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## AM2016/15 Plain language – spread of hours clauses

### Introduction

1. These submissions are made in accordance with the directions of the Plain language Full Bench issued on 2 September 2019.<sup>1</sup>

### Background

2. On 13 November 2019, the Plain language Full Bench issued a Statement which identified a potential ambiguity in the facilitative clauses in a number of awards relating to agreements to alter the span of ordinary hours<sup>2</sup> and called for submissions in relation to the issue.<sup>3</sup>
3. The AMWU filed a submission on 7 December 2018<sup>4</sup>, and a reply submission on 21 December 2018<sup>5</sup> in accordance with the amended directions of the Full Bench.<sup>6</sup>
4. On 20 August 2019, the Plain Language Full Bench issued a Decision (**August Decision**) which dealt with several matters related to the 'Plain language project.'<sup>7</sup>
5. Paragraphs [154]-[235] of the Decision deal with 'spread of hours' clauses in modern awards that were the subject of the published Statement and submissions referred to in paragraphs [2]-[3] (above). In the Decision, the Full Bench expressed a number of provisional views in relation to the matter.
6. The provisional views of the Full Bench can be summarised as follows:
  - Alteration clauses were intended to operate so that an agreement made with a group of employees, or, where available, with an individual employee, permitted

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<sup>1</sup> *4 yearly review of modern awards – plain language re-drafting – facilitative provisions altering spread of hours* [2019] FWCFB 6060 [7].

<sup>2</sup> *4 yearly review of modern awards – plain language re-drafting – facilitative provisions altering spread of hours* [2018] FWCFB 6849 [2].

<sup>3</sup> *Ibid* [18].

<sup>4</sup> [AM2016/15 Submission of the AMWU filed 7 December 2018.](#)

<sup>5</sup> [AM2016/15 Submission of the AMWU filed 21 December 2018.](#)

<sup>6</sup> [AM2016/15 4 yearly review of modern awards – plain language red-drafting – facilitative provisions altering spread of hours – amended directions issued 27 November 2018.](#)

<sup>7</sup> *4 Yearly Review of Modern Awards – Plain Language Project* [2019] FWCFB 5409.

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an alteration to shift the entire spread of hours forward by one hour or back by one hour;<sup>8</sup>

- The alteration clauses were not intended to prohibit different agreements being reached with different groups in an enterprise or, where an Alteration clause permits agreement to be reached with individual employees, different agreements being reached with different individuals;<sup>9</sup>
  - To the extent that there is doubt as to the current capacity for employers and employees to take such an approach under the alteration clauses, they should be varied to make it clear that such a capacity exists.<sup>10</sup>
  - That the awards being reviewed should be varied consistent with the above principles;<sup>11</sup> and that
  - Such variations are necessary to achieve the modern awards objective and that in particular the variations will promote flexible modern work practices and ensure that the awards are simple and easy to understand.<sup>12</sup>
7. On 2 September 2019 a Statement was issued by the Full Bench, inviting interested parties to comment on the provisional views and draft that were published together with the Statement. <sup>13</sup>
8. In accordance with this invitation, the AMWU makes the following comments, both generally in response to the ‘provisional views’ and also in response to the draft determinations.

### **AMWU Submissions in Response to the Provisional Views of the Full Bench**

9. The AMWU generally agrees with and supports the provisional views of the Full Bench, particularly the view that:

*“the Alteration clauses were intended to operate so that an agreement made with a group of employees or, where available, with an individual employee, permitted an alteration to shift the entire spread of hours forward by one hour or back by one hour.”<sup>14</sup>*

This conclusion is consistent with the submissions that the AMWU made in relation to the alteration clauses.<sup>15</sup> Furthermore, the AMWU can advise that it considers that the words proposed in the draft determinations that *“The spread of hours (6.00 am to 6.00 pm) may*

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<sup>8</sup> Ibid [228]

<sup>9</sup> Ibid [229].

<sup>10</sup> Ibid [230].

<sup>11</sup> Ibid [231].

<sup>12</sup> Ibid.

<sup>13</sup> *4 yearly review of modern awards – plain language re-drafting – facilitative provisions altering spread of hours* [2019] FWCFB 6060 [7].

<sup>14</sup> *4 Yearly Review of Modern Awards – Plain Language Project* [2019] FWCFB 5409 [228].

<sup>15</sup> [15 AM2016/15 Submission of the AMWU filed 7 December 2018.](#) [13].

*be moved up to one hour forward or one hour back*<sup>16</sup> achieve the objective of clarifying that the alteration clauses permit the spread of hours to be shifted as a whole but not increased.

10. With respect to the provisional view that *“the alteration clauses were not intended to prohibit different agreements being reached with different groups in an enterprise”*<sup>17</sup> the AMWU concedes that in relation to the awards that permit an alteration by individual facilitation and in the absence of words preventing this practice, this is likely to be correct.
11. The AMWU does not necessarily agree that there is doubt that this is currently the position and consequently is ambivalent on the need for the alterations clauses to be varied to expressly provide for this. However, this is not opposed on the basis that the proposed draft determinations are an overall improvement in ensuring that the terms of the alteration clauses are simple and easy to understand.
12. With respect to the provisional view that the alteration clauses should be varied to clarify that agreements can be reached with a section or sections of the workplace,<sup>18</sup> the AMWU largely agrees with the observations of the Full Bench at [230] that a number of awards either expressly permit or contemplate discrete agreements being reached with particular sections of an enterprise or workplace.

### **AMWU Submissions in Response to the Draft Determinations**

13. The AMWU makes the following submissions in response to the draft determinations published with respect to the following awards that the AMWU has a specific interest in (noting that some of the feedback may have more general application):
  - Airline Operations (Ground Staff) Award (**Ground Staff Award**);
  - Food, Beverage and Tobacco Manufacturing Award (**Food Award**);
  - Manufacturing and Associated Industries and Occupations Award (**Manufacturing Award**);
  - Pharmaceutical Industry Award (**Pharmaceutical Award**)
  - Seafood Processing Award (**Seafood Award**)
  - Sugar Industry Award (**Sugar Award**).
14. The AMWU generally supports the draft determinations and considers that they reflect the provisional views of the Bench as expressed at [228]-[234].
15. However, the AMWU notes that in respect of the awards that currently permit individual facilitation (the Food Award, Manufacturing Award, Seafood Award and Sugar Award) the qualifying words *“in appropriate circumstances”* have been removed from the subparagraph that deals with individual facilitation.
16. The AMWU considers that removal of the words *“in appropriate circumstances”* constitutes a substantive variation to an existing restriction on an employer’s capacity to

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<sup>16</sup> 4 Yearly Review of Modern Awards – Plain Language Project [2019] FWCFB 5409 [232]-[233].

<sup>17</sup> Ibid [229].

<sup>18</sup> Ibid [230].

make an agreement with an individual employee.

17. This restriction has particular relevance with respect to the Food and Manufacturing Awards, as clause 8.3(c) of those awards places a fetter on an employer's capacity to make an individual agreement, requiring that such individual agreements not be made with more than half of the employees in a workplace or section or sections of the workplace.<sup>19</sup> It is not suggested that this limits the circumstances in which it may be appropriate or inappropriate for an employer to reach an agreement with an individual employee.
18. The AMWU notes that in the August Decision, the Full Bench confirmed that in reviewing the alteration clauses it did not intend on varying any caveats or restrictions relating to the use of the alteration clauses.<sup>20</sup>
19. Accordingly, the AMWU submits that the words "in appropriate circumstances" should be reinserted into the draft determinations in respect of those awards that allow individual facilitation.

### **Food Award**

20. In accordance with the above submissions, the AMWU submits that the draft determination for the Food Award be amended as follows. Proposed changes are marked up using strike through and underline:

1. *By deleting clause 30.2(c) and inserting the following:*

*(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 moved up to one hour forward or one hour back by agreement between an employer and:*

*(i) the majority of employees at the workplace;*

*(ii) the majority of employees in a discrete section of the workplace; or*

*(iii) an individual employee, but only in appropriate circumstances.*

*Different agreements may be reached with the majority of employees in different sections of the workplace or with different individual employees.*

### **Manufacturing Award**

21. In accordance with the above submissions, the AMWU submits that the draft determination for the Manufacturing Award be amended as follows. Proposed changes are marked up using strike through and underline:

1. *By deleting clause 36.2(c) and inserting the following:*

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<sup>19</sup> *Manufacturing and Associated Industries and Occupations Award 2010* clause 8.3(c); *Food, Beverage and Tobacco Manufacturing Award 2010* clause 8.3(c).

<sup>20</sup> *4 Yearly Review of Modern Awards – Plain Language Project* [2019] FWCFCB 5409 [226].

*(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 moved up to one hour forward or one hour back by agreement between an employer and:*

*(i) the majority of employees at the workplace;*

*(ii) the majority of employees in a discrete section of the workplace; or*

*(iii) an individual employee, but only in appropriate circumstances.*

*Different agreements may be reached with the majority of employees in different sections of the workplace or with different individual employees.*

### **Seafood Award**

22. In accordance with the above submissions, the AMWU submits that the draft determination for the Seafood Award be amended as follows. Proposed changes are marked up using strike through and underline:

1. *By deleting clause 23.2(c) and inserting the following:*

*(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 moved up to one hour forward or one hour back by agreement between an employer and:*

*(i) the majority of employees at the workplace;*

*(ii) the majority of employees in a discrete section of the workplace; or*

*(iii) an individual employee, but only in appropriate circumstances.*

*Different agreements may be reached with the majority of employees in different sections of the workplace or with different individual employees.*

### **Sugar Award**

23. In accordance with the above submissions, the AMWU submits that the draft determination for the Sugar Award be amended as follows. Changes are marked up using strike through and underline:

1. *By deleting clause 36.2(c) and inserting the following:*

*(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 moved up to one hour forward or one hour back by agreement between an employer and:*

*(i) the majority of employees at the workplace;*

*(ii) the majority of employees in a discrete section of the workplace; or*

*(iii) an individual employee, but only in appropriate circumstances.*

*Different agreements may be reached with the majority of employees in different sections of the workplace or with different individual employees.*

## **Conclusion**

24. In accordance with these submissions, the AMWU supports the making of the determinations as currently drafted with respect to the *Ground Staff Award* and the *Pharmaceuticals Award*, and supports the making of the determinations with respect to *Food Award, Manufacturing Award, Seafood Award and Sugar Award*, subject to the proposed variations at [20]-[23].

**GABRIEL MILLER**

National Research Officer

20 September 2019