

ARTIO Submission on Australian Government Proposed 10 National Employment Standards

Background

The Australian Road Transport Industrial Organisation (ARTIO) is an Industrial Organisation of Employers registered under the Workplace Relations Act 1996. It represents employers in the transport and logistics industry, particularly those engaged in road transport. As at 31 December 2007, it had around 440 members. These include the large multi-national transport companies such as Toll, Linfox etc down to the small family owned businesses that perform a large percentage of Australia's freight task. Nearly all of ARTIO's members would be constitutional corporations and therefore affected by the proposed new 10 National Employment Standards (NES).

ARTIO operates as a federation with Branches in all States except South Australia. ARTIO and its Branches operate independently and in accordance with the particular Constitution applying in that Branch.

ARTIO Council, which has a representative from each State, meets on a bi-monthly basis to consider and discuss IR issues impacting on the organisation and its members. Much of its day-to-day activities are carried out by the Branches, especially when dealing with operational IR issues. This submission is made on behalf of the Organisation and its Branches.

ARTIO is the principal employer organisation party to the major Federal awards in the road transport industry, including the following awards:

- Transport Workers Award 1998
- Transport Workers (Long distance Drivers) Award 2000
- Transport Workers (Refuse Recycling and Waste Management) Award 2001
- Clerks (Road Transport Industry) Award 2002

In addition, the various ARTIO Branches are major players in their respective state award systems and therefore have a keen interest in the development of the new

NESs, including their interaction with the award system. ARTIO is interested in the NES development in the context of the outcome of the planned award modernisation exercise to be undertaken by the Australian Industrial Relations Commission (AIRC) over the next 20 months.

Currently, there are over 150 transport awards in all Australian jurisdictions and it appears that the aim is to reduce these to 10 or so applying on a national basis. This will be a complex and time consuming exercise, as there will be a need to reflect current 'operational' issues in these new modern awards, and in particular how they might then interact with the 10 proposed NESs.

Further, in any attempt to introduce new arrangements, for example flexible work arrangements, community service leave etc there is a direct cost to the employers' business. That may be in 'transaction costs' associated with meetings with staff who want more flexible working arrangements or sourcing casual employees to replace absent staff.

The 10 National Employment Standards

The 10 proposed NESs are:

1. Maximum weekly hours of work
2. Flexible working arrangements
3. Parental leave (and related entitlements)
4. Annual leave
5. Personal/carer's leave and compassionate leave
6. Community Service leave
7. Long Service leave
8. Public holidays
9. Notice of termination and redundancy pay
10. Fair Work Information Statement

This submission will consider each of those standards separately and make relevant comments concerning their operation from both a general perspective and also with

specific reference to ‘live’ issues in the transport industry. ARTIO’s position on the various issues raised under each proposed NES is set out in bold throughout this submission.

General Comments

Generally speaking, ARTIO supports the notion that any NES be binding in all respects and cannot be varied in any industrial instrument, whether that be a new modern award or agreement, howsoever described. As discussed in the Government paper the issue of compliance will (must) be addressed down the track with the further implementation of Fair Work Australia.

ARTIO also believe that Australia must have an independent body to assist in the resolution of disputes/grievances at the workplace. ARTIO strongly supports the role the Australian Industrial Relations Commission (AIRC) has played in this area over the last century. It is especially important that a body with integrity and respect be involved and it is a little difficult to imagine how ‘all purpose shop front centres’ will continue to provide this service.

The issue of “precedent” is critical to ARTIO and with the implementation of a modern award system, ARTIO advocates the need to record and publish arbitrated decisions that will impact on those modern awards. The situation existing in Australia under Workchoices from March 2006, whereby disputes were subject to private mediation without being on the public record, is not supported by ARTIO. Issues resolved were not made public and therefore other participants in the industrial system had no knowledge of solutions.

1. Maximum weekly hours of work

This is an issue of major concern to the transport industry. It is a well accepted current practice that the working week for most employees in the transport industry, especially those in direct operations, is around 50-55 hours per week. This has been the case for many years and all participants accept that around 10-15 hours of PAID OVERTIME are regularly worked. Any attempt to confuse or alter these arrangements would have an adverse impact on the nation’s freight task.

ARTIO has no objection to the principle of having a maximum number of hours to be worked but it considers that this NES should be based on the concept of ‘normal or ordinary’ hours of work. This does not detract from the proposal which also includes ‘reasonable additional work’ but it does make it clear that 38 is the standard for ‘normal or ordinary’ hours.

POSITION: ARTIO is of the strong view that the standard should be expressed as “Maximum weekly ordinary hours of work” with reasonable additional hours based around the current provisions as determined by the Full Bench of the AIRC in the Reasonable Hours Test Case.

2. Flexible Working Arrangements

It seems to ARTIO that the proposed flexible work arrangements relate to the extension of the concept of parental leave.

It would be ARTIO’s view that any extension or introduction should be prescriptive and specific in defining an employee’s entitlements. Failure to do this will lead to unnecessary confusion and potential conflict at the workplace.

POSITION: ARTIO opposes the concept of flexible working arrangements beyond the existing parental leave provisions, because they would create an economic burden on employers in the transport industry.

3. Parental Leave and related Entitlements

ARTIO has no concern about increasing the right of both parents to take up to 12 months unpaid parental leave, however a request by one parent for a further 12 months, which can only be refused on reasonable business grounds, could lead to confusion and conflict at the workplace.

ARTIO considers that all service and notice requirements under parental leave should be strictly adhered to and complied with, especially written notice to return to work within the necessary time frame.

POSITION: ARTIO does not oppose this NES but is concerned to see that it operates fairly in all respects

4. Annual Leave

Existing leave provisions of 4 weeks (or 5 for shiftworkers) annual leave entitlement is not contentious. However, there is some potential conflict between paras 126 and 131 of the NES paper. Para 126 mentions 'for each year of service', whereas para 131 specifies 'during periods of the employee's service'. This leads to the question of when an entitlement to take leave arises. Is it after the 12 months continuous service or is it after it accrues in each 4 week period? ARTIO does not agree with the answer in para 140 that leave accrues progressively and can then be taken whenever. Does this mean that an employee could take 5.85 hours of annual leave each month in their first 12 months of employment? This is an extreme example but makes the point.

Currently, the taking of annual leave is subject to the operational constraints of the business. ARTIO strongly submits that this should continue into the future. If employers close down at Xmas then employees must take their annual leave at that time. Equally, an employer of 8 people cannot survive if 4 of them want to take the week before and the week after Easter off on leave. The employer must be able to retain the final say based on operational issues.

Workchoices allowed for the 'cashing out' of annual leave in specified circumstances. ARTIO's experience with the previous award system, of allowing the cashing out of annual leave in exceptional circumstances, worked well and it provided flexibility to both the employer and employee. The workchoice constraints of a filed agreement before the issue could be addressed were counter productive.

POSITION: ARTIO strongly believes that:

- **12 months service should be met before an entitlement to take annual leave arises**
- **An employer must be able to have the final say concerning the taking of annual leave based on operational matters, especially when there is an Xmas close down**
- **'cashing out; of annual leave should be allowed in exceptional circumstances**
- **Consistent with the approach of National Employment Standards, ARTIO submits that the Commonwealth should legislate to make it crystal clear whether or not annual leave accrues whilst on workers compensation. An employer should not have to access two statutes to answer a simple entitlement.**

5. PERSONAL/CARER'S LEAVE & COMPASSIONATE LEAVE

ARTIO supports the policy behind providing employees with a genuine illness or injury, an entitlement to personal leave. The same applies to a member of the employee's family or household and the entitlement to carer's leave. The key point is genuine illness. Many employees respect that concept but there are others who abuse the system and take a 'sickie' for whatever reason. This requires in many instances the engagement of casuals or labour hire employees on short notice and at a premium. The employer must be able to retain some control over the right of an employee to take personal/carer's leave by the right to refuse in circumstances where protocols/procedures have not been followed or deliberate 'roting' of the entitlement has been detected.

The entitlement to the carer's component of the personal leave is based on 'per occasion'. ARTIO fails to understand the meaning and interpretation. Who will determine disputed matters? This is an important issue.

It is unclear from the discussion paper as to whether or not 'shift allowance' is payable when an employee takes personal leave. If you accept that the concept behind personal leave is to compensate an employee for an illness or injury or a requirement to care for a member of the family or household then there is merit in an employee receiving remuneration to which they would normally be entitled, except for 'rostered overtime'. Equally, there is an argument that says personal leave should be paid at the base rate so as to minimise abuse of the system.

ARTIO favours the former view on an equity basis.

ARTIO submits that there remains an issue about when an employee's initial entitlement to personal leave arises, not dissimilar to entitlement to annual leave. In ARTIO's view there should be some qualifying period of at least six months, possibly equivalent to the probationary period before an entitlement to paid personal leave arises.

Under Workchoices, an employee has been able to 'cash out' personal leave as long as a minimum balance of 15 days is maintained. ARTIO does not support this position, as it changes the nature of personal leave from a privilege to a right.

The issues surrounding medical certificates can be complex but ARTIO firmly supports the need to ensure that any absences on personal leave on Mondays or Fridays or on the days immediately adjacent to a public holiday should require the production of a medical certificate to support the absence. Without the supporting paperwork, ARTIO does not believe an employee should receive payment.

POSITION: ARTIO strongly believes that:

- **At least 6 months service should be met before an entitlement to take paid personal leave arises**
- **'cashing out' of personal leave should not be allowed in any circumstances**
- **To be entitled to paid personal leave, an employee must produce a medical certificate on Mondays or Fridays or on days immediately adjacent to public holidays**
- **Consistent with the approach of National Employment Standards, ARTIO submits that the Commonwealth should legislate to make it crystal clear whether or not personal leave accrues whilst on workers compensation. An employer should not have to access two statutes to answer a simple entitlement.**

6. COMMUNITY SERVICE LEAVE

ARTIO generally supports the concept of community service leave as an unpaid form of leave, but holds the view that there needs to be developed a clear definition of the type of community service attracting this benefit. An unrestricted application would remove from the employer the workforce certainty required in undertaking the freight task.

Perhaps it would also be considered prudent to put a cap on the amount of community service leave an employee can receive in a calendar year. This may be difficult with jury service, especially for a complex and involved trial. However, there is a need to balance the requirements of a small business to operate without having staff away for long periods.

POSITION: ARTIO generally supports the concept of community service leave.

7. LONG SERVICE LEAVE

ARTIO recognises that long service leave (LSL) is a well established entitlement at and does not oppose its becoming a national standard. However, there will be some complexity on moving to that standard as there are different entitlements across the States.

ARTIO does not support the simple approach of moving to the highest state standard as that can create a large cost impost on an employer in Tasmania if they had to move immediately to SA standards. ARTIO would see LSL an issue that can properly be addressed over the next few years to work towards a simple, national LSL system.

ARTIO is very firm in its view that an employee dismissed summarily should not have an entitlement to be paid LSL. It is inconsistent in our view for an employee to be paid an entitlement for long and meritorious service when legally dismissed for a serious and potentially criminal offence.

POSITION: ARTIO does not oppose the establishment of a simple, national LSL system over the next few years.

8. PUBLIC HOLIDAYS

The general rule is that an employee is entitled to a 'public holiday' as defined in the relevant industrial instrument without loss of pay. ARTIO supports the continuation of that principle.

A major issue that invariably arises involving public holidays is the rate of pay an employee is entitled to as a consequence of working on them. Given the change that has occurred over the last 25 years and the increasing speed towards a continuous 24/7 society, ARTIO believes the Federal Government should provide some leadership on this specific issue. This issue is important given that a National Employment Standard on public holidays will exist but require reference to State legislation.

Australia clearly has the following national Public Holiday's:

- New Year's Day

- Australia Day
- Labour Day, celebrated on different days in different States
- Good Friday
- Easter Monday
- Anzac Day
- Queen's Birthday
- Xmas Day
- Boxing Day

Each State then declares an extra day or days to suit particular State history/culture. It appears that Easter Saturday is a Public Holiday in some states but not all. Further, there is still some confusion surrounding Easter Tuesday, especially in Tasmania. In theory, Melbourne Cup Day is only a Public Holiday within 40kms of the Melbourne metropolitan area. Some States gazette "show holidays" on a regional basis.

ARTIO considers that the NES should clearly stipulate the 10 national holidays and a rate of payment for any employee working on those holidays, irrespective of the location with provision for a maximum of 2 additional days per annum gazetted by any State or Territory.

POSITION: ARTIO supports:

- **the general principle that an employee is entitled to a Public Holiday without loss of pay**
- **The NES should determine the 10 national holidays**
- **The NES should determine what is the appropriate rate of payment for work on any of the designated national Public Holidays**

9. NOTICE OF TERMINATION & REDUNDANCY PAY

ARTIO supports the general thrust of this NES. It is supportive of the 2004 AIRC Redundancy test case standards, particularly the exemption of small business with less than 15 employees. ARTIO does not object to the Notice table contained in this NES, as it is simply a reflection of the law that has been in place for some time.

However, ARTIO strongly believes that an employee MUST be required to provide the same period of notice (or forfeit monies in lieu) to terminate the contract of employment as the employer. It is noted that there is no mention of employee notice periods in this NES and it must be addressed. Further, in para 274 an employer must pay all entitlements, including 'expected overtime'. It is only fair then, that an employee not providing the proper notice, must be able to have monies withheld from all entitlements, including accrued annual or long service, up to the amount of the insufficient notice.

'Continuous service' should be defined to exclude periods of leave without payment beyond a 6 month period. It appears that the definition of 'continuous service' in paras 275, dealing with termination and 284 , dealing with redundancy are inconsistent. This should be rectified to ensure a common and consistent definition of the term.

POSITION: ARTIO strongly argues for:

- **Consistency of the definition of 'continuous service'**
- **The acceptance that an employee MUST give the same period of notice, or forfeit monies in lieu required, detailed in para 272**

10. FAIR WORK INFORMATION STATEMENT

ARTIO considers the Fair Work Information Statement to be a bureaucratic imposition and expense on employers in the transport industry. ARTIO contends that employees are not interested in an Information Statement and certainly any document beyond a page will not be read. ARTIO contends that the Information Statement provides no benefit in reality as employment conditions will be provided in industrial instruments howsoever described in the Commonwealth legislation.

It is not clear whether or not there will be a penalty for failure to provide a copy of the FWIS to a new employee, but in ARTIO's view this should not be the case.

POSITION: ARTIO totally opposes the re-introduction of the Fair work Information Statement.