



# STATEMENT

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

## **4 yearly review of modern awards – plain language re-drafting – facilitative provisions altering spread of hours** (AM2016/15)

JUSTICE ROSS, PRESIDENT  
VICE PRESIDENT HATCHER  
COMMISSIONER HUNT

MELBOURNE, 2 SEPTEMBER 2019

*4 yearly review of modern awards – plain language re-drafting – spread of hours clauses – remove ambiguity*

[1] In a Decision<sup>1</sup> issued on 20 August 2019 (the August 2019 Decision), we dealt with an ambiguity in a number of awards concerning facilitative provision permitting the alterations of the ‘span of hours’ by up to one hour at either end of the spread (the Alteration clause).

[2] An example of the Alteration clause is clause 30.2 in the Food Manufacturing Award:

30.2 – Ordinary hours of work – day workers

...

(c) The ordinary hours of work are to be worked continuously, except for meal breaks, at the discretion of the employer between 6.00 am and 6.00 pm. The spread of hours (6.00 am to 6.00 pm) may be altered by up to one hour at either end of the spread, by agreement between an employer and the majority of employees concerned or, in appropriate circumstances, between the employer and an individual employee. (emphasis added)

[3] As we noted in the August 2019 Decision, the use of the word ‘either’ in the Alteration clause can be interpreted as allowing for the spread of hours (6am to 6pm) to be altered in different ways, for example:

Possible interpretation	Application (example)	Total spread of hours
Spread may be altered by 1 hour at both ends to shift entire spread	7am to 7pm	12 hours
	5am to 5pm	12 hours

<sup>1</sup> [\[2019\] FWCFB 5409](#)

Possible interpretation	Application (example)	Total spread of hours
Spread may be altered by up to 1 hour at only one end to increase spread by 1 hour	6am to 7pm	13 hours
Spread may be altered by 1 hour at both ends to increase spread by 2 hours	5am to 7pm	14 hours

[4] The list of awards being reviewed in relation to the Alteration clause is as follows:

- Airline Ground Staff Award;
- *Aquaculture Industry Award 2010* (Aquaculture Award);
- *Business Equipment Award 2010* (Business Equipment Award)
- Clerks Award;
- *Contract Call Centres Award 2010* (Call Centres Award);
- Food Manufacturing Award;
- Manufacturing Award;
- Pharmaceutical Industry Award;
- *Seafood Processing Award 2010* (Seafood Processing Award);
- *Storage Services and Wholesale Award 2010* (Storage Services Award); and
- Sugar Industry Award.

[5] In the August 2019 Decision we expressed the following *provisional* views:

[228] It is our *provisional* view that the Alteration clauses were intended to operate so that an agreement made with a group of employees or, where available, with an individual employee, permitted an alteration to shift the entire spread of hours forward by one hour or back by one hour. Hence, if the standard spread is 6am to 6pm (a 12 hour spread) the Alteration clause would facilitate the variation of the spread forward to 5am to 5pm, or back to 7am to 7pm, retaining the 12 hour spread. This approach is consistent with the language used in the provisions. The alternative approaches contended for have no practical utility because, as earlier stated, they cannot result in the employee's number of ordinary working hours in the day being extended.

[229] However it also seems to us that the Alteration clauses were not intended to prohibit different agreements being reached with different groups in an enterprise or, where an Alteration clause permits agreement to be reached with individual employees, different agreements being reached with different individuals. For example, it may suit the employer and a group of employees in a part of the enterprise with a common start time to vary the standard spread to facilitate an early start - say at 5am. In the case of this group of employees, the effect of such an agreement would be to alter the spread of hours for that group to 5am to 5pm. It may suit the employer and a group in another part of the enterprise to start later and finish later, in which case they may agree to shift the spread for that group to 7am to 7pm. Likewise, where agreements with individual employees are permitted, the employer may agree with employee X to move the spread of hours forward to 5am to 5pm, and may also agree with employee Y to move the spread back to 7am to 7pm.

[230] To the extent that there is doubt as to the current capacity for employers and employees to take such an approach under the Alteration clauses, we consider that the Alteration clauses should be varied to make it clear that such a capacity exists. We note that a number of awards expressly permit or at least clearly contemplate discrete agreements being reached with particular operational groups of employees in an enterprise. These awards are the Airline Ground Staff Award, the Business Equipment Award, the Call Centres Award, the Food Manufacturing Award, the Manufacturing Award and the Pharmaceutical Industry Award. In the case of the Food Manufacturing Award, for example, it does this by way of a provision separate to the Alteration clause (earlier set out) which refers to a number of identified facilitation clauses in the award generally, including the Alteration clause, and states that they ‘can be utilised by agreement between an employer and the majority of employees in the workplace *or a section or sections of it*, or the employer and an individual employee’ (clause 8.3(a), italics added). We note that different expressions are used in some of these awards (e.g. ‘in the workplace or a section or sections of it’; ‘in the plant, work section or sections’ etc), but the objective is the same. The position in other awards is less clear; for example, the Clerks Award permits agreement simply with ‘the majority of employees concerned’. However even in the case of that clause, the additional capacity to reach agreements with individual employees implies that different agreements may be reached with different employees, and this in turn implies that different agreements may be reached with different groups of ‘employees concerned’.

[231] It is our *provisional* view that the 11 modern awards set out at [168] above be varied consistent with the *provisional* views set out above (at [228]-[230]). Further, it is our *provisional* view that such variations are necessary to achieve the modern awards objective. In expressing that *provisional* view we have taken into account the matters in s.134(1)(a) to (h), insofar as they are relevant. In particular, the variations proposed will:

- promote flexible modern work practices; and
- ensure that the awards are simple and easy to understand.

[232] In respect of Alteration clauses which currently permit both majority and individual agreement, our *provisional* view is that they should be varied to read as follows (using the Food Manufacturing Award provision as the template):

30.2 – Ordinary hours of work – day workers

...

(c) The ordinary hours of work are to be worked continuously, except for meal breaks, at the discretion of the employer between 6.00 am and 6.00 pm. The spread of hours (6.00 am to 6.00 pm) may be moved up to one hour forward or one hour back by agreement between an employer and:

- (i) the majority of employees at the workplace;
- (ii) the majority of employees in a discrete section of the workplace; or
- (iii) an individual employee.

Different agreements may be reached with the majority of employees in different sections of the workplace or with different individual employees.

[233] In respect of Alteration clauses which currently permit majority agreement only, our *provisional* view is that they should be varied to read as follows (using the Pharmaceutical Industry Award as a template):

23.2 Ordinary hours of work—day workers

...

(b) The ordinary hours of work for day workers are to be worked continuously, except for meal breaks and rest pauses, between 7.45 am and 5.15 pm, Monday to Friday inclusive. The spread of hours (7.45 am to 5.15 pm) may be moved up to one hour forward or one hour back by agreement between an employer and:

- (i) the majority of employees at the workplace; or
- (ii) the majority of employees in a discrete section of the workplace.

Different agreements may be reached with the majority of employees in different sections of the workplace.

[234] We acknowledge that the Alteration clauses in some of the 11 awards (e.g. the Call Centres Award) are structured differently and would require some modification to the above proposed provisions. Draft variation determinations will be published shortly.’

### Next steps

[6] Draft variation determinations will be published with this statement.

[7] Interested parties are invited to file submissions in response to the *provisional* views expressed above<sup>2</sup> and in relation to the draft variation determinations by **4.00pm on Friday 20 September 2019**. Any submissions in reply must be filed by **4.00pm on Friday 4 October 2019**.

[8] Submissions should be sent to [amod@fwc.gov.au](mailto:amod@fwc.gov.au) and will be published on the Commission’s website.

[9] Any request for an oral hearing is to be filed by **4.00pm Friday 27 September 2019**.

[10] Absent a request for an oral hearing we will determine any outstanding issues on the papers, unless we decide to list the matter for an oral hearing.

PRESIDENT

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<sup>2</sup> Also see [\[2019\] FWCFB 5409](#) at [228] to [234]