From: Garry <ma00010standingby@gmail.com>
Sent: Monday, 27 July 2020 12:14 AM
To: Chambers - Bissett C <Chambers.Bissett.c@fwc.gov.au>
Cc: AMOD <AMOD@fwc.gov.au>
Subject: AM2019-20 Proposers Response

Good Evening,

This is my response to the submissions received so far.

This document covers most areas of my submission, but my earlier submissions may have greater depth of detail for some aspects.

Sincerely

Garry Whackett

AM2019/20

Sunday, 26 July 2020

Proposed Variation under section 160 of the Fair Work Act 2009 to:
Manufacturing and Associated Industries and Occupations Award 2010 - Clause 32.14 Standing By

Submitted by Garry Whackett
Matter Number AM2019/20

I thank AIG for their submission. It does help add clarity.

It is my assertion that the current interpretation of the current Clause 32.14 Standing By in MA00010 is flawed. This flawed interpretation creates ambiguity and uncertainty in the standing by clause 32.14.

AMBIGUITY and UNCERTAINTY

It is interesting that everyone that has made a submission has claimed that Clause 32.14 has a very clear meaning and they find no ambiguity. I would be extremely surprised if those that have made that claim, don't have the capacity to recognise the ambiguity and uncertainty that exists when the accepted interpretation is applied. As such, those claims seem disingenuous.

This is a rhetorical question that requires no answer, but I am curious, is there a professional standard that distinguishes between just bullshitting to the Commission to advance an argument as opposed to making a false and misleading statement to the Commission?

This is an extract from AI Groups' submission on this matter dated 17/7/20, referring to the Standby exception.

29. The *nature* of the requisite custom is clear when the provision is read as a whole. The clause is concerned with employees being required to regularly hold themselves in readiness to work after ordinary hours. Accordingly, the Exception applies if there is a current habitual practice or convention at an enterprise of employees being required to regularly hold themselves in readiness to work after ordinary hours. Where such a practice or convention prevails at an enterprise, an employee at that enterprise will not be entitled to the payment prescribed by the clause. WHERE SUCH A PRACTICE OR CONVENTION DOES *NOT* PREVAIL AT AN ENTERPRISE, an employee at that enterprise will be entitled to the payment prescribed by the clause if the employee is required regularly to hold themselves in readiness to work after ordinary hours.

From **AUSTRALIAN BUSINESS INDUSTRIAL and THE NSW BUSINESS CHAMBER LTD** submission dated 10/7/20

Paragraph 5.3
(b) The operative component of the clause is not found in the first subclause, so the second part will be considered first. It provides that an employee who is "*regularly"*

required to hold themselves in readiness to work after ordinary hours (i.e. to *stand by*) must be paid for that time at the employee's ordinary hourly rate. This entitlement is intended to compensate the employee for the inconvenience of being required to hold themselves in readiness to return to work - for example, by remaining close to the workplace or refraining from particular activities (such as the consumption of alcohol).

(c) The first subclause provides for an *exception* to the entitlement referred to in the operative portion of the clause..... Accordingly, the existence of a custom (which will presumably be comprised of both a regular arrangement concerning "standing by" and some form of remuneration) will displace the entitlement to payment for the entirety of the period.

It has been suggested that the entitlement to be paid for being on Standby is specific to the individual employee and his work practice will determine if the Standby Clause is enlivened, and the exception applies to the practices of an enterprise. If it is the enterprises practice is of engaging employees on Standby regularly, then that enterprise is exempt from paying the Award rate.

Both submissions seem to say the same thing. I accept that the exemption does refer to the enterprises practices.

I thank the ABI and NSWBC for their contribution. I shall refer to their submission quoted above in paragraph 5.3 (b) and (c).

Every employee that is *regularly* engaged on standby must be paid per the award when the criteria to enliven the Clause are met. From 5.3 (b) "It provides that an employee who is "*regularly"* required to hold themselves in readiness to work after ordinary hours (i.e. to *stand by*) must be paid for that time at the employee's ordinary hourly rate. "

When the exemption from 5.3 (c) is applied, "The first subclause provides for an *exception* to the entitlement referred to in the operative portion of the clause."

If we evaluate Clause 32.14 with the understanding that 5.3 (b) refers to an individual and 5.3 (c) refers to an enterprise what is the outcome?

If we consider an individual employee:

> If that individual enlivened the clause for being paid per the award and then is excluded because standing by was a regular practice of an enterprise, it is possible that this is a valid exemption.

If we consider **every** employee that has been engaged on standby and has met the criteria to be paid:

> If every employee that has enlivened the standby clause, then has that payment taken away because it is the regular practice of an enterprise of engaging employees on standby, **then that exemption criteria becomes a contradiction, not just an exemption.**

I have asked those opposed to my amendment to identify any class of employee that could meet the criteria to enliven the standing by clause as explained in 5.3 (b) that

does not have that entitlement to payment extinguished by the exemption. We still have time if anyone has an answer.

When 100% of those that enlivened the Standby Clause 32.14 then have it extinguished by the exemption in those first eight words of the clause, that's an obvious contradiction that creates the ambiguity.

It is this contradiction which gives rise to ambiguity and confusion. This situation is why section S160 was included in the Act.

It could be argued that the ambiguity only exists in the interpretation of the clause and not the wording as I have stated. I submit that whatever the source, if the communities understanding of the clause is ambiguous and confusing it is the Commissions role to act to remove that ambiguity.

It could be argued that if 100% of readers misinterpret this clause there is no ambiguity, but now my application makes it obvious that a plausible alternate interpretation exists, therefore ambiguity exists.

THE NATURE OF THE EXEMPTION

From AI Groups submission quoted above paragraph (29)
"WHERE SUCH A PRACTICE OR CONVENTION DOES *NOT* PREVAIL AT AN ENTERPRISE, an employee at that enterprise will be entitled to the payment prescribed by the clause if the employee is required regularly to hold themselves in readiness to work after ordinary hours."

This is another question that I have asked and received no response.
HOW CAN ANY ENTERPRISE STARTING UP UNDER THIS AWARD, HAVE A STANDBY PRACTICE THAT PRE-DATES ITS OWN EXISTENCE? It is clearly impossible.

I again thank AI Group for their submission. This is from their submission dated 17/7/20.

THE HISTORY PRECEDING CLAUSE 32.14 OF THE AWARD

33. The *Consolidated Metal Trades Award*17 in 1937 contained the following clause 11(d):
"An employee occasionally required to hold himself in readiness to work after ordinary hours shall until released be paid standing by time at ordinary rates from the time from which he is so to hold himself in readiness. **BUT ANY CUSTOM NOW PREVAILING under which an employee is required regularly to hold himself in readiness for a call back SHALL CONTINUE**."

In this form the exemption is very easy to understand and impossible to misinterpret. The last sentence in this clause 11(d) is the genesis of the exemption relied upon in MA00010 Clause 32.14.

The wording of the exemption from Consolidated Metal Trades Award17 “But any custom now prevailing under which an employee is required regularly to hold himself in readiness for a call back shall continue”, is comparable with the wording “Subject to any custom prevailing at an enterprise” used within MA00010.

Despite the history of misinterpretation, I submit that this clause from the Consolidated Metal Trades Award17 does provide a reliable explanation as to when and how the exemption in MA00010 is to apply.

The earlier form of expressing the exemption condition provides not only the nature of the custom, but also how and when the exemption is to apply. This is how the exemption is to apply as taken from Consolidated Metal Trades Award17. Any enterprise is **free to CONTINUE**, the practices in place before this award provision became the appropriate instrument. **The details of when and how the exemption is to apply, is NOT explicit in the currently accepted interpretation of MA00010 and tends to be overlooked.**

How did the exemption interpretation go from,

1. If you have an existing practice, you are free to CONTINUE to use that practice.

To become:

2. If an enterprise regularly engages staff on standby that enterprise is exempt and staff need not be paid?

The standby practice of all enterprises became regulated by clause 11(d) in Consolidated Metal Trades Award17 in 1937. Since then this provision has continued with no significant change in various subsequent awards. Every enterprise employing an employee on standby after this clause’s introduction was obliged to comply with its requirements.

In 1937 when this clause was introduced there were only two possible outcomes for those enterprises engaging staff on standby.

1. Your enterprise had a standing by practice that pre-dated the inclusion of this provision in the award so your enterprise is free to CONTINUE to use its existing practice.
2. If no practice was present that pre-dated this award’s standing by provision, you must pay the hourly rate in the award.

The form of the exemption “But any custom now prevailing under which an employee is required regularly to hold himself in readiness for a call back SHALL CONTINUE” leaves no room for any doubt that the standing by practice must pre-date the inclusion of this provision to regulate the practice of standing by.

The ONLY way to establish a custom prevailing is to do so before this clause was included in the award.

If the first instant of employing an employee on standby is PRIOR to the inclusion of this standing by provision in the award, no provision existed in the award at that time, so that enterprise was free to establish its own arrangements for engaging and remunerating its employees on standby. So when the standby provision was included in the award, an enterprise could demonstrate they had a custom prevailing that meets the Fairwork Ombudsman's definition. If an enterprise has a standing by practice that pre-dates the inclusion of this provision in the award, it qualifies for the exemption lawfully.

However, if the first instance of engaging an employee on standby is **AFTER** this award's provision was enacted (1937), the enterprise must comply with the obligation to pay the hourly rate for being on standby as required by the award. It's impossible to create a standing by practice that pre-dates the existence of the enterprise to meet the exemption criteria of having **any custom now prevailing**. NO ENTERPRISE MAY HAVE A PRACTICE THAT PRE-DATES ITS OWN EXISTENCE.

The entitlement to an exemption should have died out in 1937.

FWC may vary etc. modern awards if necessary to achieve modern awards objective:

Just to throw another log on the fire, I don't believe that the currently accepted interpretation of Clause 32.14 is valid, but if it was, I believe it is within the Commissions power to take action on the basis of Work Value under the objectives of the Fair Work Act. It seems **unreasonable** that two groups of employees, with similar qualifications, experience and responsibility should get paid dramatically different rates of pay under Clause 32.14 in MA00010 for doing exactly the same work. Those that are entitled to be paid per this clause are to receive their normal hourly rate for this duty, whilst those working for an exempt organisation are not entitled to any payment for these same duties and responsibility. That seems unfair and unreasonable.

STARTING A NEW WORK PRACTICE

I wish to suggest starting a **NEW work practice** today that requires staff to work a normal day shift and then hold themselves in readiness to return to work until tomorrow morning. Employees can be rostered on call for every hour that they are not at work, 125.5 hours a week in my case. They shouldn't drink alcohol in case they are called back to work and they can't travel too far from home in case they are called out. They are expected to react promptly if a call out does come in. There is no minimum payment for this service; just whatever I, the employer, feel is necessary.

A staff member may have gone home to relax at the end of the day shift, had a meal and gone to bed at say 11:00 pm after being awake all day for 17 hours. There is no minimum rest period they must have before being called back to work. It will be

acceptable to wake them, with perhaps 1 hour's sleep, to go back to work. When called back to work, if each call back does not exceed 3 hours in duration, that time does not count as time worked for determining stand down time between shifts.

If this NEW practice was subject to normal scrutiny, it would not have a snowballs hope in hell of getting accepted, but because it is an existing practice that the community relies upon it has gone unchallenged until now.

Whilst this may be an academic exercise for all other interested parties, I have worked under this award provision and it is my opinion that this is an extreme and outdated work practice that's past it use by date. Despite the misconception that being on standby is not working, even when not called back, being on standby is still demanding and mentally tiring. Just having to consider what activities I do in my free time when not working, but still on standby is a mental burden. We can't act freely and spontaneously and enjoy our free time and there is no time within those 125.5 hours that I may rest without the possibility of being called back to work.

SUMMATION

1. There is a clear and obvious contradiction in Clause 32.14 when the currently accepted interpretation is applied.

2. My expectation is that when the contradiction is removed, the award will reflect the values and outcomes expressed in The *Consolidated Metal Trades Award*17 in 1937. Any enterprise that qualified to be exempt from paying the award hourly rate by having a practice that pre-dates the inclusion of this provision in that award may CONTINUE to do so until a change of ownership. If that change of ownership results in the establishment of a new enterprise then the exemption is extinguished.

3. Part B amendment: "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". I believe my part B amendment **is reasonable** and just adds to the understanding of an employer's obligations and could be included in MA00010 Clause 32.13 (g) Call back, to replace the existing paragraph (g) which is **NOT reasonable**:

(g) *Overtime worked in the circumstances specified in clause 32.13 is not to be regarded as overtime for the purposes of clause 32.12 concerning rest periods after overtime, when the actual time worked is less than 3 hours on the call back or on each call back.*

However, if that is beyond the Commission's capability, could I prevail upon the Commission to bring this matter to the attention of those that do have a DUTY OF CARE to eliminate unsafe and unreasonable work practices?

Sincerely

Garry Whackett