



Fair Work Commission: 4 Yearly Review of Modern Awards

SUBMISSION

**PLAIN LANGUAGE RE-DRAFTING - FACILITATIVE
PROVISIONS ALTERING SPREAD OF HOURS**

(AM2016/15)

7 DECEMBER 2018

AUSTRALIAN BUSINESS INDUSTRIAL

- and -

THE NSW BUSINESS CHAMBER LTD

1. BACKGROUND

- 1.1 This submission is filed by Australian Business Industrial (**ABI**) and the NSW Business Chamber Ltd (**NSWBC**) and relates to the Statement issued by the Fair Work Commission (**Commission**) on 13 November 2018 in respect of the facilitative provisions altering the spread of hours in modern awards.
- 1.2 ABI is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth) and the NSWBC is a recognised State registered association pursuant to Schedule 2 of the *Fair Work (Registered Organisation) Act 2009* (Cth).

2. THE CLAUSE

- 2.1 In May 2015, the Fair Work Ombudsman (**FWO**) identified ambiguity in the operation of a clause found in a number of modern awards which allows for the alteration of the span of ordinary hours by up to one hour at either end of the span. An example of the wording is found at clause 30.2(c) of the *Food, Beverage and Tobacco Manufacturing Award 2010*:

(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)

- 2.2 ABI and NSWBC acknowledge a degree of ambiguity in the drafting of the provision. There appear to be three possible meanings for the provision:
- (a) Firstly, the spread of hours may be altered by up to one hour at one end of the spread only; Secondly, the spread of hours may be altered by up to one hour at one end or at both ends (which would result in an increase or decrease in the spread of hours by a maximum of two hours); or
- (b) Thirdly, that the spread of hours may be altered by up to one hour at both ends of the spread, so that the number of hours in the spread of hours remains the same but shifts by up to an hour earlier or later in the day (in which case the number of hours in the spread remains the same).
- 2.3 The ambiguity arises as a result of the varied meanings of the word “either”. ABI and NSWBC 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”. In support of this proposition, ABI and NSWBC note the definition of “either” in the Macquarie Concise Dictionary as follows:

1. one or the other of two... 2. each of the two; the one and the other... 3. One or the other but not both....

- 2.4 This interpretation demonstrates that the interpretation outlined at outlined at 2.2(a)¹2.2(a) is the most appropriate for the practical and fair operation of the clause.
- 2.5 ABI and NSWBC do not agree with the position advanced by union parties in respect of a number of the relevant Awards; relevantly, that the clause should be interpreted such that the provisions allow the spread of hours to be shifted by one hour at one of the ends of the spread such that the total length of the spread of hours does not increase (i.e. the third possible interpretation as outlined at 2.2(b)).² This interpretation appears to rely upon assigning the word “either” with the meaning “one or the other”, but not “both”.
- 2.6 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.
- 2.7 The intention of the clause is as a facilitative provision which provides for rostering flexibility for employees and employers, by permitting agreement on an extended period during the day when day work employees can work their ordinary hours. Ordinary time work within the spread remains subject to the constraints on ordinary hours, that is a maximum average of 38 hours per week (depending on the award), most often worked at a rate of 7.6 or 8 hours per day, or longer , (including possibly 12 hours in a day). The

¹ See also submissions filed in respect of the *Business Equipment Award 2010, Clerks - Private Sector Award 2010* and the *Storage Services and Wholesale Award 2010*.

² See, for example: the AWU submission in respect of the *Aquaculture Industry Award 2010* and the *Seafood Processing Award 2010*, the AWMU in respect of the *Manufacturing and Associated Industries and Occupations Award 2010*, the *Pharmaceutical Industry Award 2010*, the *Seafood Processing Award 2010* and the submissions of employee parties in respect of the *Storage Services and Wholesale Award*.

provision applies to individual day work employees as well as to work groups or sections, and both arrangements can coexist.

- 2.8 There is little justification for limiting the provisions to apply to only one end of the spread of hours at a time. ABI and NSWBC submit that this is particularly so given that an election to vary the spread of hours at one end does not practically exclude variation of the spread at the other.
- 2.9 This interpretation of the clause does not result in an outcome which reduces the entitlements of employees. The clause may only operate by agreement and only in relation to the *spread* of ordinary hours, as opposed to *number* of ordinary hours worked by an individual employee.
- 2.10 In this way, the interpretation preferred by ABI and NSWBC does not fall into conflict with the approach endorsed by Senior Deputy President Marsh in her decision in the review of the *Graphic Arts - General - Interim Award 1995* during the Award Simplification proceedings (and which is referred to at [11]-[15] of the Statement).³ The Deputy President emphasised that the clause is intended to operate such that an additional hour may be worked at ordinary time by an employee or group of employees, without incurring the penalty or overtime rate. This is the practical effect of the interpretation preferred by our clients, as the limitation on the number of ordinary hours worked on a particular day is not affected, but rather the spread over which those hours may be worked by particular employees.
- 2.11 If the Commission is not minded accept the above interpretation, ABI and NSWBC submit in the alternative that the clause should be understood to allow the *extension* of the spread of ordinary hours at the beginning or the end of the spread (i.e. the interpretation as outlined at 2.2(a)).

3. CONCLUSION

- 3.1 In putting these reply submissions, ABI and NSWBC seek to properly assist the Commission in the discharge of its discretion pursuant to section 156 of the *Fair Work Act 2009* (Cth).

³ Print R7898, 5 August 1999.

3.2 If you have any questions in relation to these submissions, please contact Kate Thomson on (02) 4989 1003.



Luis Izzo
Director

Australian Business Lawyers & Advisors Pty Limited
(02) 9458 7640
luis.izzo@ablawyers.com.au

Kate Thomson
Senior Associate

Australian Business Lawyers & Advisors Pty Limited
(02) 4989 1003
kate.thomson@ablawyers.com.au

On behalf of Australian Business Industrial and the NSW Business Chamber Ltd