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Date: 4th April 2008
To: Department of Employment and Workplace Relations
From: First IR Consultancy Pty Ltd
Via: email

Submissions

These submissions are being made on behalf of a number of employers in the broad acre pastoral, agricultural and horticultural industries.

All these employers have real difficulties with the changes made to their operations by WorkChoices and welcome the opportunity to address their issues with the Government

Yours Sincerely,

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NES Submissions

These submissions have been made on behalf of a number of companies that are engaged in the Northern Cattle Industry and other broad acreage farming and horticultural concerns. These submissions are made in light of the invitation in the Discussion Paper: National Employment Standards Exposure Draft.

These submissions are in relation to the proposed NES dealing with the “*Maximum weekly hours of work*” and any resultant legislation to measure, record and give effect to this proposal. We acknowledge that paragraph 35 of the Discussion Paper explicitly provides that compliance requirements will be part of the substantive legislation, and that our comments in relation to this may not be part of this process, we maintain the view that an understanding of how a NES operates is vital to the framing of any NES.

We are mindful that the purpose of the discussion paper, as stated in paragraph 11 is to assist in the understanding of the operation of the NES. Accordingly, this submission seeks to assist in the understanding of the Minister and the Department of how the Northern Cattle Industry measures and remunerates for working time and how such systems are generally applicable to other broad acreage enterprises.

Maximum Weekly Hours of Work

Division 2, Section 9 (1) of the exposure draft states:

“Subject to subsection (2), an employee’s hours of work for an employer in a week must not exceed 38 hours per week”.

Whilst the principle of expressing maximum work periods in ‘hours per week’ is not a new phenomena in the context of Australian Industrial Relations. What was new in the WorkChoices amendments was the obligation on employers to count hours for all employees regardless of how their lawful industrial regulation accounted for working periods. Our concerns essentially go to the requirement to quantify work periods in hours in industries where ‘hours’ are not the basis for remuneration.

It is this dual accounting obligation that has created significant uncertainty for the parties on whose behalf these submissions have been made.

History of the Day Rate in the Northern Cattle Industry:

The Northern Territory Cattle Industry Award 1981:

The Northern Territory Cattle Industry Award 1981 was made on the 2nd of October 1981 (C No. 3072 of 1980). This Award, and its predecessor Awards used a weekly rate of pay based on a 40 hour week. This method of payment has continued up to the current Northern Territory Cattle Industry Award 2001.

The 2001 Award is a common rule award for the following industry and scope;

5. INDUSTRY AND SCOPE OF AWARD

5.1 *This award applies throughout the Northern Territory.*

5.2 *Subject to the exceptions and exemptions contained in this award, this award governs the wages and conditions of employment of all employees engaged in the performance of all work, whether permanent or casual, in or in connection with or incidental to the industries or industrial pursuits of*



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the Northern Territory Cattle Industry of breeding, raising or fattening of livestock on holdings in the Northern Territory and in connection with pasture improvement on those holdings in the Northern Territory.

5.3 *This award does not apply to:*

- *station managers;*
- *overseers;*
- *members of the employer's family; or*
- *persons engaged in domestic duties including gardening.*

Under the Award system employees are paid on the basis of a maximum of 8 ordinary hours per day for 5 days a week. Employers are required to account for all hours worked and remunerate their employees accordingly.

Rate of Pay in Collective Agreements:

In the late 1990's a number of Northern Cattle Industry Employers acknowledged that the Award system was at best being ignored and that the reality was that the industry was finding it increasingly difficult to employ and retain sufficient skilled labour to allow for the economic working on large scale pastoral holdings.

As such, these organisations, on whose behalf these submissions have been made, entered into a series of collective employment agreements that changed the basis of working in this industry from an hourly basis to a daily basis. That is, the unit of time that was the basis for employment, including leave accruals was changed from an hour to a day.

The major reasons behind this move to the use of the day rate system include allowing for:

- Variable hours worked by individual employees (some start at 6.30 am, others 6.45 am or 7 am or later depending on the task and/or role). Similar variable end times occur also, making record keeping difficult.
- Variable duration and timing of breaks. Some employees may break for 20 mins mid-morning others for 40 mins later in the morning, depending on the task (for example mustering versus working in cattle yard). Similar variable breaks may occur for lunch.
- These variable hours and breaks are a result of distance to work sites, travel involved and the need to ensure sound standards of animal welfare.
- Not all employees are fully supervised during the course of the day due to the remoteness of work sites. Supervisors cannot be certain of the exact timing and duration of working hours and breaks.
- Employees live on-site and therefore do not sacrifice any of their own time due to travel to their place of employment. However, the employee may be required to travel some distance before the commencement of work (for example, to a remote paddock to muster).

In terms of compensation for working said hours, employees receive a day rate that is significantly higher than the rates under the award, 7 weeks annual leave, guaranteed breaks in working periods. These day rates are the rates that are payable (and used for accrual purposes) for employee paid leave entitlements, and which in the opinion of several members of the AIRC left an employee no worse off. (See comments in transcript in AG2003/5978, AG2004/7225, AG2004/8500, and AG2004/8712).

This was a deliberate decision on the part of the major employers and their employees to move away from an hourly based pay system to a daily based pay system, in recognition that the day was a more appropriate measure of work in this particular area. As most of the work headquarters (station homesteads) are isolated, and work on the stations is even more remote, it was agreed between the companies and the employees that the most appropriate remuneration system is a day. Employees



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often work, during the season for up to 14 days in stock/mustering camps, which may be a hundred kilometres from the station homestead.

This was achievable via the Australian Industrial Relations Commission certifying these agreements, and directing that the respondent employers keep records (in accordance with the regulations at that time) that would allow an inspector to assess whether or not the employer was complying with its obligations under its agreement.

Currently the majority of employers that we represent are operating on pre-WorkChoices certified agreements. Many of these organisations have expressed an interest in either varying their agreements or lodging new ones. However, these organisations have been loathe to terminate or vary their pre-WorkChoices agreements due to the record keeping requirements introduced under the WorkChoices legislation.

Record Keeping Requirements:

Employers operating on pre-WorkChoices certified agreements must keep records relating to the number of days, or half days worked and the remuneration paid for each of these periods of time, pursuant to their industrial instrument and the orders of the Australian Industrial Relations Commission. This is a result of the pre-WorkChoices requirements to maintain records to demonstrate compliance with the industrial instrument. Accruals for the purposes of paid leave are also on the basis of 'days' and 'weeks' rather than hours.

The WorkChoices changes differed in that there was an obligation under the Act to count hours:

S.172(2) of the current Workplace Relations Act states that an APCS prevails over any workplace agreement, and s.203(1) requires an APCS to be expressed as an hourly rate.

In the case of the Northern Territory Cattle Industry Award, the APCS's are derived from the award itself which express the basis of pay as an hourly rate. Workplace inspectors are empowered under s169(1) of the Act to ensure that: workplace agreements, awards, the APCS, minimum entitlements, and the requirements of the Act and Regulations are being observed.

We note that the *Transition to Forward with Fairness* legislation effectively leaves these requirements intact. It is this issue that these submissions are primarily concerned with.

Accordingly, if an employer were to create a new agreement or vary the existing agreement it would have to keep two sets of records: one for days worked, and one for hours worked to meet its dual record keeping requirements.

Objectives of the Act:

Sections 3(e) and (d) of the Act, as amended by WorkChoices provides that employers and employees should be able to adopt the most appropriate mechanism of pay for their industry:

“The principle object of this Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:

...

d) ensuring that, as far as possible, the primary responsibility for determining matters affecting the employment relationship rests with the employer and employees at the workplace or enterprise level; and

e) enabling employers and employees to chose the most appropriate form of agreement for their particular circumstances; and ...”



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Provisions in similar terms as objectives of industrial relations legislation have been included in previous Commonwealth legislation including the 1996 Act and the 1988 Act.

The AIRC acknowledged that this alternative system of accounting for work performed in this area was consistent with the objectives of the legislation.

Solution 1: Alternate Equal Standards in Awards

The essence of our submission in relation to this area, is that the AIRC as part of the Award modernisation process should be authorised to declare that a term of a modern awards meets the relevant National Employment Standard.

Section 173 of the current Act states:

“A term of a workplace agreement or a contract has no effect to the extent to which it purports to exclude the Australian Fair Pay and Conditions Standard or any part of it.”

And Section 3(1) of the exposure draft states:

“A term of a modern award, or of an agreement or contract, has no effect to the extent to which it purports to exclude the National Employment Standards or any part of the National Employment Standard.”

This means that a term in an award or an agreement cannot exclude the standard. For example an agreement cannot provide for 45 ordinary hours a week instead of the NES 38 hour week, and potentially it cannot provide for any other method of time based remuneration other than by the hour.

We propose that in certain circumstances the AIRC be authorised to express a component of the NES in a modern award in a different way that is taken to equal the NES so long as it does not provide for a detriment to the employee. This can be accomplished by the Minister directing the President of the AIRC to provide for a non hourly rate of pay in a relevant modern award, or can be achieved by allowing the AIRC a discretion to describe a remuneration system, such as a day rate, as meeting the minimum obligations that arise under the NES.

Section 576C(1) of the *Transition to Forward with Fairness* requires the award modernisation process to be carried out in accordance with a written request made to the President of the AIRC by the Minister.

Section 576C(3)(c) requires the Commission to include in a modern award terms about particular matters, being matters about which terms may be included in a modern award; and s576C(3)(d) allows the Minister to give directions about how, or whether, the Commission is to deal with particular matters about which terms may be included in a modern award.

The Commission in complying with the Minister’s direction under s576C(3)(d) must be required to ascertain the views of the parties that are affected by any differing treatment of the basic NES which may arise as result of the award modernisation process. We take this to include relevant employer and employee associations, employers and employees.

Solution 2: Alternate Equal Standard in Agreement

In the alternative, we propose that the Workplace Authority Director or a Court be given an explicit discretion to approve an agreement to express a component of the NES in a different way that is taken to equal the NES. This expression of the NES will then be used for the purposes of an employer’s record keeping requirements.



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Record Keeping Requirements:

The Act requires that records be expressed as an hourly rate. We propose that this requirement be changed to express records as:

“an hourly rate or a method of calculating payment in accordance with an agreement approved by the Workplace Authority Director or a Court. “

This change would allow a Workplace Inspector or trade union official to be satisfied that an employer has met:

- the requirements of its industrial instrument (expressed as a day rate);
- the accounting of work performed expressed in the Award, (as a day rate approved by the WAD);
- the NES (expressed as a term established to equal the NES).

This would remedy the requirement of employers to keep 2 sets of records: one for days worked, and one for hours worked.