the exception of the following points:

MA000006 AM2014/229 Academic Award

9.4 (a) Minimum Wages for Casual Employees

The second iteration of "Marking as a supervising examiner" should be deleted, rather than the first.

(ref. transcript 10 May 2016, PN141 – PN145)

That is, the reference to 'Marking as a supervising examiner" that should be deleted is the one which includes the words "(where academic holds a relevant doctoral qualification)", as the supervising examiner marking rate is fixed by reference to 9.4(b)(i), for which holding of a doctoral qualification or otherwise is irrelevant.

16.2 Public Holiday substitution

The question about consistency of this provision with the NES remains.

(ref. transcript 10 May 2016, PN159 – PN167)

The NTEU's earlier submission on this point was:

Clause 16 – Public Holidays

It is long established practice that many universities schedule teaching and related activities on some public holidays, and treat these as ordinary working days for the purpose of setting the academic calendar for staff and students. 16.2 reflects this practice and the quid-pro-quo that the parties in the industry have settled on: a substitute day which itself will be treated as a public holiday for the purposes of matters such as the taking of leave and the payment of penalty rates.

The question arises whether this established practice is consistent with the NES.

The NES (s. 114) commences with an employee's entitlement to take off public holidays but that entitlement is immediately qualified by an employer right to request that the employee work on a public holiday, a request which can only be refused by the employee if the request is unreasonable. Factors which are relevant to reasonableness relate not only to the operational requirements of the employer, but to the personal circumstances and particular nature of work performed by the employee.

In the absence of clause 16.2, it is likely that the practice of universities to require staff to work on public holidays as a matter of course would generally be considered "reasonable". However in order to be consistent with the NES, it seems likely that

(a) the employer would need to pay penalty rates for staff who work on those days, rather than deferring that entitlement to a substitute day unless the employee individually agreed to the substitute day (for example, what would be the entitlement of a person who ceased employment before the substitute day came around?);

(b) the employer would need to be open to reasonable requests from staff not to work on public holidays, having regard to personal circumstances including family responsibilities; and

(c) the request to work on the public holiday should be directed only to those staff where the nature of the work they perform is relevant to the capacity of the institution to perform its business on that day.

S. 115(3) allows for substitution arrangements to be provided for in a modern award, but on the basis of agreement between an employer and an employee, rather than as a blanket, non-negotiable provision. 16.2 does not currently meet that standard.

16.2 therefore appears to be inconsistent with the provisions of the NES on public holidays.

A better approach would be to amend the first line of 16.2(a) to read "An employer **and an employee** may **agree to** substitute…"

MA000007 AM2014/230 General Staff Award

20.2 Public Holiday substitution and effect on payment for holidays

The question about consistency of these provisions with the NES remains.

(ref. transcript 10 May 2016, PN159 – PN167, PN265)

The NTEU's earlier submission on this point was:

Clause 20 – Public Holidays

The parties have been asked to comment on whether the words "subject to the provisions of this clause" should be deleted from 20.1.

It is long established practice that many universities schedule teaching and related activities on some public holidays, and treat these as ordinary working days for the purpose of setting the academic calendar for staff and students. 20.2 reflects this practice, and the quid-pro-quo that the parties in the industry have settled on: a substitute day which itself will be treated as a public holiday for the purposes of matters such as the taking of leave and the payment of penalty rates.

The question arises whether this established practice is consistent with the NES.

The NES (s. 114) commences with an employee's entitlement to take off public holidays but that entitlement is immediately qualified by an employer right to request that the employee work on a public holiday, a request which can only be refused by the employee if the request is unreasonable. Factors which are relevant to reasonableness relate not only to the operational requirements of the employer, but to the personal circumstances and particular nature of work performed by the employee.

In the absence of clause 20.2, it is likely that the practice of universities to require staff to work on public holidays as a matter of course would generally be considered "reasonable". However in order to be consistent with the NES, it seems likely that

(a) the employer would need to pay penalty rates for staff who work on those days, rather than deferring that entitlement to another date (for example, what would be the entitlement of a person who ceased employment before the substituted day came around?);

(b) the employer would need to be open to reasonable requests from staff not to work on those days, having regard to personal circumstances including family responsibilities; and

(c) the request to work on the public holiday should be directed only to those staff where the nature of the work they perform is relevant to the capacity of the institution to perform its business on that day.

s. 115(3) allows for substitution arrangements to be provided for in a modern award, but on the basis of agreement between an employer and an employee, rather than as a blanket, non-negotiable provision.
The combination of the words "subject to the provisions of this clause" and the words of clause 20.2 therefore appear to be inconsistent with the provisions of the NES on public holidays.
A better approach would be to delete the words "subject to the provisions of this clause" from 20.1, and to amend the first line of 20.2(a) to read "An employer **and an employee** may **agree to** substitute…"

20.3 Effect on Payment for Holidays

The parties have also been asked to comment on whether 20.3 is inconsistent with the NES. NTEU submits that 20.3 is inconsistent with the requirement at s.116 that an employee will be paid for their absence on a public holiday, by imposing an impermissible restriction on the circumstances in which such payment will be made.

MA000075 AM2014/224 Post-Secondary Award

10.1(b) Academic Teachers – casual rates

The second iteration of "Marking as a supervising examiner" should be deleted, rather than the first.

(ref. transcript 10 May 2016, PN141 – PN145)

That is, the reference to 'Marking as a supervising examiner" that should be deleted is the one which includes the words "(where academic holds a relevant doctoral qualification)", as the supervising examiner marking rate is fixed by reference to Schedule A.6(a), for which holding of a doctoral qualification or otherwise is irrelevant.

20.2 Public Holiday substitution

The question about consistency of this provision with the NES remains.

(ref. transcript 10 May 2016, PN159 – PN167, PN364)

The NTEU's earlier submission on this point was:

> **Clause 20 – Public Holidays**
>
> S. 115(3) of the Fair Work Act allows for substitution arrangements to be provided for in a modern award, but on the basis of agreement between "an employer and employee", rather than, as provided in subclause 20.2, by agreement between "an employer and the majority of employees".
>
> 20.2 therefore appears to be inconsistent with the NES.
>
> A better approach would be to replace the words "the majority of employees in an enterprise" with the words "an employee". The table in clause 5.2 would need to be amended accordingly.

Sincerely,

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National Tertiary Education Union

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