

8 April 2008

NES Exposure Draft submission  
GC31  
Workplace Relations Policy Group  
Department of Education, Employment and Workplace Relations

***By Email***

Dear sir/madam

**National Employment Standards Exposure Draft**

We have reviewed the above draft, and on behalf of Godfrey Hirst Australia Pty Ltd, and its subsidiaries, including Feltex Carpets Pty Ltd, make the following submission:

**Background**

Godfrey Hirst Australia Pty Ltd is Australia's largest carpet manufacturer (with brands including Godfrey Hirst, Hycraft, Carisse, Feltex, Redbook Carpets, Minster and Invicta). It is one of Australia's largest remaining textile industry employers, employing over 1,000 employees in Victoria, over 6 manufacturing sites, including Geelong and Benalla (where over 60% of employees are employed), and various state sales offices.

The majority of employees are employed under union collective workplace agreements registered under the Workplace Relations Act, though employees are also employed under registered employee collective workplace agreements, AWA's and common law contracts.

Most employees were previously covered (prior to entering the most recent workplace agreements) by the Textile Industry Award 2000, though employees are also covered by a variety of other awards including the Metal Industry Award, Storage Services - General Award, Clerical and Administrative Employees (Victoria) Award, IT Professional Award and various state awards relevant to our wholesale sales representatives and merchandisers.

**Preliminary**

***1/2. Flexibilities for Managerial/High Income employees***

Flexibilities in respect to maximum hours (for which these employees are well rewarded and have a high degree of control to manage their own hours),

redundancy pay (for which above standard notice periods rather than redundancy pay is more commonly negotiated) and the rights and obligations in respect to taking of annual leave are all issues which require further consideration.

It is queried whether the Standard should apply to employees over a certain wage level (who it must be assumed have the requisite negotiation power to negotiate a suitable employment arrangement suitable to their own personal needs) or allowing employers to pursue an individual approach on specified matters subject to a no disadvantage test.

## **Maximum Weekly Hours**

### **1. *Construction of the Hours Standards***

The NES should expressly provide that an employer will not be in breach of the NES where an employee works additional hours of their own volition.

### **3. *High Income Employees***

See comments under the preliminary section above.

### **5. *General Issues***

#### ***Averaging of Maximum Weekly Hours***

Currently the majority of employees are employed on the basis of a 38 hour week implemented as a 40 hour week, with 2 hour RDO accruals or a 12 hour continuous shift structure, 4 days on, 4 days off (ie 48 hours each 8 days) with RDO's taken as a 4 day block each 10 roster cycles.

Averaging of the 38 hour week should be included as part of the NES.

As a carpet manufacturer whose business is production line orientated, our manufacturing employees are primarily covered by the Textile Industry Award. However, the majority of employers covered by this award are clothing industry related which is largely piece work orientated. Clothing and footwear industry is highly unlikely to be seeking to make provision for 12 hour continuous shifts (as utilized in our high technology extrusion factory).

The diversity of enterprises covered by the Award (and it is suspected this is similar for many other Awards) makes the concept of an "industry specific" averaging arrangement impractical, and runs the risk that employers with legitimate and fair rostering arrangements find their operations severely impacted upon.

It is believed the award coverage of most awards will have similar diversity. On an issue as important at maximum weekly hours and averaging of those hours which could deem impossible many shift structures, the rights of employers and employees to average hours (particularly as part of rostering of normal hours) over an extended period (which should be up to 6 months as a minimum) should be included as part of the Standard, as the norm, rather than be left as something employers will have to fight for as part of the new award development process.

## Requests for Flexible Working Arrangements

### *6. Responsibility for a child*

It is believed that provisions should be included to define the term “employee with responsibility for the care of a child”. These provisions should include provision that the employee is legally responsible and also that no other person legally responsible for the care of the child is available to care for the child (eg if the child’s other parent does not work and is available to care for the child). The examples provided in the discussion paper (guardian and foster parents) would be covered by the ‘legally responsible’ definition.

### *7. Genuine Business Grounds*

It is noted, in respect to requests to change start or finish times, this can lead to changes in shift penalties payable under awards/workplace agreements (noting even if the request is at the employee’s request, these penalties cannot be contracted out of). It is believed it should be clarified that should a request lead to a shift penalty being increased, or payable when not currently payable, the employer has the right to refuse such request (as a reasonable business ground), or alternatively, the employee and employer have the right to agree to waive any shift penalties when such change in hours is in response to a request of an employee under the NES (overriding the provisions of any awards/workplace agreements)

## Parental Leave and Related Entitlements

### *9. Evidence of being fit to work*

Currently many awards provide for the right of an employer to request evidence of being fit to work if an employee wishes to continue to work within 6 weeks of the expected date of birth.

Serious OH&S duties are placed upon employers. Employers should have the right to request evidence from employees that the employee is fit to work should an employee seek to work within 6 weeks of the expected date of birth.

### *Transfer to a Safe Job – General Comments*

It is an implied condition of employment that an employee have certain physical abilities to undertake their job. “Fit to work” is assessed in the context of the position an employee undertakes and is trained and skilled to undertake.

An employee is employed for a certain job, and to provide that if the employee can no longer safely do that job, but is “fit to work” – the question is raised as to what sort of job is the employee fit to undertake?

In small businesses the availability of alternative jobs is limited. Even in large organizations, if an shift employee with no office skills is only fit to undertake an office job (which the office is already fully manned), should an employer be required to put her into a job in which she has no skills or training at full pay, working hours

which may not suit that environment (eg afternoon or night shift) or alternatively provide full pay until the date of the birth of the baby?

Similarly, if a doctor prescribes an employee is “fit to work” but only in jobs which are not available with the employee’s current employer or so narrow to not be a full time job in the employer’s business?

### **10. Evidence requirement for transfer to a safe job**

A medical certificate should be required in all circumstances that specifies the reasons why the employee needs to be transferred to a safe job (which should be the employees existing job with modifications to allow it to be safely undertaken), and/or identifying those jobs suitable within the skills and capabilities of the employee within the employer’s enterprise.

### **11. Other Additional Rules**

At a minimum a threshold should be provided as to what “fit to work” means, which it is believed should mean the employee is still fit to undertake a substantial part of their current job, subject to modifications of the parts of that job which maybe hazardous.

Similarly, an employer should be entitled to seek to change the hours of work of the employee if reasonable in the circumstances (eg. offering an office job to a shift worker).

Further, the risk period should cease as at the projected start of the unpaid maternity leave. It is unreasonable an employee should receive full pay until the date of birth, when it was intended the employee be on unpaid leave for a period prior to the birth of the baby.

### **14. General Issues**

The draft Standard makes no mention on the abilities to or the number of times an employee can make requests to vary the period of parental leave (if at all possible). Existing legislation, custom and practice allows for variation on one occasion (in writing) and such provision should be included to prevent the employee continually changing the resumption date and moving the goal posts out/in as they may decide (with the potential disruption to the employer’s coverage plans).

The definition of spouse does not appear to include same sex partners, which may be applicable for adoption.

In relation to the adoption of a child, the current Workplace Relation Act provides that parental leave (for adoption of a child) is only available if the child the employee wishes to adopt has not lived with the employee for a period of six months or more; essentially preventing a foster child that is later adopted or a step child or a child of the employees spouse (de facto) that is ‘officially’ adopted by an employee. It is believed the concept of adoption leave is to allow parents to bond with a new child, and on this basis, it is believed a similar restriction as to that current contained in the AFPCS should be included in the NES.

## Annual Leave

### **15/16. Shift Worker**

If additional annual leave is to be provided for shift workers as part of the NES, the definition of shift worker should be included within the NES.

Godfrey Hirst currently has "shift workers", who work various fixed shifts on a Monday-Friday shift cycle – all of who accrue 4 weeks annual leave per annum. We also employ 12 hour continuous shift workers who are regularly rostered to work weekends who accrue 5 weeks annual leave per annum.

"Shift worker" should be defined in the NES (if additional annual leave is to be given to those workers as part of the NES) as being workers rostered on the basis of seven day continuous shift work – being work carried out with consecutive shifts of employees throughout the 24 hours of each of the seven days of the week without interruption except during breakdowns or due to unavoidable causes beyond the control of the employer (or words to this effect)

### **19. Interaction between different kinds of leave under the NES and other kinds of absences**

Only leave approved prior to the period of absence (eg LSL or approved unpaid leave) or jury leave (which legally requires an employee to "report" for duty, similar to reporting to work) should be deemed not paid annual leave.

We have real concerns should personal leave be included within the types of leave for which an employee may seek re-crediting of annual leave. Currently if a person is sick on a public holiday, they are not entitled to be recredited with the public holiday and take another day off in lieu.

So should be the situation with annual leave.

Sick leave applies when an employee is rostered to work – accordingly, is not payable on weekends or public holidays.

While an employee is rostered to work, the employee has a duty to act in a manner that they are fit to work. When on holiday an employee is under no such duty, and an employee could well not be fit to work for any time during their entire holiday!!!!

Employees are often exposed to increased risks while on holidays (ie travel sickness, Bali belly) and it would be unreasonable to expect an employer to pay sick leave and re credit annual leave in these circumstances.

If sick leave is to be included, employers should have the right to require that all employee maintain fitness and availability to work as they would under normal employment conditions and not increase their risk of illness of disease through diet, alcohol, drugs or travel.

In addition to this the majority of our employees take annual leave during scheduled shutdowns. A situation where employees where able to have annual leave recredited

due to sickness would create a difficulty for our business attempting to accommodate annual leave during scheduled production

### ***22/23. Payment while absent on annual leave***

It is supported that payment should only be at base rate of pay, unless necessary to ensure fair minimum safety net. Most allowances relate to disability factors not relevant to annual leave, and accordingly should not be included in the rate of pay for annual leave. Further leave loading is available under many awards/workplace agreements as compensation for lost leave loading and other additional payments to base pay during periods of leave. Payment while absent should be addressed by leave loading, rather than changes in the base rate of pay payable while on annual leave.

## **24. General Issues**

### ***Taking of Annual Leave***

Employers must be provided with some right to require employees to take annual leave. For OH&S issues, annual leave is an essential ingredient of employee health. Employers are responsible for employees health, and employers should have the right if an employee has greater than 18 months accrual of annual leave to require that the leave be taken. This should be a requirement in all industries and part of the NES.

Similarly, provision should be included within the NES for shutdowns providing the employer with the ability to direct employees to take a period of annual leave, during a period when the employer shuts down the business (or parts of the business) without capping the number of times or maximum amounts that shutdowns can occur.

The proposed Standard also provides that an employer “must not unreasonably refuse to agree” to a request by an employee to take paid annual leave. Currently, the employer has no right to require an employee to take leave, which could effectively allow employees to accrue excessive amounts of leave, and then seek to take the leave in a single block – often with the potential for considerable disruption to a business. Further in a manufacturing context, only limited coverage is available for taking of annual leave, and requests are often rejected based on production requirements.

Even though refusal in these situations could possibly be considered reasonable, it is envisaged this could lead to considerable disputation. This virtual “right” of an employee to take the leave whenever they wish, without any obligation to work with their employer to minimise the impact upon the business – only that it be in a situation where their employer cannot reasonably refuse – is clearly likely to lead to far more impact of employees taking annual leave than should be the case if employer and employee work together for leave to be taken at a mutually convenient time (rather than the time which the employee wants without regard to the interests of the employer).

### **Personal/Carer’s Leave and Compassionate Leave**

### ***25/26. Notice of Personal/Carer's Leave***

Employees should be required to advise employers of their taking of personal leave prior to the start of work, or if not possible, within an hour of the start of work, other than in exceptional circumstances.

If an employee is due to start work at a particular time, the employer should be advised that the employee will not be attending work so arrangements can be made to cover that employee, rather than wondering if they maybe going to turn up late or have had a serious accident or incident preventing them attending work. Generally, this is not an onerous requirement.

Prima facie, employees should be expected to provide medical certificates as proof of illness. In our workplaces we typically allow 2 to 3 single days each calendar year without proof of illness, however this should be an employer prerogative based upon attendance patterns.

An employer should be entitled to require proof of illness for periods of illness of greater than one day and either before or after public holidays, RDO's, annual leave, weekends, employees under a warning for attendance related matters, employees without any sick leave accrual or during a period of notice of termination of employment.

### ***28. General Issues***

#### ***Interaction between different kinds of leave under the NES and other kinds of absences***

As discussed above, personal leave should only be available when an employee is rostered to work (ie not on approved leave, public holiday, weekend or other time when the employee is not expected to report for work)

### **Community Service Leave**

#### ***33. General Issues***

As seen with the Gippsland bushfires in 2006/07, some emergencies can be quite prolonged.

Godfrey Hirst supports community service leave and actually has provision for up to 3 days paid leave each year with another 7 days leave at 50% pay (which employees can "top up" with annual leave or RDO accruals).

However, even though the community service leave in the NES is unpaid leave, the prolonged absence of an employee can be disruptive to a business, and it is believed a reasonable cap should be provided on community service leave.

### **Long Service Leave**

***34. Issues from preservation of LSL entitlements.. and the intention that workplace agreements will not be able to override state and territory LSL laws?***

Currently all Godfrey Hirst employees accrue LSL in accordance with state LSL laws, however a number of our workplace agreements provide for “cashing in” of LSL by mutual agreement (with the employee’s right to take the “time” represented by the LSL cashed in as unpaid leave at a future time should the employee so wish).

The “cashing in” of LSL has been in response to requests by employees for this flexibility, and has been permitted by the fact the workplace agreement can override the state LSL law.

It is believed that workplace agreements should have the right to override state and territory LSL laws in respect to the potential to cash in LSL.

***36. General Issues***

With employees in every state of Australia, Godfrey Hirst accepts that the differing requirements between states is confusing and can give rise to complexity when dealing with employees moving between states.

However, it is noted that employee packages in different states take into account the differing entitlements, and there are concerns if a national system is developed that it not just adopt the most employee advantageous elements of each states system to make a national system.

As a Victorian employer, given the higher accrual rates in some other states, this could place a further burden and cost of labour on businesses, actively seeking to retain manufacturing in Australia.

If a national system were developed, it should set the minimum standards, and if any standardization across states should only be implemented over an extended period of time.

**Public Holiday**

***39. Base Rate of Pay rule***

It is supported that payment should only be at base rate of pay, unless necessary to ensure fair minimum safety net. Most allowances relate to disability factors not relevant for a public holiday, and accordingly should not be included in the rate of pay for public holidays.

***41. General Issues***

A number of Godfrey Hirst sites have local public holidays as the “official” gazetted public holiday in the local area. However the majority of employees at these sites have elected to have Melbourne Cup day in lieu of the local public holiday. Provision for the substitution of public holidays is included within our various registered workplace agreements.

In our situation, we could not agree to substitute public holidays, if it meant that a substantial number of employees still had the right to refuse to work the original public holiday, and also had the right to work the day which had been substituted as the public holiday (as we would have no right to require them to take leave on this day).

Accordingly, it is believed that the definition of public holiday should include provision for substitution of public holidays, either by vote of majority of employees at a particular workplace, or with individual employees. This should be part of the definition of public holiday, so that once substituted, the substituted date becomes the public holiday and the public holiday becomes a working day which the employees are obliged to work without any additional penalty or payment for this day.

To not include a provision of this nature would require Godfrey Hirst to make all employees take the designated local public holiday despite the majority seeking to substitute another day (which itself is a well established public holiday).

## **Notice of Termination and Redundancy Pay**

### ***45. General Issues***

It is noted employees have an obligation to give notice, and the employer's right to deduct notice from any termination pay if notice is not provided should be specifically included.

Godfrey Hirst currently has a wide range of redundancy entitlements, most well above TCR.

However, executives have no redundancy entitlements, with notice provisions being in lieu of redundancy (most notice being 3-12 months).

Given that redundancy is in addition to notice, it is believed that highly paid employees (who generally have good general skills which enable them to find alternative employment should they be made redundant and have the capacity to negotiate redundancy/notice terms upon employment should they so require) should be excluded from the entitlement to redundancy pay, or that a credit against the redundancy is allowed for notice in excess of the notice period provided under the Standard.

## **Fair Work Information Statement**

### ***46. Prospective Employees***

It is believed that changes should be made to the proposed NES to allow an employer to provide the Information Statement prior to the employee commencing employment.

At Godfrey Hirst, we issue letters of offer, at which time the prospective employee is provided tax declaration, superannuation choice form and any other forms relevant to their proposed employment. Particularly with employees not based at head office,

this is the logical time and easiest from an administrative perspective to ensure provision of the Information Statement.

It is also noted that given the nature of the information being provided in the statement, it is preferable the employee have this information at the time they are signing their letter of offer, rather than after agreeing to the terms of their employment and actually starting work!

It is hoped the above comments assist in the consultation process and we would welcome the opportunity to speak to or expand upon this submission, or answer any specific queries or areas of clarification, as appropriate.

Yours faithfully,

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