

Fair Work Commission
Level 10, Terrace Tower, 80 William Street
EAST SYDNEY NSW 2011
Via email: AMOD@fwc.gov.au

11 December 2018

Re: AM2016/15 – plain language redrafting – facilitative provisions altering spread of hours

BACKGROUND

1. A Full Bench of the Fair Work Commission headed by Justice Ross published a Statement¹ regarding the above matter on 13 November 2018.
2. The Full Bench has invited interested parties to make submissions in relation to the span of hours issue and the list of awards at Attachment B to the Statement.
3. These submissions of the Australian Workers' Union (**AWU**) are filed in accordance with that invitation.

SUBMISSIONS

4. The AWU has a presence in a number of awards that provide for the alteration of the span of ordinary hours by facilitative provision. These awards include many listed at Schedule B:
 - 4.1. *Aquaculture Industry Award 2010*;
 - 4.2. *Food, Beverage and Tobacco Manufacturing Award 2010*
 - 4.3. *Hydrocarbons Industry (Upstream) Award 2010*;
 - 4.4. *Manufacturing and Associated Industries and Occupations Award 2010*;
 - 4.5. *Seafood Processing Award 2010*;
 - 4.6. *Storage Services and Wholesale Award 2010*; and
 - 4.7. *Sugar industry Award 2010*.

¹ [2018] FWCFB 6849

5. The AWU notes that the *Airline Operations – Ground Staff Award 2010* should be added to the list at Schedule B to the Statement as a similar facilitative provision appears at 28.2(c) of that award.
6. The AWU has made submissions during the award review process concerning the operation of a facilitative provision of this nature for a number of the awards listed above. The AWU accepts that the operation of the provisions is ambiguous.
7. Of the possible interpretations of the provision listed in the Statement², the AWU has made submissions throughout the review that are consistent with either the first or the second interpretation, which are:
 - 7.1. that the facilitative provision allows the span of ordinary hours to be *shifted* without any increase to the amount of hours in the span³; and
 - 7.2. that the facilitative provision allows the span of ordinary hours to be *increased* by up to one hour in total on one end of the span only⁴.
8. The AWU concedes that on the basis of the words chosen for the provision – specifically ‘either’ – and the consideration of the operation of such a clause given by Senior Deputy President Marsh in the *Graphic Arts – General – Interim Award 1995*⁵ Decision, the intention of the provision seems to be to allow the span of hours to be *increased* by up to one hour in total on one end of the span only.
9. Consistent with our previous submissions⁶, the AWU considers that the words ‘by up to one hour at *either* end’ indicates that a choice *between* both ends of the span must be made. This precludes any argument that the span of hours can be extended by up to one hour at each end, which would effectively extend the span of hours by up to two hours in total, as the words do not permit that interpretation.
10. The AWU accepts that such an interpretation also largely precludes an argument that the span of hours may be shifted whilst maintaining the same spread of hours, because this would necessarily involve a change to both ends of the span – for example, a shift from 0600 – 1800 to 0700 – 1900.

² [2018] FWCFB 6849 at [4]

³ Such as for the *Hydrocarbons Industry (Upstream) Award 2010* and the *Aquaculture Industry Award 2010*

⁴ Such as for the *Storage Services and Wholesale Award 2010* and the *Sugar industry Award 2010*

⁵ [Print R7898], 5 August 1999

⁶ AWU Submissions re: AM2014/214, 15 July 2015

11. However, the AWU takes this opportunity to re-iterate that a provision that allows the span of hours to be shifted but not extended has considerable merit and should be considered by the Full Bench to be a potential outcome for this matter.
12. A facilitative provision that allows an employer and its employees to agree to shift the span of ordinary hours by up to one hour in either direction provides some flexibility for the employer in determining an amended span of hours to suit the employer, but does not subject employees to an *increased* span of hours that would necessarily mean the potential forfeiture of *more* shift loadings and/or penalties that the employees would have otherwise been entitled to.
13. The AWU notes that it is not the role of facilitative provisions to assist employers to avoid award entitlements, and we submit that any decision regarding the operation of this particular provision should be made through that lens.
14. The AWU considers that although it will be helpful for a Full Bench to determine the proper operation of this type of facilitative provision, that assistance will be limited unless the determination applies to all awards that currently allow for the span of ordinary hours to be altered by agreement – including clause 22.2(b) of the *Hydrocarbons Award*.
15. The AWU submits that despite the relevant clause in the *Hydrocarbons Award* not being in the exact same terms as the other facilitative provisions that allow for the amendment of the span of hours by agreement, and having been the subject of a previous Full Bench Decision⁷, the clause in this award is intended to have the same effect as it has in other awards.
16. Accordingly, the content of clause 22.2(b) of the *Hydrocarbons Award* should be amended to reflect the manner in which facilitative provisions that permit the alteration of the span of ordinary hours are intended to operate as determined by this Full Bench. This will ensure that the provision operates in a uniform manner across the relevant awards, and will avoid any future confusion.
17. The AWU considers that the best balance between employer interests and employee interests that a provision that allows for the span of ordinary hours to be altered by agreement can strike is for the span of hours to be *shifted* by up to one hour in either direction, but not extended. This ensures a degree of flexibility for the award-covered employer to vary the span of hours in the award to suit the business with the least potential negative affect on employees.

⁷ [2015] FWCFB 7236 at [44], [45]

18. The AWU notes that there is no countervailing benefit for the employees who agree to the amendment of ordinary hours, and therefore the impact on such employees of a variation to their ordinary hours must be kept to an absolute minimum.
19. The extension of ordinary hours is almost certain to cause employees to forfeit loadings or penalties that are likely to have applied had the ordinary hours not been extended, and the greater the extension, the greater the potential detriment.
20. The AWU submits that the operation of the facilitative provision to allow the alteration of the span of ordinary hours is open to a number of interpretations, and this should be remedied with a consistent approach across all awards.
21. On the basis of the words used in the provision and the previous consideration given to a similar provision by the Australian Industrial Relations Commission, the AWU concedes that the facilitative provision ostensibly allows an employer and its employees to agree to add an additional hour to one end of the span of ordinary hours.
22. However, in terms of the potential effect of the provision on employees, particularly in recognition of the forfeiture of loadings and penalties that otherwise would have been payable and additionally that no countervailing benefit exists for employees agreeing to alter the span of ordinary hours, the alteration permitted by the provision should be restricted to the ordinary hours being *shifted*, not extended.

Yours Faithfully,



Zachary Duncalfe
NATIONAL LEGAL OFFICER
The Australian Workers' Union