

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

**AM2016/15 Plain Language re-drafting – facilitative provisions  
altering spread of hours**

**COVER SHEET**

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*Fair Work Act 2009*

FAIR WORK COMMISSION

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## Introduction

1. The AMWU makes the following submissions in relation to the span of hours issue in accordance with the amended Directions of the plain language Full Bench of 27 November 2018.<sup>1</sup>

## Background

2. On 13 November 2018 the Fair Work Commission issued a Statement<sup>2</sup> (**the November Statement**).
3. The November Statement identifies a ‘possible ambiguity’<sup>3</sup> 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.”<sup>4</sup>*

4. The above text is taken from the clause 36.2 of the current Manufacturing and Associated Industries and Occupations Award 2010 (**the Manufacturing Award**), however the phrase appears in substantially the same terms in a number of modern awards, as identified in the Attachment B which is annexed to the November Statement.
5. The November statement calls for submissions both in relation to the “span of hours issue as well as the list of Awards at Attachment B.”<sup>5</sup>
6. It is convenient to deal with the second item first.

## List of Awards at Attachment B

7. The AMWU submits that the list of Awards at Attachment B is accurate, in that the 11 awards listed contain an alteration clause in substantially the same terms.
8. However, the AMWU would note that the Airline Operations Ground Staff Award

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<sup>1</sup> [Amended Directions of the Plain Language Full Bench 27 November 2018](#).

<sup>2</sup> 4 Yearly Review of Modern Awards – plain language re-drafting – facilitative provisions altering spread of hours [2018] FWCFB 6849.

<sup>3</sup> Ibid [2].

<sup>4</sup> Manufacturing and Associated Industries and Occupations Award 2010 clause 36.2(c).

<sup>5</sup> 4 Yearly Review of Modern Awards – plain language re-drafting – facilitative provisions altering spread of hours [2018] FWCFB 6849 [2018] FWCFB 6849 [19].

2010 (**the Ground Staff Award**) also has an alteration clause (see clause 28.2(c)) in substantially the same terms as the other awards listed at attachment B.

9. Therefore, the AMWU submits that the Ground Staff Award should be added to the list at Attachment B.

### **The Span of Hours Issue**

10. 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”<sup>6</sup>*

11. 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**);

12. These submissions will address each of the three possible interpretations that have been put and argue that:

- a. The clause could reasonably be interpreted in accordance with either interpretation 1, or interpretation 2;
- b. That, therefore, the alteration clause is self-evidently ambiguous; but that
- c. Interpretation 3 is clearly wrong and not available on the text.

### ***Interpretation 1***

13. The AMWU has always understood that the purpose of the alteration clause was to provide for an alteration of the entire spread hours, so that the spread moves as a block, but that only one additional hour (that otherwise wouldn’t be permitted to have been worked at ordinary time) is allowed.

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<sup>6</sup> Ibid [4].

14. 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.

15. The AMWU submits that it is necessary to read the alteration clause in context of the Award as a whole, particularly the provisions that make it clear that it is not the role of facilitative provisions to diminish an entitlement. For example, clause 8.1(b) of the Manufacturing Award provides:

*"The specific award provisions establish both the standard award condition and the framework within which agreement can be reached as to how the particular provisions should be applied in practice. Facilitative provisions are not to be used as a device to avoid award obligations nor should they result in unfairness to an employee or employees covered by this award."*<sup>7</sup>

16. When read in the context of the Award as a whole, and particularly clause 8.1(b) the Manufacturing Award, the AMWU submits that Interpretation 1 should be preferred.

17. This is because interpretation 1 is consistent with the role of the facilitative provisions, in that it allows employees and employers the flexibility to move the spread of ordinary hours, but not to increase it (which may affect shift rates and/or penalties), meaning an avoidance of other award obligations.

### ***Interpretation 2***

18. As discussed above, the AMWU has traditionally understood the intent of this clause to be to provide for flexible spread of ordinary hours, but not to add a 13<sup>th</sup> or 14<sup>th</sup> hour to the spread.

19. However, it is conceded that a reasonable interpretation of the alteration clause would allow the clause to be interpreted to mean that a 13<sup>th</sup> or 'additional' hour may be added to either end of the spread of ordinary hours.

20. This is so because there is nothing in the text of the alteration clause that explicitly prevents a 13<sup>th</sup> hour from being added to the total spread.

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<sup>7</sup> Manufacturing Award clause 8.1(b).

21. Furthermore, the words “*by up to one hour*” together with the word *either* suggests a facilitation is allowed to add one hour to either end of the spread (but not both).

### **Interpretation 3**

22. The AMWU submits that interpretation 3 is clearly wrong. The alteration clause in its current form does not permit an additional hour to be added to both ends of the spread as per interpretation 3.

23. Put simply, if the clause was intended to allow for an additional hour at both ends of the spread, there are a myriad of ways the clause could be expressed to make clear that intended operation.

24. To this end, it is instructive that the clause does not read:

- “*by up to one hour at both ends of the spread*”; nor
- “*by up to one hour at each ends of the spread*”; nor
- “*By up to one hour at either or both ends of the spread*”

25. Rather, the alteration clause expresses the alteration as permissible at ‘either’ end of the spread.

26. As noted in the November Statement the Macquarie Dictionary defines the word ‘either’ 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.”*<sup>8</sup>

27. As is made clear from the Macquarie dictionary definition, the word ‘either’ can have multiple meaning, depending on the context.

28. The AMWU submits that the word ‘*either*’, when read in context, should be taken to mean “one or the other; not both.”

29. This is so because when read in conjunction with the words “*up to*” it is clear to a reasonable person that the total spread may only be altered by “*up to*” one hour. If the alteration clause permitted the spread to be increased by one hour at both ends,

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<sup>8</sup> The Concise Macquarie Dictionary Revised Edition Doubleday 1982.

then the words ‘*up to*’ would have no work to do because the same meaning could be obtained by phrasing the clause: “*may be increased by one hour at either end of the spread.*”

30. If this logic is followed to its inevitable conclusion, then it follows that the word ‘either’ read and construed in context, must mean “*one or the other but not both.*”

### ***The Alteration Clause is Ambiguous***

31. Considering the AMWU submissions above, the AMWU submits that the alteration clause is ambiguous (i.e. capable of two or more meanings) because it could reasonably be interpreted in accordance with either interpretation 1 or interpretation 2.
32. The AMWU submits that considering the identified ambiguity, it is permissible to have regard to the surrounding circumstances to aid in the interpretation and resolution of the ambiguity.

### ***Metal Industry Award Simplification***

33. As noted in the November Statement, the alteration clause in the Manufacturing Award was the subject of arbitration during Award Simplification before Her Honour Senior Deputy President Marsh.<sup>9</sup>
34. The November statement indicates that the Decision in Metals does not assist in the interpretation of the alteration clause,<sup>10</sup> a statement that the AMWU agrees with.
35. However, the following except from the transcript of that arbitration supports the AMWU’s submissions that the alteration clause was intended to operate in accordance with interpretation 1:

*“Mr Smith: It may. For example, your Honour, if the spread of hours in a particular place was 6am to 6pm, and in that workplace it made sense, because it was a service facility for service to be carried out between 6pm and 7pm rather than, you know, at the other end of the day, because no-one was there, that they may agree to vary the spread to 7am until 7pm, rather than 6am until 6pm. So*

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<sup>9</sup> Metals Industry Award – Award Simplification Print P9311 11 March 1998.

<sup>10</sup> 4 Yearly Review of Modern Awards – plain language re-drafting – facilitative provisions altering spread of hours [2018] FWCFB 6849 [12].

*there could be some consequences for penalty rates.....*"<sup>11</sup>

### **Graphic Arts Award Simplification**

36. The Decision of Her Honour Senior Deputy President Marsh in relation to the Graphic Arts Award is also instructive. Her Honour says at [147]:

*"I make it clear that the introduction of a facilitative clause as sought by the employers falls within the scope of facilitation decided in ASD. 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."*<sup>12</sup>

37. The above passage establishes that Her Honour found that the facilitation (as sought by the Employers) permits an 'additional hour' to be worked at ordinary time. The Graphic Arts Decision makes clear that the facilitation does not permit an additional two hours to be worked at ordinary time (which would be the practical effect of interpretation 3).

38. However, it is relevant that the clause inserted into the Graphic Arts Award is not in the same term as in Metals. The clause in the Graphic Arts Award provides:

*"The daily spread of hours may be altered by up to one hour at one end of the spread (but not both)"*<sup>13</sup>

39. In the Graphic Arts Decision at [144] Her Honour stated:

*"I have given careful consideration to the competing considerations before me and I repeat the conclusion I reached in Metals:*

*"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 a more flexible span of ordinary hours meets the needs of particular employees while achieving greater workplace flexibility. The appropriate safeguards should ensure arrangements are genuinely agreed to by an employee or the majority of*

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<sup>11</sup> Transcript paragraph 25, p.172 of C Nos 24164 and 24165; 22/12/97 (as cited in [AMWU Submissions of 29 October 2014](#) AT [45].

<sup>12</sup> Graphic Arts – General – Interim Award 1995 Print R7898 [147].

<sup>13</sup> Graphic Arts, Printing and Publishing Award 2010 clause 30.2(a)(iii).

*employees.*"<sup>14</sup>

40. Considering Her Honour confirms that her reasoning for finding that additional flexibility is required is the same for the Graphic Arts Award that it was for the Metal Industry Award. It is reasonable to draw an inference that the facilitation was intended to operate the same way as it operates in Metals.
41. The Graphic Arts alteration clause self-evidently does not permit an additional hour at both ends of the spread. Consequently, the AMWU submits that the alteration clause in the Manufacturing Award (and the other awards identified at Attachment B as being in substantially the same terms) should also be interpreted in that way.
42. Such an interpretation would be consistent with both interpretation 1 and interpretation 2.

### ***Resolving the Ambiguity***

43. If the Full Bench considers the alteration clause to be ambiguous, the AMWU respectfully invites the Full Bench to consider varying the alteration clauses in the awards identified at Attachment B (plus the Airline Operations - Ground Staff Award) to make it clear that the alteration clause does not permit an increase to the total spread of ordinary hours.
44. This could be done in similar terms to the AMWU's proposed variation to the Pharmaceutical Industry Award 2010<sup>15</sup>(although it would of course be necessary to tailor the variation to the particulars of each individual award).
45. The AMWU submits that such a variation would be:
  - a. Consistent with the apparent intended operation of the alteration clause (see [34]); and
  - b. Consistent with the purpose of facilitative provisions (see [15]).

### **Conclusion**

46. The AMWU concludes by submitting the following:

➤ The alteration clause appears to be ambiguous.

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<sup>14</sup> Graphic Arts – General – Interim Award 1995 Print R7898 [144].

<sup>15</sup> [Submissions of the AMWU 25 November 2014.](#)

- It could reasonably be interpreted in accordance with interpretation 1 and interpretation 2 (but read in context interpretation 1 is to be preferred).
- It cannot reasonably be interpreted in accordance with interpretation 3.
- The ambiguity can and should be resolved by clarifying that the facilitation does not permit an increase to the total spread of hours.

47. The AMWU is content for this matter to be dealt with on the papers, and we do not seek a hearing.

**END**

**AMWU 7 December 2018.**