



**Submissions of the "Automotive, Food, Metals, Engineering,
Printing and Kindred Industries Union" known as the Australian
Manufacturing Workers' Union (AMWU)**

**AM2015/16 Plain language re-drafting – facilitative provisions
altering spread of hours**

COVER SHEET

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Fair Work Act 2009

FAIR WORK COMMISSION

**AM2015/16 Plain Language re-drafting – facilitative provisions altering
spread of hours**

**Reply Submissions of the "Automotive, Food, Metals, Engineering, Printing
and Kindred Industries Union" known as the Australian Manufacturing
Workers' Union (AMWU)**

Introduction

1. These reply submissions are made in accordance with the amended directions of the plain language Full Bench of 27 November 2018.¹
2. On 13 November 2018 the Fair Work Commission issued a Statement² (**the November Statement**).
3. The November Statement identifies a ‘possible ambiguity’³ that has been identified in clauses in modern awards which permit an alteration to the spread of ordinary hours of work (**the alteration clause**). The possible ambiguity identified concerns the phrase:

“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.”⁴

4. The November Statement describes the ‘possible ambiguity’ as follows:

“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”⁵

5. The three possible interpretations can be described as follows:
 - Spread may be altered by 1 hour to shift entire spread (**Interpretation 1**);
 - Spread may be altered by 1 hour at only one end to increase spread by 1 hour (**Interpretation 2**);
 - Spread may be altered by 1 hour at both ends to increase the spread by 2 hours (**Interpretation 3**).

Submissions in response to November Statement

6. On 7 December 2018 the AMWU made submitted that the alteration clause was ambiguous because it could reasonably be interpreted consistently with both

¹ [AM2015/16 4 yearly review of modern awards – plain language re-drafting – facilitative provisions altering spread of hours – amended directions.](#)

² [4 Yearly Review of Modern Awards – plain language re-drafting – facilitative provisions altering spread of hours \[2018\] FWCFB 6849.](#)

³ Ibid [2].

⁴ Manufacturing and Associated Industries and Occupations Award 2010 clause 36.2(c).

⁵ [4 Yearly Review of Modern Awards – plain language re-drafting – facilitative provisions altering spread of hours \[2018\] FWCFB 6849. \[4\].](#)

interpretation 1 and interpretation 2, but not interpretation 3.⁶

7. The AMWU also submitted that interpretation 1 was to be preferred⁷, and the ambiguity should be resolved by varying the alteration clause to clarify that altering the spread of hours does not permit the length of the spread to increase.⁸
8. The following industry parties also made submissions:
 - The Australian Workers' Union (**AWU**)
 - The Shop Distributive and Allied Association (**SDA**)
 - Australian Business Industrial and The NSW Business Chamber Ltd (**ABI**).
 - The Australian Industry Group (**AiG**)
9. This reply submission will reply to the submissions of ABI and AiG.

Response to ABI Submissions

ABI Submission that 'either' means both

10. The ABI submit that:

"the word "either" should be interpreted in this context to allow the variation of the spread of hours at either or both ends of the spread i.e. as meaning: "both" or conversely "one or the other""⁹

11. This submission is self-contradicting. The alteration clause cannot simultaneously mean "each of the two" and "one or other of the two", as appears to be submitted. This is because they are two inherently different propositions
12. If the alteration clause allowed an alteration at both ends of the spread, then it would necessarily also permit an alteration at only one end of the spread. However, the alteration clause is not expressed to allow an alteration at both ends of the spread.
13. The ABI cite the Macquarie dictionary definition of the word "either" in support of their submission that the spread may be altered at both ends of the spread.¹⁰

⁶ [Submissions of the AMWU of 7 December 2018 \[46\].](#)

⁷ Ibid.

⁸ Ibid.

⁹ [Submissions of Australian Business Industrial and NSW Business Chamber Ltd of 7 December 2018 \[2.3\].](#)

¹⁰ Ibid.

14. As cited in the AMWU's 7 December Submissions, the definition of 'either' in the Macquarie dictionary is as follows:

*"adjective 1. one or the other of two: you may sit at either end of the table. 2. each of the two; the one and the other: there are trees on either side of the river. – pronoun 3. one or the other; not both: take either; either is correct."*¹¹

15. The AMWU submits that the definition of 'either' in the Macquarie dictionary does not assist with the ABI's preferred interpretation.

16. Instead the definition supports the AMWU's interpretation that the use of the word 'either', in context, indicates that while an alteration to either one or the other ends of the spread is permissible, ultimately a choice must be made about which end is to be altered.

ABI Submission that Union position is wrong

17. In response to Union submissions favoring interpretation 1, the ABI submit that:

This interpretation appears to rely upon assigning the word "either" with the meaning "one or the other", but not "both".

Further, this interpretation requires the word "altered" to mean changed but not increased. This interpretation is not logically consistent. It is not possible to "shift" the spread of hours at only one end of the spread of hours without increasing or possibly decreasing the number of hours making up the spread of hours. If the number of hours in the spread of hours is to be maintained, the spread of hours must be "shifted" at both ends. Nor is the provision well written to achieve that result. It is not an intuitive reading to understand "altered by up to one hour at either end [...]" to mean the [12 hour spread of hours] (6:00am to 6:00pm) may be shifted by up to one hour in either direction."¹²

18. The AMWU concedes that there is a tension between its two simultaneous submissions that:

- a. The word 'either' means 'one or the other but not both'; and

¹¹ The Concise Macquarie Dictionary Revised Edition Doubleday 1982.

¹² [Submissions of Australian Business Industrial and NSW Business Chamber 7 December 2018](#) [2.5-2.6].

- b. That the alteration clause is intended to operate to allow the spread of hours to be shifted as a block but not increased).
19. However, the AMWU submits that ultimately this tension is reconcilable. If the spread of hours is altered in accordance with interpretation 1, to, for example move the spread from 6.00am-6.00pm to 5.00am-5.00pm the alteration is still only taking place at one end of the spread (in this case the beginning of the spread). It is merely that the other end of the spread gets '*dragged*' in the same direction.
20. This means that the facilitation is still only permitting **one** additional hour to be worked at ordinary time that would otherwise be outside the normal spread of hours, and thus is only being altered at one end of the spread.
21. Thus, it is submitted that the AMWU's preferred interpretation (interpretation 1) is not inconsistent with the Decision of SDP Marsh, and further, is consistent with the way facilitative provisions are intended to operate.¹³

ABI Submission regarding maximum number of daily hours

22. At [2.9] ABI submit that the alteration clause only operates in relation to the spread of ordinary hours as opposed to the number of ordinary hours.¹⁴
23. The AMWU agrees with this submission and further submits that notwithstanding the alteration clause permits an alteration to the spread, the actual maximum number of ordinary hours that may be worked by an employee in any one day remains unchanged and will depend on the construction of the individual award.
24. However, the AMWU does not agree that the fact that alterations to the spread of hours do not change the maximum number of ordinary hours of work per day assists in the ABI construction of the alteration clause.
25. Furthermore, the AMWU strongly disagrees with the submission that:

"this interpretation (interpretation 3) does not result in an outcome which reduces the entitlements of employees."¹⁵

26. This is plainly wrong. Alterations to the spread of hours will necessarily have an effect

¹³ See [Submissions of AMWU of 7 December 2018](#) [16-17].

¹⁴ [Submissions of Australian Business Industrial and NSW Business Chamber 7 December 2018](#) [2.9].

¹⁵ Ibid.

on employee entitlements and have the potential to affect either penalty rates or shift allowance entitlements (depending on the provisions of the particular modern award in question).

27. For example, clause 36.2(d) of the Manufacturing and Associated Industries and Occupations Award provides that any work performed outside of the spread of hours must be paid for at overtime rates.¹⁶

28. This was expressly addressed by Her Honour Senior Deputy President Marsh (albeit in the context of the Graphic Arts Award) where her Honour said in relation to the alteration clause:

“The level of the shift penalty and the overtime rates is not reduced - the facilitation permits an additional hour to be worked at ordinary time without incurring the penalty or overtime rate but only on an agreed basis.”¹⁷

Response to AiG Submission

AiG Submission that either means both

29. The AiG submit that:

“when we drafted the wording of the facilitative provision and made submissions in support of it, we did not contemplate that the word “either” could be interpreted as meaning only one end or the other.”¹⁸

30. This submission does not assist in the interpretation of the alteration clause. The subjective intentions of parties cannot displace the clear language of the text. To this end, as has been pointed out previously by the AMWU, it is instructive that the alteration clause does not permit an alteration at ‘each’ ends of the spread or ‘either or both’ ends of the spread.

AiG Submissions regarding the history of the alteration clause

31. The AiG appears to submit that the reason that the text of the Graphic Arts alteration clause is different to the clause in Manufacturing is because Senior Deputy President Marsh accepted the submissions of the AMWU and decided to clarify that the spread

¹⁶ Manufacturing and Associated Industries and Occupations Award 2010 clause 36.2(d).

¹⁷ Graphic Arts – General – Interim Award 1995 Print R7898 [144].

¹⁸ [Submission of the Australian Industry Group of 7 December 2018](#) [5].

may only be altered at one or the other ends of the spread but not both.¹⁹

32. This is an unsubstantiated assertion. There is nothing in the Graphic Arts Award Simplification decision to indicate that Her Honour specifically changed the wording in response to submissions of the AMWU.

33. On the contrary, Her Honour's comments at [114] of the Graphic Arts Award Simplification Decision²⁰ indicate that alteration clause in the Graphic Arts Award was intended to operate in the same way as the alteration clause in the Metals Award.

AiG Submission regarding a loss of flexibility

34. At [15] the AiG say they oppose "*the loss of the existing flexibility to vary the spread of hours at both ends of the spread of hours.*"²¹

35. The AMWU says that this is not a loss of flexibility, because the alteration clause currently does not permit an alteration at both ends of the spread.

36. The AMWU further notes, that the AiG has not adduced any evidence of the alteration clause being used in such a way to support their submission that changing the alteration clause would result in a loss of flexibility.

AiG Submission regarding individual facilitation

37. At [16] the AiG submit that:

*"it is critical that different individual employees in an enterprise are able to agree to a variation at different ends of the spread"*²²

38. The AMWU submits that whether this is permissible will depend on a construction of the particular modern award.

39. For example, if a modern award, permitted an alteration to the spread of ordinary hours by individual facilitation, then prima facie, the flexibility identified by the AiG would be permissible, subject to any limitations or restrictions.

40. However, if individual facilitation were not permissible, then the flexibility identified

¹⁹ Ibid [10].

²⁰ Graphic Arts – General – Interim Award 1995 Print R7898 [144].

²¹ [Submission of the Australian Industry Group of 7 December 2018](#) [15].

²² Ibid [16].

by the AiG would not be permissible.

41. Furthermore, even in circumstances where an award *does* permit individual facilitation, there may be other caveats or restrictions on using facilitative provisions on an individual basis.

42. For example, the Manufacturing Award provides that the spread of ordinary hours may be altered:

“by agreement between an employer and the majority of employees concerned or, in appropriate circumstances, (emphasis added) between the employer and an individual employee”²³

43. The AMWU submits that such restrictions should not be disturbed by this process.

End

21 December 2018

²³ Manufacturing and Associated Industries and Occupations Award 2010 clause 36.2.