

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Plain language re-drafting -
facilitative provisions altering
spread of hours
(AM2016/15)

6 December 2018

Ai
GROUP

4 YEARLY REVIEW OF MODERN AWARDS

AM2016/15 – PLAIN LANGUAGE RE-DRAFTING

1. INTRODUCTION

1. This submission is made by the Australian Industry Group (**Ai Group**) in response to the Commission’s Statement of 13 November 2018 ([2018] FWC 6849) regarding the plain language redrafting of facilitative provisions concerning the spread of hours.
2. The relevant clause arose from a proposal of the Metal Trades Industry Association of Australia (**MTIA** – a predecessor organisation of Ai Group) pursued in the 1996-98 award simplification proceedings relating to the Metal Industry Award.
3. The clause that MTIA proposed was adopted without modification into the *Metal Engineering and Associated Industries Award 1998* (**Metals Award 1998**) and similar clauses were subsequently included in numerous other awards.
4. The following extract from Marsh SDP’s *Metal Industry Award Simplification Decision*¹ is relevant:

6.1.1(c)

MTFU

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.

MTIA

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 (ie. 6.00am 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.

I adopt the reasoning in 6.1.1(b) in relation to the potential impact of the additional flexibility sought by MTIA. It may well be that access to more a flexible span of ordinary hours meets the needs of particular employees while achieving greater workplace flexibility. The

¹ Print P9311.

appropriate safeguards should ensure arrangements are genuinely agreed to by an employee or the majority of employees.

This provision will be inserted into the award and will be subject to the safeguards in clauses 2.2.2 (Facilitation by Individual Agreement) and 2.2.3 (Facilitation by Majority Agreement).

5. When we drafted the wording of the facilitative provision and made submissions to the Australian Industrial Relations Commission (**AIRC**) in support of it, we did not contemplate that the word “either” could be interpreted as meaning only one end or the other.
6. The meaning of “either” was not focussed on in the metal industry award simplification proceedings. This issue of contention came up in subsequent negotiations between Ai Group and the AMWU regarding the graphic arts award simplification proceedings.
7. After the *Metal Industry Award Simplification Decision* was handed down by Marsh SDP on 11 March 1998, Her Honour, Ai Group and the AMWU focussed attention on the simplification of the Graphic Arts Award.
8. Many of the facilitative provisions that had been inserted into the Metals Award 1998, were considered by the parties and the AIRC for inclusion in the Graphic Arts Award.
9. At the time, Ai Group and the AMWU expressed differing, strong views on the meaning of “either”. Ai Group submitted that “either” meant one end or both ends, as Ai Group had intended when we drafted the provision. The AMWU submitted that “either” meant one end or the other, but not both. Agreement was not able to be reached and the matter was arbitrated.
10. In the *Graphic Arts Award Simplification Decision*² of 5 August 1999, Marsh SDP decided to include facilitative provisions in the *Graphic Arts – General – Award 2000* allowing the spread of hours to be extended but inserted the following words in the clause in response to the submissions of the AMWU: (Emphasis added)

² Print R7898.

6.1.1(a) Spread of hours

6.1.1(a)(i) The ordinary hours of work are to be worked continuously, except for meal breaks, at the discretion of the employer, in the spread of hours between 7.00 a.m. and 6.00 p.m. However, the ordinary hours of work for employees engaged to clean the premises or attend to heating apparatus for the machines or buildings may be between the hours of 6.30 a.m. and 6 p.m.

6.1.1(a)(ii) The daily spread of hours may be altered 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. This is subject to Level 2 Facilitation. Provided that where agreement has been reached with the majority of employees in the workplace or section or sections of it, the employer may not implement the agreement unless agreement has been reached with each individual employee to be covered by the facilitative provision.

6.1.1(a)(iii) The daily spread of hours may be altered by up to one hour at one end of the spread (but not both), by agreement between the employer and an individual employee. This agreement is subject to Level 2 Facilitation and may:

11. It can be seen that Marsh SDP decided:

- To not use the word “either” in the Graphic Arts Award given the differences of views between Ai Group and the AMWU about the meaning of the expression in the Metals Award 1998;
- To only allow an employer and the majority of employees to agree to an extension at one end of the 7.00am to 6.00pm spread of hours in the Graphic Arts Award;
- To allow an extension at both ends of the 7.00am to 6.00pm spread of hours by agreement between the employer and different individual employees in the enterprise, i.e. an individual employee in an enterprise could only agree to extend the spread of hours applicable to him or her at one end, but a different individual employee in the same enterprise could agree to an extension at the other end of the spread of hours. For example, the spread of hours for one individual employee in the enterprise could be 6.00am to 6.00pm and the spread of hours for a different individual employee could be 7.00am to 7.00pm.

12. The flexibility in the third dot point above is critical because:
- Different employees in the same enterprise often have a need for flexibility at different ends of the day. Often employees have arrangements with their partners whereby one drops off the children at school or childcare in the morning and the other picks up the children. For example (assuming that the relevant award has a 6am – 6pm spread of hours, with an ability to extend by up to one hour at either end):
 - One employee in the enterprise may wish to drop off children at school or childcare in the morning and consequently wish to start later (e.g. 10am) and finish later (e.g. 6.30pm).
 - Another employee in the same enterprise may wish to pick up children from school or childcare and wish to start earlier (e.g. 5.30am) and finish earlier (e.g. 2.00pm).
 - Enterprises often have a need for flexibility at different ends of the day for different classifications or for different employees, e.g. one employee may start work early to open up the workshop, and another employee may finish late to lock up the workshop.
13. The meaning of “either” remained unsettled in the Metals Award 1998 and in the *Manufacturing and Associated Industries and Occupations Award 2010 (Manufacturing Award)*. Ai Group and the AMWU continued to hold the same contested views that were held in 1998. The issue came up again in the 4 Yearly Review of Awards as a result of an AMWU claim.
14. The Commission’s Statement of 13 November 2018 refers to the submissions of the AMWU and a few other parties in respect of this matter but does not refer to Ai Group’s [submission](#) of 12 November 2014 which includes the following content:

Clause 13.2(c) – Ordinary hours of work – day work

161. The AMWU proposes to insert the following words to clause 13.2(c) of the Award, which sets out the spread of ordinary hours for day workers (6am to 6pm) and permits variation to the spread by one hour at either end if the employer and employees concerned agree: “Subject to clause 5.3 and subject to maintaining a 12 hour spread.”
 162. The AMWU submits that the word “either” in clause 13.2(c) is intended to mean “one or the other; not both” and cite the Concise Macquarie Dictionary to support this view. Ai Group does not agree with the union’s submission. The word “either” can mean one or the other, or both.
 163. It is important that flexibility be maintained and that existing work arrangements are not disturbed. For example, it may suit one employee in a workplace, due to family responsibilities, to have a spread of hours between 5am and 5pm, and another employee in that workplace to have a spread of hours between 7am and 7pm, by agreement with the employer. The union’s proposed variation would disturb such arrangements.
 164. The award applies to a very large number of employees in a very large number of workplaces and it is impossible for the Commission to understand the full, negative impacts of the union’s proposed amendment. Therefore, the amendment should be rejected.
15. Ai Group opposes the loss of the existing flexibility to vary the spread of hours at both ends of the spread of hours.
 16. However, if the Commission decides that one employee should not have flexibility to agree to vary the spread of hours at both ends, it is critical that different individual employees in an enterprise are able to agree to a variation at different ends of the spread for the reasons referred to in paragraph 12 above, and consistent with Marsh SDP’s *Graphic Arts Award Simplification Decision*.