Fair Work Act 2009
s.156 - 4 yearly review of modern awards

4 yearly review of modern awards—Award stage
(AM2014/224, AM2014/229 and AM2014/230)

NTEU Submissions on Exposure Drafts issued 18 December 2015

4 yearly review of modern awards – award stage – Group 3 awards

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Higher Education (Academic Staff) Award 2015 [MA000006]

Clause 1 – Title and Commencement

As the revised Award will not be made until 2016, or possibly 2017, the year of the Award title should be amended to reflect this.

Clause 3 - Coverage

NTEU seeks to amend the coverage to the Award to include Medical Research Institutes. The exposure draft proposes to copy the definition of "Higher education industry" from the definitions clause (now Schedule D) to become a new subclause 3.2. If NTEU is successful in its application to amend 3.1 to also include Medical Research Institutes, then a logical consequence would be to copy the proposed definition for Medical Research Institutes from the definitions clause to form a new subclause 3.3.

If the definition is to appear in clause 3, does it need to be repeated in Schedule D?

Clause 5 – Types of Employment

The exposure draft replicates the typology of types of employment found in the current award: full-time, part-time, fixed-term or casual.

The principal problem with the current typology is that it confuses the distinction between full time and part time (one the one hand) with the distinction between

ongoing, fixed-term, and casual (on the other). While the description of "part time employment" (at 5.5) is quite standard, and makes reference only to the number of hours worked and pro rata calculation of award entitlements, without regard to whether the employment is ongoing, fixed-term or casual, the description of "full-time employment" (at 5.4) defines it as all other employment than fixed-term, part-time or casual. Clearly as a question of fact, fixed-term and casual employment may be either full-time or part-time. To the extent that the term "full-time" is distinguished from those two types of employment, it is more properly understood to mean "ongoing" or "continuing" employment.

The AHEIA has made application to amend this typology, and the NTEU has proposed alternative wording for any such amendment. NTEU submits that any resulting amendment should not undermine the integrity of the schema designed by the Full Bench in the *Higher Education Contract of Employment Award*.

Clause 5.6(a) – Restriction on the use of fixed term employment
Clause 6 – Incidents of fixed-term contract of employment

The restrictions set out in 5.6(a) and 6 are central to the effective limitation on the use of fixed term employment in the higher education industry.

At the time of making of the *Higher Education Contract of Employment Award*, only named parties were covered by the Award. As a question of fact, the Award covered the entire higher education industry with the exception of an assortment of private providers who were small both in number and in size. The Award arose from a fiercely contested arbitration, and at the time of making of the Modern Award, those employers which had not been party to the *Higher Education Contract of Employment Award* arbitration argued that they ought not have those restrictions imposed on them without an opportunity to argue their case.

In the current Review, NTEU and the Bond University Academic Staff Association have proposed the deletion of the limitations in their entirety (refer part H of NTEU Outline and BUASA outline), or at a minimum the addition of Bond University to the institutions covered. If, however, the tribunal is minded to retain a limitation to the operation of these provisions, it is better to name the affected employers (either directly or by reference) rather than to attempt to do so through a definition.

If the purpose of a definitional approach was merely to state the extent of coverage of the old HECE Award other than by reference to an expired instrument, then it might be a challenge to define the group clearly in words which were flexible enough to deal with the structural gymnastics of those institutions over time (for example to capture changes such as the establishment of private arms or joint ventures as separate employing entities) while being narrow enough to exclude those very similar employers, engaged in the same industry, who were not covered by the old Award. It would likely lead to disputation over time as to which institutions were or were not intended to be affected.

NTEU submits that despite its inelegance, the best approach (other than deletion of the limitation entirely) is either to retain the current reference to the *Higher Education Contract of Employment Award* (and Bond University, should BUASA's application be successful), or to include a list (perhaps as a new schedule) of those institutions and amend the clause to read "only applies to those employers listed in Schedule X and their successors".

Clause 5.7 – Casual Employment

There is a note to the exposure draft which states that this clause may be affected by AM2014/197. The NTEU is unaware of any application in those proceedings in relation to the Higher Education Academic Award, but NTEU has foreshadowed an application in relation to this award which it seeks to review after the outcome of AM2014/197 is known.

Clause 5.8 - Probation

The proposed clause 5.8 appropriately and accurately consolidates the largely repetitive wording previously found in each of the previous subclauses11.1, 11.2 and 11.3. Whether the words "a full-time, part-time or fixed-term employee" continues to be the correct typology to use in this sub-clause will depend on the outcome of the NTEU and AHEIA applications mentioned in relation to Clause 5, above. NTEU submits that better wording would be "a continuing or fixed-term employee", noting that either can be full time or part time, and may move between full time and part time without requiring a new contract of employment (eg in relation to part time return from parental leave or family flexibility).

The parties have been asked to comment on whether it is appropriate to retain provisions relating to probation in the Award at all.

NTEU submits that it is not only appropriate but necessary in this industry. Probation for university staff, and particularly for academic staff, is commonly as long as three years. While the Fair Work Act provides access to the unfair dismissal jurisdiction after 6 months service (or 12 months for small businesses), that is only of relevance if a dismissal is unfair. The existing award words reflect established standards in the industry relating to the minimum entitlements applicable to probationary employment, including that the period of probation must be related to the nature of the work to be carried out, that an employee on probation be informed of problems and given an opportunity to address them before an adverse decision is made, and that an employee cannot be subjected to multiple probationary appointments with the same employer simply because they are employed on a series of fixed term contracts.

These protections all reflect real issues that have arisen in the industry, and are sensible protections for employees in an industry where probationary employment can extend for so long. They form an integral part of the BOOT (Better Off Overall Test) for this industry.

Clause 7.6

NTEU has applied for substantive amendment to this subclause to ensure that the prohibition on use of MSALs for reclassification is conditional on the existence of access to an academic promotion system. In the absence of this, there is no enforceable right to be employed at an appropriate classification level, and the rates of pay are therefore not soundly based on work value. Refer NTEU Outline of Submissions – Part C.

Part 3 – Hours of Work

NTEU has made extensive remarks about this in our Outline of Submissions at Part A, and has proposed extensive amendment to this provision to bring it into compliance with the Fair Work Act.

Part 4 – Rates of Pay

NTEU submits that the rates of pay set out in clause 9.1 are intended to apply to all continuing and fixed term employees (pro rata if part time).

The rates of pay for all casual academic work should be set out in clause 9.4. The last category of work encompassed in 9.4 is "other required academic activity", which should encompass everything which is not properly characterised as lecturing, tutoring, musical accompanying, undergraduate clinical nurse education, or marking.

If NTEU is successful in its application to introduce an allowance for Information and Communication Technology expenses (ref NTEU Outline of Submissions – Part J), this Part could be re-titled "Rates of Pay and Allowances".

Clause 9.4 – Casual Employees

References throughout the table of casual rates at 9.4(a) to "where academic holds Doctorate" should be to "where academic holds Doctorate or performs full subject coordination duties" to better reflect the provision at 9.4(b)(ii).

The fourth rate mentioned at 9.4(a) for marking is unnecessary, as the rate of pay is identical to the second mentioned marking rate, which is drawn from Level B (as per 9.4(b)(i), and therefore the distinction between Level A step 2 and Level A step 6 (the minimum rate payable if an academic holds a doctorate or performs full subject coordination duties) is irrelevant.

Refer to NTEU Outline of Submissions – Part D for a more detailed explanation of these points.

Note also that NTEU has sought the introduction of a new payment for casual academics for Policy Familiarisation and Professional and Discipline Currency, which

would be paid as “other required academic activity.” (Ref. NTEU Outline of Submissions – Part B)

Clause 12.3 – Leave Loading

NTEU supports updating the clause to say “… the Australian Bureau of Statistics’ average weekly total earnings of all males (Australia) reported most recently preceding the date of accrual.”

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…"

Clause 19.1(b)(ii)

NTEU submits that the word "context" should be replaced by the word "content". (Refer NTEU Outline of Submissions – Part K)

Schedule D – Definitions

Consistent with our comments in relation to clause 3 above, we note that the definition of "higher education industry" appears both in Clause 3 and in Schedule D. This repetition is probably unnecessary.

If NTEU's submission in relation to extending the coverage of the award to encompass Medical Research Institutes is successful, then the proposed definition of "Medical Research Institute" should be located in the same place(s) as the definition of "higher education industry".

Higher Education (General Staff) Award 2015 [MA000007]

Clause 1 – Title and Commencement

As the revised Award will not be made until 2016, or possibly 2017, the year of the Award title should be amended to reflect this.

Clause 3 - Coverage

The exposure draft proposes to copy the definition of "Higher education industry" from the definitions clause (now Schedule I) to become a new subclause 3.2. If the definition is to appear in clause 3, does it need to be repeated in Schedule I?

The coverage of the Award also extends to "University unions and Student unions as defined". If it is appropriate to place the definition of "higher education industry" in clause 3, then the definition of "University unions and Student unions" currently found in Schedule I should also be copied to become a new 3.3.

NTEU seeks to amend the coverage to the Award to include Medical Research Institutes. If NTEU is successful in its application to amend 3.1 to also include Medical Research Institutes, then a logical consequence would be to copy the proposed definition for Medical Research Institutes from the definitions clause to form a new subclause 3.4.

Alternately, these three definitions could become 3.2 (a), (b) and (c).

If the definitions are to appear in clause 3, do they need to be repeated in Schedule I?

Clause 6 – Types of Employment

The exposure draft replicates the typology of types of employment found in the current award: full-time, part-time, fixed-term or casual.

The principal problem with the current typology is that it confuses the distinction between full time and part time (on the one hand) with the distinction between ongoing, fixed-term, and casual (on the other). While the description of "part time employment" (at 6.5) is quite standard, and makes reference only to the number of hours worked and pro rata calculation of award entitlements, without regard to whether the employment is ongoing, fixed-term or casual, the description of "full-time employment" (at 6.4) defines it as all other employment than fixed-term, part-time or casual. Clearly as a question of fact, fixed-term and casual employment may be either full-time or part-time. To the extent that the term "full-time" is distinguished from those two types of employment, it is more properly understood to mean "ongoing" or "continuing" employment.

The AHEIA has made application to amend this typology, and the NTEU has proposed alternative wording for any such amendment. NTEU submits that any resulting amendment should not undermine the integrity of the schema designed by the Full Bench in the *Higher Education Contract of Employment Award*.

Clause 6.6(b) – Restriction on the use of fixed term employment
Clause 7 – Incidents of fixed-term contract of employment

The restrictions set out in 6.6(b) and 7 are central to the effective limitation on the use of fixed term employment in the higher education industry.

At the time of making of the *Higher Education Contract of Employment Award*, only named parties were covered by the Award. As a question of fact, the Award covered the entire higher education industry with the exception of an assortment of private providers who were small both in number and in size. The Award arose from a fiercely contested arbitration, and at the time of making of the Modern Award, those employers which had not been party to the *Higher Education Contract of Employment Award* arbitration argued that they ought not have those restrictions imposed on them without an opportunity to argue their case.

NTEU submits that it is better to name the affected employers (either directly or by reference) rather than to attempt to do so through a definition.

If the purpose of a definitional approach was merely to state the extent of coverage of the old HECE Award other than by reference to an expired instrument, then it might be a challenge to define the group clearly in words which were flexible enough to deal with the structural gymnastics of those institutions over time (for example to capture changes such as the establishment of private arms or joint ventures as separate employing entities) while being narrow enough to exclude those very similar employers, engaged in the same industry, who were not covered by the old Award. It would likely lead to disputation over time as to which institutions were or were not intended to be affected.

NTEU submits that despite its inelegance, the best approach (other than deletion of the limitation entirely) is either to retain the current reference to the *Higher Education Contract of Employment Award*, or to include a list (perhaps as a new schedule) of those institutions and amend the clause to read "only applies to those employers listed in Schedule X and their successors".

Clause 6.7 - Probation

The proposed clause 6.7 appropriately and accurately consolidates the largely repetitive wording previously found in each of the previous subclauses 10.1, 10.2 and 10.3. Whether the words "a full-time, part-time or fixed-term employee" continues to be the correct typology to use in this sub-clause will depend on the outcome of the NTEU and AHEIA applications mentioned in relation to Clause 6, above. NTEU submits that better wording would be "a continuing or fixed-term employee", noting

that either can be full time or part time, and may move between full time and part time without requiring a new contract of employment (eg in relation to part time return from parental leave or family flexibility).

The parties have been asked to comment on whether it is appropriate to retain provisions relating to probation in the Award at all.

NTEU submits that it is not only appropriate but necessary in this industry. Probation for university general staff is often significantly longer than 6 months. While the Fair Work Act provides access to the unfair dismissal jurisdiction after 6 months service (or 12 months for small businesses), that is only of relevance if a dismissal is unfair. The existing award words reflect established standards in the industry relating to the minimum entitlements applicable to probationary employment, including that the period of probation must be related to the nature of the work to be carried out, that an employee on probation be informed of problems and given an opportunity to address them before an adverse decision is made, and that an employee cannot be subjected to multiple probationary appointments with the same employer simply because they are employed on a series of fixed term contracts.

These protections all reflect real issues that have arisen in the industry, and are sensible protections for employees in an industry where probationary employment can extend for so long. They form an integral part of the BOOT (Better Off Overall Test) for this industry.

Clause 6.8(a)

The reworded definition of "casual employment" needs the addition of the words "is" and "a payment" and the removal of the comma, in order to be more grammatically correct, as follows:

(a) Casual employment means employment where a person **is** engaged by the hour and paid on an hourly basis **a payment** that includes a loading related to award based benefits for which a casual employee is not eligible.

Clause 8 – Classifications

NTEU seeks to amend the Award to include words in relation to classifications (ref NTEU Outline of Submissions – Part F) which goes further than the words proposed in the exposure draft, by describing the approach to the classification of positions. The words proposed by the NTEU were agreed between the parties in the Award Simplification procedure.

Part 3 – Hours of Work

NTEU seeks the inclusion of additional words at the commencement of the Ordinary Hours of Work clause. (Ref. NTEU Outline of Submissions – Part E).

The parties have been asked to comment on whether the penalty rates for public holiday work should be included in clause 15 or clause 20.

NTEU submits that it is preferable that they be included in clause 15, to provide a single, comprehensive table of the days on which different penalty rates apply.

The parties have been asked to comment on whether the penalty payment for inadequate notice of roster change at 9.2(b)(iii) should be expressed as "150% of the minimum hourly rate" rather than as "an additional allowance of 50% instead of any other shift penalty that may apply".

NTEU submits that neither the current nor the proposed new wording is adequate. The purpose of this provision is to provide a disincentive to the employer to change rosters without adequate notice to the employee, and compensation to the employee in circumstances where roster changes do occur with inadequate notice. The replacement of a 115% or 130% shift penalty with a 150% penalty rate has this effect. However, if less than 72 hours' notice is given of a change of shift roster that results in a person being rostered to work on a Saturday or Sunday, being paid at 150% of the minimum hourly rate for that shift would make no difference on a Saturday, and could have the effect of reducing the penalty they would otherwise be entitled to for working on a Sunday. The penalty rates applicable to weekend shift work are higher because of the disruptive effect such shifts have on an employee's personal and family life. Such disruption is higher, not lesser, if it occurs without adequate notice. NTEU acknowledges that no application has been made in these proceedings for an increase in the cumulative penalty rate for Saturdays or Sundays in such circumstances. However the clause should not operate to reduce the Sunday rate.

NTEU submits that the provision should therefore simply read "entitled to a shift penalty of 150% of the minimum hourly rate" without any subsequent reference to "instead of any other shift penalty that may apply", and subclause 16.5 should be amended to also refer to penalties arising under 9.2(b)(iii). The effect of this would be that employees would be eligible to the higher of the penalty rates applicable.

Clause 16 - Overtime

NTEU has applied for an amendment to the Overtime clause (ref NTEU Outline of Submissions – Part E) in recognition that the current reference to "all authorised work", without any active obligation on the employer to ensure the performance of unauthorised work is so far as possible eliminated, can operate to unfairly disadvantage workers.

Clause 16.4 – Time off instead of paid overtime

The word "overtime" is missing from the first line of 16.4 as follows:

"An employee will be paid overtime or provided with time off instead of paid **overtime** for all authorised work …"

Clause 17.5 – Leave Loading

NTEU supports updating the clause to say "… the Australian Bureau of Statistics' average weekly total earnings of all males (Australia) reported most recently preceding the date of accrual."

Clause 17.6 – Close down

The cross reference in subclause 17.6(c) should be to subclause 17.6(b) rather than to subclause 17.4.

The parties have been asked to comment on whether the addition of the words "with the same employer" would add clarity to the operation of 17.6. NTEU does not object to the addition of those words, provided that the effect of the protection would continue in the case of transfer of business.

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…"

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.

Schedule A – Classification Definitions

NTEU notes that our application (ref NTEU Outline of Submissions – Part G) proposes minor amendments to this Schedule.

Schedule C – Allowances

NTEU notes that our application (ref NTEU Outline of Submissions – Part J) proposes the addition of an Information and Communication Technology Allowance to this Schedule.

Schedule H – 2015 Part-day Public Holidays

NTEU is not aware of any issue having arisen in relation to the working of the specific hours contemplated in this clause. Both those days occurred during institutional close down periods across the industry, and the small number of employees who worked on those days at any hour should already have received the appropriate public holiday penalty rate for this period. The employers will be in a better position than the NTEU to confirm that this was the case.

In the absence of any practical issue relating to those two dates in 2015, this Schedule appears to have no work to do. We note that the Schedule declares itself to be interim and subject to further review.

Educational Services (Post – Secondary Education) Award 2015 [MA000075]

Clause 1 – Title and Commencement

As the revised Award will not be made until 2016, or possibly 2017, the year of the Award title should be amended to reflect this.

Clause 3 – Coverage
Schedule I - Definitions

The exposure draft proposes to copy the definition of "Post-secondary educational services industry" from the definitions clause (now Schedule I) to become a new subclause 3.2. If the definition is to appear in clause 3, does it need to be repeated in Schedule I? If it is to also remain in Schedule I, the full definition, including sub-clauses (a) – (i) should be included there.

Clause 5.2 – Facilitative Provisions

The following items should be added to the table:

Clause	**Provision**	**Agreement between and employer and:**
8.1(d)(ii)	RDO accrual within 28 day work cycle	An employee
8.1(d)(iii)	Establishing RDO system or flexible hours system	The majority of employees
15.4	Time off instead of overtime payment	An employee

Clause 6.4 – Part-time employment

NTEU notes that this award is not part of the common claim on part time employment (AM2014/196)

Clause 6.5 – Casual employment

NTEU notes that this award is not part of the common claim on casual employment (AM2014/197)

Clause 9 – Breaks

NTEU submits that 10 minute rest breaks (9.4(a) and (b)) are paid breaks.

NTEU submits that the breaks described in 9.4(c) apply to any overtime worked, as distinct from rostered shift work on weekends.

Clause 10

NTEU seeks amendment to **10(a) – Academic Teachers – full time and part time minimum wages** to include a second note to the table, together with an asterisk at the rate for Level A Step 6 to reflect the "PhD Point", which is the minimum rate payable for an academic teacher who holds a doctorate or performs full subject coordination duties. That this skill level marker is embedded in the rates structure is demonstrated by examining the wording for the differential rates of pay for casual academic teachers, eg at 10(b) "Other required staff activity", and by reference to Schedule A.7.1(c), but the absence of clear words to this effect in the full time pay structure leave open the possibility that full time staff at that skill level might nevertheless be appointed and paid at the bottom incremental step of Level A.

NTEU also seeks amendment to the wording in **10(b) – Academic Teachers casual rates** for several of the casual rates, where the reference to full subject coordination duties is not properly reflected in the words distinguishing the pay rates.

The parties have been asked to comment on whether there should be rounding rules for these annual and weekly rates in **10(c) – Teachers and tutor/instructors**. NTEU has no submission on this point.

The parties have been asked whether the award should specify whether the annual and weekly rates in 10(a), (c) and (d) – General Staff have had any Annual Wage Review increase applied. The NTEU submits that it is helpful that the award state the latest AWR which has been applied to it. This enables the parties at the workplace level to easily ascertain whether they are applying current wage rates.

Clause 11.2(d)(iii) and (e) – payment for time travelling

NTEU submits that the rate of pay for time spent travelling between an employee's usual place of employment and a temporary location should be the rate of pay ordinarily payable for work at that time. That is, if the travel must occur on a Sunday, or in the form of additional hours after completing that employee's ordinary working hours in any day, then the relevant penalty rate should apply.

Clause 14(1)(c) – Public Holiday work

NTEU submits that where a employee is required to work on a day that is a substituted day for a public holiday, that work should be treated as if it were work on a public holiday, and therefore that the minimum 4 hour payment should apply.

Clause 15.5(d) – payment in lieu of overtime on termination

As this subclause applies to teaching staff and general staff at Levels 7 and 8, who are excluded from the penalty rates for overtime set out at 15.1, and who instead get overtime at hour-for-hour (or 100%) in accordance with 15.5(a), it is NTEU's understanding that any overtime paid out on termination would be at 100% of the relevant hourly rate (which might include higher duties allowance, for example, but would not include any penalty loadings).

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.

Schedule H – 2015 Part-day Public Holidays

NTEU is not aware of any issue having arisen in relation to the working of the specific hours contemplated in this clause. Both those days occurred during institutional close down periods commonly observed across the industry, and the small number of employees who worked on those days at any hour should already have received the appropriate public holiday penalty rate for this period. The employers will be in a better position than the NTEU to confirm that this was the case.

In the absence of any practical issue relating to those two dates in 2015, this Schedule appears to have no work to do. We note that the Schedule declares itself to be interim and subject to further review.

Schedule I – Definitions

The definition for "Post-secondary educational services industry" is incomplete. It needs subclauses (a) to (i) from clause 3.2 added.

The parties have been asked to address the question of where the existing definitions would leave a person who did not hold a teaching qualification but was teaching an accredited course or unit. NTEU submits that it is a requirement for the registration of a Registered Training Provider that the employer institution demonstrate to the regulatory authority that the staff delivering accredited courses are teacher qualified, and therefore that this circumstance should not arise. A person without the qualification would not be able to be employed in such work without the employing institution jeopardising its registration.

NTEU submits that no changes are needed to the definitions to deal with a hypothetical category of employee who cannot be employed in this industry.