BACKGROUND PAPER

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)

SYDNEY, 27 NOVEMBER 2019

This is a background document only and does not purport to be a comprehensive discussion of the issues involved. It does not represent the view of the Commission on any issue.

[1] This matter is listed for hearing at **9.00am** on **Thursday 28 November 2019**. The purpose of the paper is to facilitate the hearing by identifying the relevant issues and summarising the submissions filed.

[2] During the award stage of the Review, the AMWU submitted that the span of hours clause in the *Pharmaceutical Industry Award 2010* (Pharmaceutical Industry Award) was ambiguous as the word 'either' could be interpreted as allowing the spread of hours to be altered by up to one hour at only one end of the span, or one hour at both ends of the span. They proposed an amendment to the clause to insert the words 'subject to maintaining a 9.5 hours spread', so it would read as follows:

> "Where the employer and the majority of employees in the affected plant, work section or sections agree, subject to maintaining a 9.5 hours spread, the spread of hours may be altered by up to one hour at either end of the spread.'

[3] Ai Group opposed this variation and submitted that it was a substantive change and that this issue would arise in a number of awards. The Full Bench decided to defer consideration of this issue until the conclusion of the award stage of the Review.

[4] The issue raised goes beyond the Pharmaceutical Industry Award and concerns an ambiguity in the facilitative clauses in a number of modern awards which provide a mechanism to alter the 'span of hours' by up to one hour at either end of the spread (the Alteration clause). An example of an 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)

[5] 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
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

[6] A Statement[1] published on 13 November 2018 identified a number of modern awards which contained Alteration clauses in substantially the same terms as set out above and invited interested parties to make submissions in relation to the resolution of the ambiguity in the Alteration clauses and to identify any other awards containing a facilitative clause in similar terms. Parties were also advised that the issue would be dealt with on the papers unless a request was received by 30 November 2018.

[7] Submissions were received from:

- ABI;
- Ai Group;
- AMWU;
- AWU;
- SDA; and
- The Motor Trades Association of South Australia (the MTA).

[8] The final list of awards being reviewed in relation to the Alteration clause is:

- *Airline Operations-Ground Staff Award 2010* (Airline Ground Staff Award);
- *Aquaculture Industry Award 2010* (Aquaculture Award);
- *Business Equipment Award 2010* (Business Equipment Award)
- *Clerks – Private Sector Award* 2010 (Clerks Award);
- *Contract Call Centres Award 2010 (*Call Centres Award);
- *Food, Beverage and Tobacco Manufacturing Award 2010* (Food Manufacturing Award);
- *Manufacturing and Associated Industries and Occupations Award 2010* (Manufacturing Award);

[1] [2018] FWCFB 6849

- *Pharmaceutical Industry Award 2010* (Pharmaceutical Award);
- *Seafood Processing Award 2010* (Seafood Processing Award);
- *Storage Services and Wholesale Award 2010* (Storage Services Award); and
- *Sugar Industry Award 2010* (Sugar Award).

[9] No request for an oral hearing was received and accordingly the span of hours issue was dealt with 'on the papers', in a decision published on 20 August 2019[2] (the *August 2019 decision*).

[10] In the *August 2019 Decision* the Full Bench made six general observations.

1. Consistent with the views of most parties we found that the Alteration clause is ambiguous; the ambiguity arises from the use of the word 'either', which may be interpreted in different ways (see [5] above).

2. In our view the resolution of the ambiguity is not confined to ascertaining the original intention of the drafter of the clause, given the differences in the statutory context and the fact that the issue arises in the context of the Review. We proposed to resolve the ambiguity consistent with our obligation to ensure that modern awards provide a fair and relevant safety net of minimum terms and conditions. It follows that merit arguments and the modern awards objective are relevant to the resolution of the ambiguity in the Alteration clause.

3. It is desirable that the Alteration clause be varied in a way that is consistent across the affected awards, while taking into account the terms of the Alteration clause in each of the awards before us.

4. A facilitative provision which permits the variation of the spread of hours in an award necessarily imposes some financial detriment on employees. Such variations necessarily reduce employee entitlements as they permit the certain hours to be paid at ordinary time rates which would have been, absent the variation, paid at overtime rates. However, we rejected the proposition that the facilitation of such variations provides 'no countervailing benefit' for the employees who agree to vary their span of hours. Employees may have a need for some flexibility in relation to start and finish times, to meet their family responsibilities and personal commitments. Variations to the standard spread of hours may assist such employees.

5. ABI contended that its proposed interpretation of the Alteration clause does not reduce employee entitlements because (among other things) a variation to the spread of hours does not affect the maximum number of ordinary hours that an employee may be required to work each day. It is correct that varying the spread of hours does not affect the maximum number of ordinary hours which may be worked by an employee but we do not agree with the proposition that a variation to the spread of hours does not reduce employee entitlements.

   The point advanced by ABI raises another, more significant issue – namely what is the utility of a facilitative provision that permits a variation to *both* ends of the spread of hours in circumstances where an employer cannot require an employee to

[2] [2019] FWCFB 5409

work the full (varied) spread of hours at ordinary rates? It seems to us that this points against the Alteration clauses being interpreted as allowing, in respect of any individual or majority agreement reached pursuant to the clause, an extension of the span of hours by one hour at both ends of the day, since this would not result in any operational benefit additional to an extension of the span at only one end of the day.

6. Different employees in the same enterprise may have a need for flexibility at different ends of the day and that enterprises may have a need for flexibility at both ends of the spread for different parts of the enterprise.

[11] On the basis of the above six general observations the Full Bench went on to express 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. …

[229] ….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….

[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….

[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])….

[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
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> …
>
> (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:
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> > (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
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> …
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> (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.

[235] Interested parties will be invited to file submissions in response to the *provisional* views expressed above and in relation to the draft variation determinations.'

[12] Draft variation determinations for the modern awards affected were published shortly after the *August 2019 Decision*.

[13] In a Statement[3] issued on 2 September 2019 (the September 2019 Statement), parties were invited to file submissions on the above *provisional* views and the draft variation determinations. The following parties filed submissions:

- Ai Group 25 September 2019;
- AMWU 20 September 2019 and 18 October 2019;
- AWU 21 October 2019; and
- CFMMEU – Construction & General Division (CFMMEU C & G) 18 October 2019.

[14] Ai Group opposes the implementation of the *provisional* views submitting that:

'The implementation of the *provisional* views would disrupt a large number of existing hours of work arrangements – some of which have been in place for over 20 years.

Major operational problems would be imposed on a large number of employers and substantial hardship would result for a large number of employees.'[4]

[15] It is also asserted that 'some employers' have contacted Ai Group and 'expressed alarm about the implications of the *provisional* views on their businesses and their employees'.

[16] Ai Group urges the Full Bench to abandon its *provisional* views and allow the spread of hours to be varied at both ends. In the alternative it is submitted that the approach determined in the *Graphic Arts Award Simplification Decision*[5] be adopted by providing that the spread of hours may be extended by up to one hour at one end of the spread (but not both). It is submitted that this alternative approach 'would not cause the major problems that would result from the implementation of the Commission's *provisional* views'.[6]

[17] Three points are advanced in support of Ai Group's position.

[18] First, it is submitted that the *provisional* view that the alteration clauses were intended to operate to only permit the entire spread of hours to be shifted forward or back by one hour

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[3] [2019] FWCFB 6060

[4] Ai Group submissions 25 September 2019 at [4] – [5]

[5] Print PR7898

[6] Ibid at [8]

'is demonstrably not correct'. Ai Group contends that it is 'well placed' to identify what the intent was at the time that these clauses were inserted into awards during the award simplification process. At [15] of its submission Ai Group refers to materials which are said to demonstrate 'Ai Group's intent in devising and pursuing the facilitative provision during the 1996 – 98 *Metal Industry Award Simplification Case* before Marsh SDP'.

[19] The submission put is based on Ai Group's *subjective* intention in the award simplification proceedings, and as the Full Bench noted in the *August 2019 Decision*, the AMWU takes a different view:

> 'that it has always understood the purpose of the Alteration clause as providing for the alteration of the *entire* spread of hours, such that the spread of hours moves as a block, but that only one additional hour is allowed. For example, if the spread of hours were expressed to be between 6.00am and 6.00pm, then the facilitative provisions could operate (with agreement) such that the entire spread could be moved to provide for a spread of ordinary hours between 5.00am and 5.00pm or 7.00am and 7.00pm, but not provide for a 13 or 14 hour total spread.'[7]

[20] Second, it is submitted that the *provisional* view that there would be no utility in allowing the spread of hours to be altered at both ends, 'is not correct'.

[21] At [223] – [228] of the *August 2019 Decision* the Full Bench said:

> 'But the point advanced by ABI raises another, more significant issue – namely what is the utility of a facilitative provision that permits a variation to *both* ends of the spread of hours in circumstances where an employer cannot require an employee to work the full (varied) spread of hours at ordinary rates? It seems to us that this points against the Alteration clauses being interpreted as allowing, in respect of any individual or majority agreement reached pursuant to the clause, an extension of the span of hours by one hour at both ends of the day, since this would not result in any operational benefit additional to an extension of the span at only one end of the day.
>
> …
>
> 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.'

[22] Ai Group contends that the information in the table below 'conclusively demonstrates that there is substantial utility in allowing the spread of hours to be extended in numerous common circumstances under nearly all of the listed Awards. Further, Ai Group submits that the table also demonstrates 'that existing vital flexibility for employers and employees will be lost if the *provisional* view is implemented'.[8]

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[7] [2019] FWCFB 5409 at [171]

[8] Ibid at [25]

Award	*Spread of hours for day workers*	*Maximum No. of ordinary hours for a day worker*	*Circumstances where there is utility in extending the spread of hours at one or both ends*
Airline Award	7.00am – 6.00pm (clause 28.2(c))	12 hours exclusive of meal breaks (clauses 28.4(c), 29.1(a) and 29.1(b).	Spread of hours needs to be extended at both ends to permit a 12-hour day to be worked with an unpaid meal break. A 12-hour day cannot be worked without an extension in the spread of hours even if a paid meal break is provided.
Aquaculture Award	5.00am to 7.00pm (clause 19.2(c))	10 hours exclusive of meal breaks (clauses 19.2(c) and 21.1)	-
Business Equipment Award	6.30am to 6.30pm (clause 27.2(a)(i))	12 hours exclusive of meal breaks (clause 27.2(a)(iii))	Spread of hours needs to be extended, at least at one end, to permit a 12-hour day to be worked with an unpaid meal break.
Clerks Award	7.00am to 7.00pm, Monday to Friday, and 7.00am to 12.30pm on Saturday (clause 25.1(b))	10 hours exclusive of meal breaks (clauses 27.2(a)(iii) and 26.1)	Spread of hours needs to be extended at both ends to permit a 7-hour day to be worked on a Saturday if an unpaid meal break of half hour is provided, or to permit a 6.5-hour day to be worked if a one hour unpaid meal break is provided.
Call Centres Award	7.00am to 7.00pm (clause 24.6(a))	12 hours exclusive of meal breaks (clauses 24.8(a)(ii), 25.1 and 25.2)	Spread of hours needs to be extended, at least at one end, to permit a 12-hour day to be worked with an unpaid meal break.
Food Award	6.00am to 6.00pm (clause 30.2(c))	12 hours exclusive of meal breaks (clauses 30.5(c) and 32.1)	Spread of hours needs to be extended, at least at one end, to permit a 12-hour day to be worked with an unpaid meal break.
Manufacturing Award	6.00am to 6.00pm (clause 36.2(c))	12 hours exclusive of meal breaks (clauses 36.5(c) and 38.1)	Spread of hours needs to be extended, at least at one end, to permit a 12-hour day to be worked with an unpaid meal break.
Pharmaceutical Award	7.45am to 5.15pm (clause 23.2(b))	No limit on daily hours specified. Meal breaks for day workers are unpaid (clause 24.1).	Spread of hours needs to be extended at one end to permit a 9.5-hour day to be worked with a half hour unpaid meal break. Spread of hours needs to be extended at both ends to permit a 10.5-hour day to be worked with a half hour unpaid meal break.
Seafood Award	6.00am to 6.00pm (clause 23.2(c))	12 hours exclusive of meal breaks (clauses 23.5(c) and 25.1)	Spread of hours needs to be extended at least at one end to permit a 12-hour day to be worked with an unpaid meal break.
Storage Award	7.00am to 5.30pm (clause 22.2(a))	10 hours exclusive of meal breaks (clause 22.1(c) and 23.1)	Spread of hours needs to be extended, at least at one end, to permit a 10-hour day to be worked with a one hour unpaid meal break.
Sugar Award	6.00am to 6.00pm (clause 29.3(b))	10 hours exclusive of meal breaks (clause 29.3(b)(iii) and 30.1(a))	-

[23] Finally, Ai Group challenges the assumption that the implementation of the *provisional* views will not alter the existing capacity to access flexibility by agreement between the employer and an individual employee.

[24] Ai Group submits that the implementation of the *provisional* views would 'substantially alter the existing capacity of employers and employees to reach agreement on hours of work arrangements to suit their needs. Ai Group contends that it is 'very clear' from the table set out above that the implementation of the *provisional* views would:

- cause major operational problems for employers; and
- cause hardship to thousands of employees who have organised their lives, including childcare arrangements, around the flexibility that the existing facilitative provisions provide.[9]

[25] By way of example, Ai Group submits that 12 hour work days are 'relatively common' in the manufacturing industry and that the table set out above indicates that 'many 12 hour work day arrangements will no longer be possible if the Commission's *provisional* views are implemented'.[10]

[26] The AMWU generally agrees with and supports the *provisional* views expressed in the *August 2019 Decision.*

[27] In its submission of 20 September 2019, the AMWU generally supports the draft determinations and considers that they reflect the *provisional* views of the Full Bench. However, the AMWU notes that in respect of the awards that currently permit individual facilitation (the Food Award, Manufacturing Award, Seafood Award and Sugar Award) the qualifying words 'in appropriate circumstances' have been removed from the subparagraph in the draft determination that deals with individual facilitation. The AMWU submits that removal of the words "in appropriate circumstances" constitutes a substantive variation to an existing restriction on an employer's capacity to make an agreement with an individual employee and that these qualifying words should be retained.

[28] In its reply submission of 18 October 2019, the AMWU responds to the submissions advanced by Ai Group. As to Ai Group's contention (at [4] – [7] of Ai Group's submissions) that the implementation of the *provisional* views will have adverse effects on employees and employers the AMWU submits that:

> 'The assertions contained in these submissions are more properly the subject of witness evidence. In the absence of such evidence the AiG's assertions should be given no weight.'[11]

[29] As to Ai Group's challenge to the *provisional* view that the Alteration clause was not intended to permit an extension to the spread of hours the AMWU submits:

- there is no evidence before the Commission that suggests that it was the intention of the parties or of SDP March for the Alteration clause to allow for an extension to the span of hours;
- on the contrary, it appears that it was the intention of the parties that the intention of the parties was to facilitate 'early starts' by agreement and this is how the Alteration clauses are used in practice;

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[9] Ibid at [28]

[10] Ibid at [29]

[11] AMWU submission 18 October 2019

- the use of the word "alter" rather than "expand" or extend" is further suggestive of this;
- in this context, the Alteration clause is intended to do no more than allow an additional hour to be worked at ordinary time that would otherwise be fall outside the spread of hours; and
- this is entirely consistent with the *provisional* views of the Full Bench and the draft determinations.

[30] As noted above, Ai Group submits that the Full Bench expressed a *provisional* view that there would be no utility in allowing the spread of hours to be extended at both ends. Ai Group contests that *provisional* view on the basis of the table set out above. The AMWU advances two submissions in relation to this aspect of Ai Group's submissions.

[31] First, the AMWU submits that Ai Group's submission is not an accurate characterisation of what the Full Bench said in the *August 2019 Decision*. What the Full Bench actually said is as follows:

> 'It is correct that varying the spread of hours does not affect the maximum number of ordinary hours which may be worked by an employee.'
>
> What is the utility of a facilitative provision that permits a variation to both ends of the spread of hours in circumstances where an employer cannot require an employee to work the full (varied) spread of hours at ordinary rates?'

[32] The AMWU submits that it is clear from the above excerpts that the observation that there is no utility in expanding the spread of hours is not expressed as being a *provisional* view and that Ai Group now seek to re-litigate what is essentially a construction point.

[33] The AMWU contend that Ai Group had the opportunity to make the submissions it raises now in accordance with the timetable that was set by the Full bench in the November 2018 statement, but chose not do so.

[34] The AMWU contends that the Ai Group shouldn't be permitted to relitigate this point, but in the alternative advances a submission engaging with the Ai Group's submission.

[35] In that table above Ai Group asserts that there is utility in extending the spread of hours at one or both ends to allow a 12-hour shift. For example, Ai Group submit that with respect to the Manufacturing Award that:

> '(the) spread of hours needs to be extended, at least at one end, to permit a 12-hour day to be worked with an unpaid meal break.'

[36] The AMWU submits that this submission: 'proceeds on the false basis that the maximum number of ordinary hours that can be worked per day is 12, which is not correct. The maximum daily ordinary hours are eight unless otherwise agreed'.

[37] Further, while the AMWU acknowledges that the Manufacturing Award (and many others that are the subject of these proceedings), allow for 12-hour shifts it submits that it is 'crucial to note that:

(a) 12-hour shift workers are not usually day workers; and

(b) There are more specific award provisions that deal with 12-hour shift arrangements. 12-Hour Shiftworkers are not usually day workers.'

[38] The AMWU states that Ai Group's submission that there is merit in increasing the spread of hours is contingent on an assertion that an extension to the spread of hours is required to allow 12 hour shifts (consisting of 12 ordinary hours and with a half hour or one hour paid meal break) to be worked. The Ai Group further assert that:

- this is currently common practice in the industry; and
- would not be permissible if the *provisional* views are implemented.

[39] Whilst the AMWU agrees that 12-hour shifts are common, it submits that it is not aware of examples of 12 hours shifts being worked in addition to a half hour or one-hour unpaid lunch break under the terms of the Award which it contends is essentially a 12.5 or 13-hour shift which would constitute 'a very unusual and obscure arrangement'.[12]

[40] The AMWU submits that contrary to Ai Group's unsubstantiated submissions, it is the experience of the AMWU that in most cases where 12-hour shifts are worked in the context of continuous shiftwork and meal breaks for continuous shiftworkers are included as part of ordinary hours, which means that the scenario which Ai Group advances does not arise.

[41] The AMWU notes that Ai Group submits that the practice is commonplace and would be in jeopardy should the *provisional* views be implemented and submits that it should file evidence in support of that assertion.[13]

[42] Further, the AMWU submits that if Ai Group's interpretation of the Alteration Clause (and how it relates to 12-hour shifts) is correct, it would give no work to do to clause 36.5(c), which deals specifically with 12-hour shifts and provides that 12-hour shifts can be worked, but only by agreement. Clause 36.5(c) provides:

> 'By agreement (emphasis added) between an employer and the majority of employees in the enterprise or part of the enterprise concerned, 12-hour days or shifts may be introduced subject to:
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> (i) proper health monitoring procedures being introduced;
>
> (ii) suitable roster arrangements being made;
>
> (iii) proper supervision being provided;
>
> (iv) adequate breaks being provided; and
>
> (v) a trial or review process being jointly implemented by the employer and the employees or their representatives.'

[43] The AMWU submits that if Ai Group's construction of the Award were accepted an employer could bypass clause 36.5 and merely reach an agreement a majority of employees (or an individual employee) to increase the spread pursuant to clause 36.2(b) and then use their discretion to set rosters within the spread to roster employees on for a 12 hour shift without first complying with the obligations imposed virtue of clause 36.5. The AMWU submits that this self-evidently cannot be the intent of the award, clause 36.5(c) must have work to do.

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[12] AMWU submission at [40]

[13] Ibid at [41] and [42]

Question for Ai Group: What does Ai Group say in response to the AMWU's submissions (summarised at [36] – [43] above) regarding the operation of 12 hour shifts in businesses covered by the Manufacturing Award?

Question for the AMWU: The AMWU submissions address Ai Group's 'utility argument' in respect of the Manufacturing Award, but what does it say about the other awards set out in the table at [22] above?

[44] As to Ai Group's submission that the implementation of the provisional views would result in a reduction in flexibility (see [24] above), the AMWU submits that in the absence of probative evidence supporting these 'bald assertions', the Commission should dismiss these submissions.

[45] As to Ai Group's alternate submission – that the approach implemented in the Graphic Arts Award be adopted – the AMWU submits that the submission advanced is misleading.

[46] Ai Group proposes the following amendment to the draft determinations (using the Manufacturing Award 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 extended by up to one hour at one end of the spread (but not both) 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.

[47] In response to this proposition the AMWU submits:

> 'The Graphic Arts Award does not allow for an 'extension'. It allows for an 'alteration'. The clause in the Graphic Arts Award provides:
>
> > '(ii) The daily spread of hours may be **altered** (emphasis added) by up to one hour at one end of the spread (but not both) by agreement between an employer and the majority of employees affected (level 2 facilitation).
>
> Contrary to the submission of the AiG, the amendment it proposes to the draft determinations does **not** reflect the status quo in the Graphic Arts Award.'[14]

[48] The AWU supports the submissions advanced by the AMWU.

[49] The CFMMEU (C&G) has an interest in the Manufacturing Award and supports the AMWU's submission of 20 September 2019.

[50] In reply to Ai Group's submissions the CFMMEU (C&G) submit that Ai Group's objections should be dismissed on the basis that Ai Group 'has provided no evidence nor

[14] AMWU submissions 18 October 2019 at [61] – [62]

arguments with sufficient merit to justify a departure from the *provisional* view expressed by the Full Bench'.[15]

[51] As to Ai Group's submissions set out at [14] and [15] above, the CFMMEU (C&G) submit that Ai Group has provided no evidence to back up these 'exaggerated' and 'questionable' claims and nor has it provided practical examples of how these employers' businesses would be affected.

[52] As to the history of the Alteration clause in the Manufacturing and Graphic Arts Awards the CFMMEU (C&G) submits:

- the Ai Group's submissions as to its intent at the time are not 'particularly helpful or relevant';
- Ai Group fail to mention the context in which SDP Marsh adopted the MTIA's proposed facilitative provision (see [13] – [14]) of the CFMMEU (C&G) submission);
- in focussing on the original intent of the Alteration Clause Ai Group repeat a submission dealt with in the *August 2019 Decision* at [218]:

> 'Second, in our view the resolution of the ambiguity is not confined to ascertaining the original intention of the drafter of the clause, given the differences in the statutory context and the fact that the issue arises in the context of the Review. We propose to resolve the ambiguity consistent with our obligation to ensure that modern awards provide a fair and relevant safety net of minimum terms and conditions. It follows that merit arguments and the modern awards objective are relevant to the resolution of the ambiguity in the Alteration clause. Indeed a number of parties addressed such matters in the course of their submissions.'

[53] As to Ai Group's submission regarding the utility in allowing the spread of hours to be altered at both ends, the CFMMEU (C&G) submits:

> 'The only argument they can muster is that the spread of hours provisions in various awards need to be altered, for example in the Manufacturing Award, to allow for the working of 12 hour shifts with an unpaid meal break.
>
> The AiG provide no evidence of 12 hour shift arrangements actually worked by employees covered by the awards to support their argument. This is not surprising as the reality is that where 12 hour shifts are worked, by agreement, the rest breaks and meal breaks are paid for and considered as time worked during the 12 hour shift. Examples of early 12 hour shift agreements that reflect this type of arrangement including the following:
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> - ACI Glass Packaging, Penrith Glass Workers 12 Hour Shift - Certified Agreement 199713 (see clause 9(a)(iii))
> - QBE 12 Hour Shift Agreement 199314 (see clause 7(j))
> - Tasmanian Advanced Minerals Pty. Ltd. Workplace Agreement 2009 (12 Hour Shift Trial And Other Variations)15 (see clause 6.4).[16]

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[15] CFMMEU (C&G) submission 18 October 2019 at [21]

[16] CFMMEU (C&G) submission at [19] – [20]