Friday, 10 April 2020

Proposed Variation under section 160 of the Fair Work Act 2009 to:
Manufacturing and Associated Industries and Occupations Award 2010 - Clause 41.6

Submitted by Garry Whackett
Matter Number AM2019/20

This proposed change is not to bring about any increase to the entitlements of those engaged to be on standby. It merely seeks to eliminate a long standing misinterpretation of this award provision.

I shall address the second part of my proposed amendment first.

Proposed amendment part 2 to MA00010 Clause 41.6 background. (Post 12 February 2020 update to the award this is now Clause 41.6)

I believe the work practices involved with engaging employees to be on standby are due to be reviewed to bring them into line with current expectations of fatigue management. It was once acceptable that long distance truck drivers would work all day loading their trucks and then take amphetamines so they could drive all night. That is a practice that has been discredited and is now a thing of the past.

The practice of relying on people that have worked a full day in physically demanding work, gone to bed at a normal time, and then been awoken and expected to go to work with inadequate rest should be a thing of the past as well.

This is not just a hypothetical debate. This was my recollection of my experience on call about 2 years ago.

When we are rostered on call we are on call for every hour of the week that we are not at work, ie 42.5 hours at work and 125.5 hours on standby. I had worked a normal day shift on Friday and was rostered on call from the end of my day shift at 16:00 hrs on Friday until 07:30 Monday morning when my next Day Shift commenced.

When I got home on Friday evening I had dinner and watched TV until going to bed at 23:00 hrs. At midnight the phone rang with a customer requesting that I drive to their Rutherford address to replace a hose on a truck. Typically I write down the details of the address that I'm to go to and contact details etc. That normally helps me wake up. On this occasion I recognised the address that I had to attend, so I did not need to write it down. I closed my eyes and woke up an hour later. I tried to contact the business to ask did they still need me because they may have contacted someone else as I was late. I got no answer so I drove from Hillsborough to the business at Rutherford. I went via Branxton as it was pouring torrential rain and I missed the Maitland exit on the Hunter Expressway, for whatever reason, but fatigue is a likely contributor.

When I arrived at the business's yard about 02:00, only two drivers were on site and neither of them knew of any truck needing repairs. I looked at the parked trucks in the yard but there were none that had an obvious need for a hose to be replaced.

I left site and got back to bed at 03:15 Saturday morning. At 05:45 I received a phone call asking was I coming to fix the truck as it was due to go out. I returned to site and found the truck was parked in a shed. The hose was replaced and I left there about 07:30. I made my way home.

This is the first and only time I have gone back to sleep when called out for a job and this is an extreme example, but when on standby, there is NO TIME from when I leave work at the end of one shift, until I return for my next shift, that I can rest without being disturbed to go back to work. I am on Standby every hour that I'm not at work and I'm expected to respond to a customer's needs promptly.

This is what is happening in the workplace under the current legislation. How do you justify having a work practice that has an employee engaged on standing by for the entire period between shifts, 15.5 hrs, with no time designated for rest and no time within that period in which they cannot be recalled to go back to work? What about the minimum 10 hrs stand down if I was working a regular shift roster?

Proposed Amendment Part 2
To be included as a second paragraph in Clause 40.6 (Post 12 February 2020 update to the award this is now Clause 41.6)

Any employer, recalling an employee to work after their ordinary hours have finished, must have a system of work in place to ensure any recalled employee has had the opportunity to be properly rested and free of fatigue.

FAIR WORK ACT 2009 - SECT 160
Variation of modern award to remove ambiguity or uncertainty or correct error

My rationale for believing that the proposed amendment 2 fits within the scope of a sect 160 amendments:

The statement above **"to remove ambiguity or uncertainty or correct error"** is written using negative language. If that statement was written using positive language it has the same intent, it just uses positive speech to express it. A positive statement could be something like **"to improve understanding or clarity or correct an error".** My added paragraph introduces **no new obligations** on employers, it just seeks to clarify and improve the understanding of an employer's duty of care.

Proposed amendment part 1 to MA00010 Clause 41.6 background. (Post 12 February 2020 update to the award this is now Clause 41.6)

1. **Does Clause (40.6) 41.6 contain ambiguity or uncertainty?**

Clause 41.6 Standing by:
Subject to any custom prevailing at an enterprise, where an employee is required regularly to hold themselves in readiness to work after ordinary hours, the employee must be paid standing by time at the employee's ordinary time rate for the time they are standing by.

The accepted interpretation: With this "special legal meaning" attributed to "subject to any custom prevailing" clause 41.6 contradicts itself within a single sentence.

This is expressed in the Fair Work Ombudsman's document Page reference No: K600586:
"This payment doesn't apply if there's a 'custom prevailing' at the workplace for employees to regularly be standing by.
'Custom prevailing' means that standing by is a routine, regular and expected part of the work.

The first eight words says that if you are regularly required to be on standby, your employer is exempt from this provision and you don't get paid, however, after the first eight words, if you are REGULARLY required to be on Standby you MUST be paid etc....

There is only one group of employees referred to here, those that are regularly required to be on Stand By. The same criterion is used to both include and exclude employees for payment under 41.6.

In the interpretation of those first eight words in 41.6, 100% of those that are regularly required to be on standby are excluded from being paid for Standing By, however, beyond the first eight words within the same sentence, 100% of those employees that are regularly required to be on standby MUST be paid an hourly rate for being on Standby....

The accepted interpretation of this clause indisputably creates ambiguity and uncertainty.

2. **Does Section 160 have the scope to do any more than to just remove ambiguity or uncertainty or correct error?**

Section 160 seems to have a very narrow scope. It appears to be an administrative provision to allow modification of the award for no other reason than just to maintain the language of the award so that it remains a usable and reliable source of information for an employment arrangement.

Section 157 is the appropriate provision that allows for rates of pay to be varied based on various criteria.

3. **When the ambiguity is removed, what rate of pay should be paid for being on Standing By?**

There are only two possibilities:

- Everybody that is regularly required to work on Standby is paid at their ordinary hourly rate for every hour they are engaged on Standby as currently stated in the award OR
- Continue the current practice that nobody gets paid for being on Standby. If that is the path chosen, we may as well just delete Clause 41.6 completely as it only applies to those that are **regularly** required to be on Standby, but when the current interpretation is applied, Clause 41.6 makes no provision for payment or any other minimum conditions for those that are regularly required to be on Standing By.

I only seek to have this clause read and have it understood as it was intended to be understood by the author. It is my belief that the ambiguity comes from the way the clause in the award has been interpreted and not from the way it was written.

From Manildra Flour Mills [2012] FCA 1010
Principles of Interpretation

50. Interpreting an industrial award requires an approach focusing on the actual words used and their plain, ordinary English meaning: see *Bryce v Apperley* (1998) 82 IR 448 at 452. If the

> words of the award have an unambiguous meaning, then that is the meaning that should be ascribed to them and there is no need for the Court to consider the expressed or supposed intention of the drafters of the award: see *Norwest Beef Industries Ltd v Australasian Meat Industries Employees Union of Workers (WA Branch)* (1984) 12 IR 314 at 331.

By my reading Justice Cowdroy's FCA 1010, if the words of the award have a clear unambiguous meaning in simple English, that is the meaning of the clause. Don't try finding another meaning to override the simple English meaning.

Please read my attachment "Analysis of Enterprise Exemption" in which I analyse the accepted interpretation of Clause 41.6 in MA00010. I found that the accepted interpretation creates 5 anomalies and inconsistencies related to Clause 41.6 in MA00010, but a simple English interpretation is logical, reasonable and eliminates those 5 anomalies.

Surely this provides a compelling argument that my interpretation has merit.

Perhaps I think differently to many of those that have experience and training in the law. I come from an engineering background. In Engineering, physics and the mechanical properties of materials determine our reality. We cannot negotiate or assign a different characteristic to a material to suit our needs. Physics, as we understand it, is not negotiable.

The Law on the other hand is a convention that is derived by man for man and there are no absolutes, such as physics, to be dealt with. Many think it is acceptable to use any means necessary to have their point of view prevail. Under the law, your reality is only limited by what you can get someone to believe.

I strongly believe in the rule of law and due process. The alternative is "the end justifies the means".

I was surprised and impressed when I read Justice Cowdroy's decision in FCA 1010. I enjoyed reading his methodical and complete evaluation of the evidence and the logical conclusions he drew. That is not what I had expected from the law.

I recently had the opportunity to discuss this interpretation of 41.6 with a senior and well respected member of the legal fraternity. That proved somewhat disappointing and disillusioning. I have been told that the law does some funny things at times and I have come to the conclusion that the law does not do funny things, practitioners of the law do funny things in the pursuit of having their position prevail. It seems that even within the legal fraternity, some believe that the end justifies the means.

I am aware that the consequences of the changes I suggest here are daunting for many and perhaps because of that, any thought that I may have a valid case is just unacceptable.

When I sort clarification of a couple of points arising in Clause 41.6.from this senior member of the legal profession, I was given a troubling explanation. I questioned how a start up enterprise could have a custom prevailing on the first instant it engaged a staff member to be on Standby? They offered the explanation that they thought it COULD be possible to establish a custom prevailing if it was written into something like a job description or duties statement of that start up enterprise.

If that was the intent of the author of 41.6, and the current 41.6 just restates the essence of a clause that that goes back some 90 years since its first inclusion in an award, why would the author have chosen such an obscure way to express that? If I was to ask 100 people what does “subject to custom prevailing” mean, how many would conclude from those words, that if you include the practice of Standing By in a duties statement, that will establish a custom prevailing in a start up enterprise? I would suggest zero.

So how did this experienced well respected practitioner of the law arrive at this belief that a custom prevailing could be established by including Standing by in a duties statement of a start up enterprise? If as suggested in Justice Cowdroy’s decision in FCA 1010, you start off with the simple English meaning of “subject to custom prevailing”, then draw a conclusion based on that, its very unlikely you will be lead to make such a conclusion. However, if you start by “knowing” that the accepted interpretation is correct, then the writing of a Standing By practice into a duties statement MUST be true for that belief to be defended. For whatever reason, it appears this practitioner of the law was so committed to maintaining the status quo, that they reached for a plausible, but highly unlikely explanation to validate a belief in the correctness of the accepted interpretation of 41.6.

The practitioner was able to overlook the 5 anomalies that I pointed out were created by this interpretation, the anomalies that disappear with a different interpretation. The practitioner did conceded that it was most unusual that an award provision such as 41.6 did not make some minimum payment provision for those engaged on standby, but again, not unusual enough to entertain the thought that the accepted interpretation may be wrong.

In my discussions of this Clause I have been told that you have to consider the use and context in determining the meaning of words. From my simple understanding, in English, some words have more than one meaning, surely this just means, use the appropriate meaning for that application. This is stated by those seeking to prove a point like there is something mystical about the use of words in the law. It seems to be used as an excuse to expand the meaning of a word to achieve a plausible yet unlikely meaning in the pursuit of creating a reality that favors their position.

There were other comments that helped me reach the conclusion that my learned friend was operating on the basis of the end justifies the means, rather than the rule of law and due process.

I encourage all to embrace supporting the rule of law and due process. In this case I believe this means consider the points I have raised and consider what conclusion should be reached about which interpretation works best with Clause 41.6 as written. Put aside self interest, respect the process and draw a conclusion on the merit of my submission, not on fear of what the repercussions may be. Section 157 would seem to be the vehicle to address such concerns about the impact.

Whilst this may be an issue that many would like to see buried, perhaps because of professional pride or the implications and disruption that it may create, please support the rule of law and due process. Please consider what type of Australia you wish to create, because it is being build one action at a time or perhaps eroded one action at a time. Do you really want to help create a society in which the end justifies the means has become the accepted norm over the rule of law and due process?

Consider recent events in the USA. A president is accused of abusing his power for personal gain and presumably operating on the basis that the end justifies the means and those that have been entrusted to hold him to account, have also chosen to not even hear the evidence against him because they also are operating on the basis of the end justifies the means.

The rule of law is eroded one action at a time. Where do you turn when the rights you currently enjoy, under the rule of law, are trampled by someone or some institution that uses its authority to pursue its goals, on the basis that the end justifies the means?

Proposed amendment part 1:
Delete the first eight words in the current 40.6 (Post 12 February 2020 update to the award this is now Clause 41.6). The new Standing By Provision then becomes;

40.6 Standing by
Where an employee is required regularly to hold themselves in readiness to work after ordinary hours, the employee must be paid standing by time at the employee's ordinary time rate for the time they are standing by.

Garry Whackett

Enterprise Exemption Analysis AM2019/20

Friday, 10 April 2020

Proposed Variation under section 160 of the Fair Work Act 2009 to:
Manufacturing and Associated Industries and Occupations Award 2010 - Clause 41.6

Submitted by Garry Whackett
Matter Number AM2019/20

This proposed change is not to bring about any increase to the entitlements of those engaged to be on standby. It merely seeks to eliminate a long standing misinterpretation of this award provision.

Does the exemption given to all employers to avoid paying the award rate for being on Standby, by the accepted interpretation of Clause 41.6, withstand critical analysis?

MA00010
41.6 Standing by
Subject to any custom prevailing at an enterprise, where an employee is required regularly to hold themselves in readiness to work after ordinary hours, the employee must be paid standing by time at the employee's ordinary time rate for the time they are standing by.

An award is the manifestation of the author's views on the minimum conditions that should apply in an employment relationship. The award has the weight of law behind it and it is a reliable constant.

Whilst the award is a constant, it can be varied, but only with good reason and the appropriate authority. Sitting below the award is the interpretation of the award. The interpretation of the award is what one or more people understand the award to mean. Whilst it is very closely related to the award, it is still an interpretation of what the reader thinks the author meant. An interpretation of the award will reflect the reader's perspective which may differ from the author's perspective. Interpretations are generally shared and not contentious, but, sometimes interpretations are reviewed in light of new circumstances. Just because an interpretation changes it does not change the award which is being interpreted. The award stands as a constant whilst an interpretation can vary.

I bring a new perspective, a new position from which to view and interpret the Standing By provision. A position that is consistent with established industrial relations principles.

Awards were not created to provide lawyers with topics for intellectual arguments in courts of law; they were created to provide guidance to employers and employees as to the minimum legislative provisions in an employment relationship when the award is the appropriate instrument that regulates that employment relationship.

My view that awards are written to enable the end users to read and understand them is reflected in this ruling by Justice Cowdroy in Manildra Flour Mills [2012] FCA 1010

Principles of Interpretation

50. Interpreting an industrial award requires an approach focusing on the actual words used and their plain, ordinary English meaning: see *Bryce v Apperley* (1998) 82 IR 448 at 452. If the words of the award have an unambiguous meaning, then that is the meaning that should be ascribed to them and there is no need for the Court to consider the expressed or supposed intention of the drafters of the award: see *Norwest Beef Industries Ltd v Australasian Meat Industries Employees Union of Workers (WA Branch)* (1984) 12 IR 314 at 331.

By my reading Justice Cowdroy's FCA 1010, if the words of the award have a clear unambiguous meaning in simple English, that is the meaning of the clause. Don't try finding another meaning to override the simple English meaning.

Simple English Definitions:

- Subject "conditionally upon"
- Custom "a traditional and widely accepted way of behaving or doing something that is specific to a particular society, place, or time."
- Prevailing "existing at a particular time; current."
- Enterprise "a business or company."

I support the idea of precedence in the law to give consistency and uniformity of approach. Many will suggest that the issue of the interpretation of the application of the Standing By provision has been adequately covered in the Logan vs Otis Elevators Appeal Decision.

I dispute that, as the questions I will ask of the court here, have not been considered in the Logan Appeal decision. If the questions I ask of this court were not considered in Logan, does it have any relevance to my case?

Logan was appointed to a salary position and paid a rate of pay exceeding the minimum award rate. Some of this over award payment was to compensate for being on call. He later claimed he was disadvantaged financially under this arrangement. Logan's claim for payment for being on Standby was unsuccessful because his conditions of employment did not enliven the standing by clause in the award, not because his employer was exempt from the award Standing By provision.

My contention relates to the interpretation of an employer's entitlement to claim an exemption from the provisions of standing by provision in an award on the basis of having a custom prevailing and therefore being exempt from the award provisions. In Logan this was never going to be a deciding factor in his case and whilst some observations were made about how long a custom had to exist to justify an exemption, this interpretation was made from the perspective of that case. The interpretation of standing by provisions that has been embraced from the Logan case results in some unacceptable outcomes that contradict established core values of our industrial relations system.

I'm told that "subject to any custom prevailing" has a special meaning assigned under the law that is either from or reflected in the interpretation of the Logan Appeal Decision, the Full Bench specifically rejected the submission that a "custom" must have existed "from time immemorial, or at least from a date before the insertion of the clause in the Award".

From that it has been taken that "**There is no requirement that the "custom prevailing" existed as of the first day an enterprise rostered an employee to be on call."**

This is expressed in the Fair Work Ombudsman's document Page reference No: K600586:
"This payment doesn't apply if there's a 'custom prevailing' at the workplace for employees to regularly be standing by.
'Custom prevailing' means that standing by is a routine, regular and expected part of the work.

Surely this test for a custom prevailing must be applied on the first instant that an employee is engaged on Standby. This would be the practice of a payroll officer, not 5 years after the award has been breached and the matter comes to court and the practice of not paying the award rate seems to indicate that a custom does exist.

It is one of the foundations of our Industrial Relations System that an award must be complied with on each and every occasion that it is the appropriate instrument that regulates an employment relationship. **It is my understanding that EVERY case that has ever gone before the Fairwork Commission has confirmed that an award/agreement must be complied with on each and every instant in which it is the legal instrument regulating that employment relationship.**

There is a critical date in the understanding of how the Clause 41.6 in MA00010 or any earlier award that has this Standing By provision with an exemption "subject to any custom prevailing" is interpreted. That date is the first occasion on which an enterprise engages an employee to be on Standby. In my interpretation, only those enterprises that have a "custom prevailing" on that first instant when they engaged an employee may claim to be exempt from the Standing By payment due under the award. The accepted interpretation, states that if this is a normal part of your job, your employer is exempt.

It seems that those that support the accepted interpretation of the exemption in Clause 41.6 make no distinction between a custom that was established before this award or after this award provision became law. If on the first instance an enterprise could not show a custom relating to Standing By, and still claimed to be exempt, then that is a breach of the award and any custom and practice are just award breaches. I did not read anywhere in the award that states a start-up enterprise has a period of grace to establish a custom prevailing exemption.

Based on the appeal of Logan vs. Otis Elevators, *that interpretation of the judgment* ***"all enterprises are told that they may claim to be exempt from the provisions of the award's standing by provision, even on the first instance of engaging an employee to be on standby, on the basis of having a "custom prevailing" even though no such custom needs to exists at that time.***

Those that support the view that an enterprise does not have to be able to show the existence of a custom prevailing on the first instant that an enterprise engages an employee on Standby are also endorsing an enterprise not complying with the award from start up until the **"apparent appearance"** of a custom prevailing has been established.

I have great difficulty reconciling my earlier observations that an award must be complied with on each and every occasion, with the interpretation that says that it is acceptable for an employer to avoid paying the award rate for being on Standby on the basis of having a custom prevailing even though no custom needs to be present at that time to justify the exemption.

It seems to me that those that have misinterpreted this clause have treated "custom prevailing" as a single term. It has been interpreted that custom is the nature of the work, so if it is normal for you to be rostered on standby, this is a normal part of your job and no payment is necessary.

The meaning of the word prevailing seems to have been ignored. Custom is about the nature of the work, but prevailing introduces an element of timing. The plain ordinary English meaning of "Prevailing" is "existing at a particular time; current." The timing of the custom is just as important as the nature of the custom.

Is there ambiguity in clause 41.6? Clearly there are two interpretations of the same award provisions and both claim to accurately reflect the awards provision for Standing By. In the following I explore the implications of both interpretations.

It is said if you wish to properly identify a tree, you should wait until it bears fruit. What fruit does the award bear with each of these alternate interpretations?

1. Award Compliance
    a) <u>The accepted interpretation:</u> On the first instant that any new enterprise engaged an employee to be on standby under the "subject to any custom prevailing" exemption, all employers are advised that they are exempt from the award provision even if they do not actually have an established custom prevailing at that time. **Surely claiming an exemption on the basis of having a custom prevailing even though no such custom has been established is inciting a payroll officer to breach the award.**

    b) <u>My Simple English Interpretation:</u> If we choose to use the simple English interpretation of Clause 41.6, then adopt the position of interpreting the award from the **PERSPECTIVE** of a **payroll officer or an employee or an employer**, as these are the people this award was written for, does it make more sense? When an enterprise's payroll officer went to pay **their first employee** for being on standby, they would have had to check the award provisions for Standing By in, say the NSW Metal Industry Award **B0106** to determine their payroll obligation. It would have stated if you have a custom **now prevailing,** your enterprise is exempt from this award provision.

        The Payroll Officer only has two options:

- If the enterprise had engaged employees on standby prior to this award provision being introduced, it does have an established custom prevailing so it is exempt OR
- The Enterprise, as a start-up enterprise, had never rostered anybody on call before, and as such, a custom cannot exist. Pay the award rate to comply with the award. When does a practice become a custom? I'm sure we both agree that it must be **more than your first instance** of engaging an employee on standing by.

So, when viewed through the eyes of a payroll officer, **this interpretation is both reasonable and uncontentious and guides the payroll officer to comply with the award.**

2. Extent of Award Coverage under Clause 41.6:
   a) <u>The accepted interpretation:</u> This award Clause 41.6 only applies to those that are regularly engaged on Standby. However, any enterprise that regularly engages employees on standby is entitled to claim to be exempt from the award provision. That means that the employers of every employee engaged regularly to be on standby are exempt from the award provision, **so we have an award clause for Standing By that does not provide any remuneration or coverage for all those that are regularly rostered on standby.** That is typically 125 hours in a week on standing by in preparedness to return to work, which is said requires no further payment beyond the award minimum hour rate that I may be paid for my 38 hours whilst actually at work.

   b) <u>My Simple English Interpretation:</u> Only those enterprises that have engaged an employee on Standing By prior to the introduction of this Standby Clause can claim to be exempt.

   To be exempt, any enterprise had to have an established "on call" practice prior to this Standing By provisions inclusion in the first award, approximately 90 years ago and have continued in the same ownership from that time. Hence the vast majority of employers are not exempt and even those enterprises that were exempt, each time they changes ownership they become a new enterprise, a new legal entity, with no custom prevailing and therefore, the exemption is extinguished. **The award now has provision within Clause 41.6 to pay those regularly engaged to be on standby.** This conditional clause would have provided a logical and reasonable transition for the introduction of this Standing by payment.

3. Award Integrity:
   (a) <u>The accepted interpretation:</u> From Clause **41.5 Call back (a).**
   Where an employee is required to regularly hold themselves in readiness for a call back they must be paid for a minimum of three hours work at the appropriate overtime rate, subject to clause 41.6 which deals with the conditions for standing by.

   Clause 41.5 (a) directs all those that are regularly on Standby to Clause 41.6 for details of conditions for being on standing by, but the employers of all those that are regularly on Standing By are exempt from the provisions in Clause 41.6 therefore

there are no provisions within 41.6 for those regularly on standby.. **The reference is wrong.**

b) My Simple English Interpretation: As now, most if not all enterprises, are **no longer exempt** from the provision in Clause 41.6, so Clause 41.6 now does apply to most employees regularly required to be on Standby, so the reference in Clause 41.5 which refers those regular Standby workers to Clause 41.6 for conditions for standing by is now correct. **This reference is now valid**.

4. Does Clause 41.6 contain ambiguity or uncertainty?

Clause 41.6 Standing by:

Subject to any custom prevailing at an enterprise, where an employee is required regularly to hold themselves in readiness to work after ordinary hours, the employee must be paid standing by time at the employee's ordinary time rate for the time they are standing by.

a) The accepted interpretation: With this "special legal meaning" attributed to "subject to any custom prevailing" clause 41.6 contradicts itself within a single sentence.

The first eight words says that if you are regularly required to be on standby, your employer is exempt from this provision and you don't get paid, however, after the first eight words, if you are REGULARLY required to be on Standby you MUST be paid etc....

There is only one group of employees referred to here, those that are regularly required to be on Stand By. The same criterion is used to both include and exclude employees for payment under 41.6.

In the interpretation of those first eight words in 41.6, 100% of those that are regularly required to be on standby are excluded from being paid for Standing By, however, within the same sentence beyond the first eight words, 100% of those employees that are regularly required to be on standby MUST be paid an hourly rate for being on Standby....either very poor legislation or the interpretation does not work..

b) My Simple English Interpretation: Whilst the above accepted interpretation only has one criterion to determine if payment is due or not and thereby creates confusion, this interpretation recognises two different criteria to determine if an employee is entitled to be paid for being on standby. The first group is all those employees that regularly are required to be on Standing By and they have the potential to be entitled to be paid.

The first eight words provide a second criterion that creates a second group of employees, those that are employed by an employer that has an exemption based on having a custom prevailing. Within the group of all employees regularly engaged to be on standby is a subgroup that are employed by an employer that did have a custom prevailing prior to the implementation of this award provision. **Now the first**

eight words of 41.6 qualify the rest of the sentence beyond those first eight words and the sentence has no ambiguity or uncertainty.

5. Does this interpretation of 41.6 provide a reasonable result?
   a) The accepted interpretation: Under the special legal understanding of "subject to any custom prevailing" if I am regularly rostered to be on standby, my employer is exempt from paying me any extra for being on standby. In the call back provision in Clause 40.5 if I'm **NOT on standing by, I am entitled to be paid for a minimum of 4 hours** when called back to work, however, if I am on standby, **even though I'm not entitled to be paid for being on standing by**, I am only entitled to be **paid a minimum of 3 hours pay** for a call back..? **That seems unreasonable.**

   b) My Simple English Interpretation: Those that are called back to work whilst on standby still are only entitled to be **paid 3 hours minimum call back** where as those not on standby get a minimum of 4 hours pay for a call back, but **now those on standing by are being paid for their time whilst on standing by, so the reduced minimum call back is not unreasonable.**

When we review the fruit that each interpretation yields;

My Simple English Interpretation: When the simple English interpretation is applied to Clause 41.6 of the award it is meaningful, easy to understand, reasonable and complete with no loose ends. It seems that this Simple English interpretation of the award is the best fit.

The accepted interpretation: How can the accepted interpretation be right when these 5 anomalies are created when this interpretation is applied to the actual words written in Clause 41.6? This interpretation makes clause 41.6 fatally flawed.

Point 1 above, this interpretation encourages an employer not to pay the award rate for engaging an employee on standby, regardless of whether an entitlement to an exemption can be shown or not.

Point 2, we have an award clause for Standing By that does not provide any remuneration or coverage for all those that are regularly rostered on standby.

Point 3, a cross reference within Clause 41.5 in the award is wrong.

Point 4, a contradiction exists within Clause 41.6. There is only one group of employees referred to in 41.6, those that are regularly required to be on Stand By. The same criterion is used to both include and exclude employees for payment.

Point 5, an employee on standby is not entitled to be paid any extra for this service, but is only paid 3 hours minimum pay when called back to work, whereas an employee not on standby is entitled to 4 hours minimum pay when called back.

Garry Whackett