

Australian Industry Group

Submission

Plain language re-drafting -
Facilitative provisions altering
spread of hours

21 December 2018



AM2016/15 PLAIN LANGUAGE RE-DRAFTING – FACILITATIVE PROVISIONS ALTERING SPREAD OF HOURS

1. INTRODUCTION

1. Ai Group’s submission of 6 December 2018 addressed the basis upon which we contend that the relevant provisions can and should be interpreted as enabling an extension of the range of ordinary hours that can be worked by extending both ends of a spread of ordinary hours otherwise provided for under the applicable awards. We also sought to identify why, as a matter of merit, the retention of such a flexibility was important. In this regard we sought, in particular, to identify why different employees in an enterprise should be able to agree to a variation at different ends of the spread.
2. This short submission responds to elements of the submission advanced by the AMWU and AWU in relation to the plain language redrafting of facilitative provisions concerning the spread of hours. It primarily addresses the contention that any ambiguity in the current contentious provisions should be dealt with by limiting the capacity for parties to vary the spread of ordinary hours an ability to ‘shift’ the spread.

2. RESPONSE TO THE AMWU AND AWU

3. The AMWU have pressed for the variation of the contentious provisions in such a manner so as to not permit an increase in the total spread of hours, but to instead only permit the entire spread to be shifted by up to one hour. In support of this proposition they contend that this is consistent with what they have “...always understood to be the purpose of the alteration clause”.¹ The union also contend, in effect, that this is consistent with the intent of the provision (when read in the context of the award as a whole) and the role of facilitative

¹ AMWU submission at paragraph 13.

provisions. The implicit contention appears to be that a mechanism that would permit an increase in the spread of hours necessarily facilitates an avoidance of other award obligations and perhaps visits some unfairness upon employees.

4. Contrary to the position adopted by the AMWU, the AWU concedes that the wording of such provisions and the reasoning of Senior Deputy President Marsh in the *Graphic Arts – General – Interim Award 1995 Decision*, suggests that such clauses are intended to permit the span of hours to be increased.² The union nonetheless argues that the wording of such provisions should be amended so as to now only permit the spread of hours to be shifted and not extended. The merit-based justification for this approach appears to essentially be focused on a desire to maximise employee access to loadings or penalties that might be forfeited if the parties are able, by agreement, to extent the spread of ordinary hours.
5. In response to the AWMU's submissions regarding their apparent consistent interpretation of the current provisions we simply note that this position appears to be at odds with their submissions referred to in the Full Bench's Statement of 13 November 2018 regarding the operation of such a provision in the *Pharmaceutical Industry Award 2010*.³
6. Regardless, the approach now primarily advocated for by both the AMWU and AWU would, in our view, represent a significant departure from the current arrangements. It would likely result in disruption to the manner in which ordinary hours are arranged in practice under the various awards. Such a change may consequently necessitate the implementation of an alteration to the existing operations of some employers, or at the very least increase their costs. Such a step should not be lightly taken and should certainly not be implemented based on the limited material before the Commission.
7. As to the merits of an approach that enables extension of the ordinary hours at both ends of the relevant spread, we also emphasis that this is likely to facilitate

² AWU submission of 11 December 2018 at paragraphs 8 to 10

³ [2018] FWCFB 6849

workplace flexibility in a manner that may benefit both employers and employees. In the context of the modern awards objective, the matters referred to in s.134(1)(d) and s.134(1)(f) would weigh in favour of retaining a broad flexibility to vary the spread of ordinary hours at both ends.

8. The unions' arguments that such provisions are either unfair or disadvantageous to employees or inconsistent with the nature of facilitative provisions should carry little weight. The arrangements operate subject to either majority or individual agreement by employees. This is a meaningful form of safeguard that has long been utilised within the context of the award system.
9. Further, there is no reason for concluding that arrangements that enable the working of ordinary hours either earlier or later than those specified in the standard spread provided for under particular awards may not suit employees as well as their employer. There are a myriad of reasons why employees may genuinely wish to work earlier or later in the day.
10. Contrary to the contentions of the unions, there is no reason why a fair and relevant safety net cannot seek to balance the interests of both employers and employees by retaining an ability for such parties to reach agreement on a limited expansion of the standard arrangements for ordinary hours. Indeed, we contend that retention of such flexibility is necessary.⁴

⁴ As contemplated for the purposes of s.138