Australian Industry Group

Application to vary the Manufacturing and Associated Industries and Occupations Award 2020

Reply Submission
(AM2019/20)

17 July 2020

AM2019/20 APPLICATION TO VARY THE MANUFACTURING AND ASSOCIATED INDUSTRIES AND OCCUPATIONS AWARD 2020

INTRODUCTION

1. An application (**Application**) has been made by Mr Garry Whackett (**Applicant**) in the Fair Work Commission (**Commission**) seeking variations to the *Manufacturing and Associated Industries and Occupations Award 2020* (**Award**). Specifically, the Applicant seeks variations to clause 32.14 of the Award. The application is made pursuant to s.160 of the *Fair Work Act 2009* (**Act**).

2. The Australian Industry Group (**Ai Group**) opposes the proposed variations. We file this submission in reply to submissions filed by:

   (a) The Applicant; dated 9 December 2019, 12 January 2020, 26 February 2020, 10 April 2020 and 30 June 2020; and

   (b) The Australian Manufacturing Workers' Union dated 8 May 2020.

THE PROPOSED VARIATIONS

3. Clause 32.14 of the Award is in the following terms:

> **32.14 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 hourly rate for the time they are standing by.

4. The Applicant has sought that the clause be varied as follows:

> **32.14 Standing by**
>
> ~~Subject to any custom prevailing at an enterprise, w~~ 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 hourly rate for the time they are standing by.
>
> An 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 from fatigue.

5. We refer to the variation proposed to the first paragraph above as the **First Proposed Variation** and to the proposed insertion of the subsequent paragraph as the **Second Proposed Variation.**

THE RELEVANT STATUTORY PROVISIONS

6. The Application is made pursuant to s.160 of the Act. Section 160(1) is in the following terms: (emphasis added)

> **(1)** The FWC may make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error.

7. The Application is advanced on the basis that the Commission has power to vary the Award pursuant to s.160(1) to remove an ambiguity and / or uncertainty. The Applicant's submissions do not allege any 'error' in the sense contemplated by s.160 of the Act.

8. Various decisions of the Commission and its predecessors have considered the concept of ambiguity and uncertainty in the context of industrial instruments and more particularly, modern awards.

9. In the often-cited decision of *Re Tenix Defence Systems Pty Limited Certified Agreement 2001-2004* [1] (***Tenix***) a Full Bench of the Australian Industrial Relations Commission (**AIRC**) considered the application of s.170MD(6) of the *Workplace Relations Act 1996*, which relevantly provided as follows:

> The Commission may, on application by any person bound by a certified agreement, by order vary a certified agreement:
>
> (a) for the purpose of removing the ambiguity or uncertainty.

10. The AIRC made the following observations about how s.170MD(6) was to be applied: (footnotes removed, our emphasis)

> **[28]** Before the Commission exercises its discretion to vary an agreement pursuant to s.170MD(6)(a) it must first identify an ambiguity or uncertainty. It may then exercise the discretion to remove that ambiguity or uncertainty by varying the agreement.

[1] *Re Tenix Defence Systems Pty Limited Certified Agreement 2001-2004* (PR917548).

[29] The first part of the process - identifying an ambiguity or uncertainty - involves an objective assessment of the words used in the provision under examination. The words used are construed having regard to their context, including where appropriate the relevant parts of a related award. As Munro J observed in *Re Linfox - CFMEU (CSR Timber) Enterprise Agreement 1997*:

> *"The identification of whether or not a provision in an instrument can be said to contain an 'ambiguity' requires a judgment to be made of whether, on its proper construction, the wording of the relevant provision is susceptible to more than one meaning. Essentially the task requires that the words used in the provision be construed in their context, including where appropriate the relevant parts of the 'parent' award with which a complimentary provision is to be read."*

[30] We agree that context is important. Section 170MD(6)(a) is not confined to the identification of a word or words of a clause which give rise to an ambiguity or uncertainty. A combination of clauses may have that effect.

[31] The Commission will generally err on the side of finding an ambiguity or uncertainty where there are rival contentions advanced *and* an arguable case is made out for more than one contention.

[32] Once an ambiguity or uncertainty has been identified it is a matter of discretion as to whether or not the agreement should be varied to remove the ambiguity or uncertainty. …

[33] We agree with Tenix that the first step in dealing with a s.170MD(6)(a) application - the identification of an ambiguity or uncertainty - requires the determination of a *"jurisdictional fact"*. In *Corporation of the City of Enfield v Developmental Assessment Commission* the joint judgment of Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ described the term *"jurisdictional fact"* in these terms:

> *"The term 'jurisdictional fact' (which may be a complex of elements) is often used to identify that criterion, satisfaction of which enlivens the power of the decision-maker to exercise a discretion."*

[34] Similarly in *Re: CFMEU - Termination of Bargaining Periods*, Lee and Madgwick JJ said:

> *". . . the question presents as one of whether the Commission may have erred as to a 'jurisdictional fact', that is, the existence or non-existence of a state of affairs which was a statutory precondition to the Commission acting. . ."*

[35] In the context of s.170MD(6)(a) the Commission must *first* identify the existence of an ambiguity or uncertainty *before* exercising its discretion to vary the agreement. We agree with the Full Bench in *Re: CFMEU Appeal* which described the existence of an ambiguity or uncertainty as *"a necessary statutory prerequisite to any variation being made."*[2]

[2] *Re Tenix Defence Systems Pty Limited Certified Agreement 2001-2004* (PR917548) at [28] – [35].

11. Although the approach adopted in *Tenix* concerned a different statutory framework and an instrument of a different nature to modern awards, it has been adopted by the Commission as the appropriate approach to be applied when considering whether an award should be varied pursuant to s.160 of the Act.

12. For instance, in *Re Australian Nursing Federation and others*[3], a Full Bench of Fair Work Australia (**FWA**) adopted the approach in *Tenix*[4] when considering an application made by Ai Group seeking a variation to the Award pursuant to s.160 of the Act.

13. The Full Bench observed that there were "rival contentions between [Ai Group] and others, including the FWO, about the import of"[5] the relevant provision of the Manufacturing Award and determined that "each of the contentions [was] arguable"[6]. The Full Bench concluded that:

> **[30]** Given the rival contentions about the import of clause 44.2 and our view that an arguable case has been made out for more than one contention, we find the current clause 44.2 of the modern Manufacturing Award is a source of ambiguity or uncertainty. We turn then to consider exercising our discretion to remove the ambiguity or uncertainty.[7]

14. In a subsequent decision[8] of another Full Bench of FWA when considering an appeal of a decision in which FWA had declined to grant a variation to the *Building and Construction General On-Site Award 2010* pursuant to s.160 of the Act, FWA again relied upon *Tenix*:

> **[16]** In particular, before the tribunal can exercise its discretion to vary an award it must first identify an ambiguity or uncertainty. Identifying an ambiguity or uncertainty '*involves an objective assessment of the words used in the provision under examination. The words used are construed having regard to their context, including where appropriate*

[3] *Re Australian Nursing Federation and others* [2010] FWAFB 9290.

[4] *Re Australian Nursing Federation and others* [2010] FWAFB 9290 at [26].

[5] *Re Australian Nursing Federation and others* [2010] FWAFB 9290 at [27].

[6] *Re Australian Nursing Federation and others* [2010] FWAFB 9290 at [27].

[7] *Re Australian Nursing Federation and others* [2010] FWAFB 9290 at [30].

[8] *Master Builders Australia Limited; Housing Industry Association Ltd v Construction, Forestry, Mining and Energy Union; Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia; The Australian Workers' Union; "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)* [2012] FWAFB 3210.

the relevant parts of a related award. As Munro J observed in Re - in Linfox - CFMEU (CSR Timber) Enterprise Agreement 1997:

> "The identification of whether or not a provision in an instrument can be said to contain an 'ambiguity' requires a judgement to be made of whether, on its proper construction, the wording of the relevant provision is susceptible to more than one meaning. Essentially the task requires that the words used in the provision be construed in their context, including where appropriate the relevant parts of the 'parent' award with which a complementary provision is to be read".[9]

15. More recently, in the context of the 4 yearly review of modern awards, Ai Group pursued a variation to the coverage of the *Horticulture Award 2010* on various bases including s.160 of the Act. In its decision [10] (***Horticulture Award Decision***), the relevant Full Bench cited *Tenix* with approval.[11]

16. The Commission went on to rely on the decision of *Re Public Service (Non-Executive Staff – Victoria) (Section 170MX) Award 2000*[12] for further guidance in relation to the meaning of 'uncertainty' for the purposes of s.160 of the Act: (our emphasis)

> **[152]** The decision of Senior Deputy President Polites in *Re. Public Service (Non Executive Staff – Victoria) (Section 170MX) Award 2000* provides further clarity on the meaning of 'uncertainty'. In this case, an award clause was varied on the basis that the clause was uncertain. In doing so, His Honour adopted the following definition of 'uncertainty':
>
> > 'In that respect I respectfully adopt the submission made by the State of Victoria that the term "uncertainty" means the quality of being uncertain in respect of duration, continuance, occurrence, liability to chance or accident or the state of not being definitely known or perfectly clear, doubtfulness or vagueness. Those are extracts for the Concise Oxford Dictionary adopted by Commissioner Whelan in *Re: Shop Distributive and Allied Employees Association v. Coles Myer* [Print R0368]. In my view, as I have indicated, this provision clearly falls within that definition.'[13]

[9] *Master Builders Australia Limited; Housing Industry Association Ltd v Construction, Forestry, Mining and Energy Union; Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia; The Australian Workers' Union; "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)* [2012] FWAFB 3210 at [16].

[10] *4 yearly review of modern awards – Horticulture Award 2010* [2017] FWCFB 6037.

[11] *4 yearly review of modern awards – Horticulture Award 2010* [2017] FWCFB 6037 at [151].

[12] *Re Public Service (Non-Executive Staff – Victoria) (Section 170MX) Award 2000* (Print T3721).

[13] *4 yearly review of modern awards – Horticulture Award 2010* [2017] FWCFB 6037 at [152].

17. As is clear from the aforementioned authorities, the Commission has power to vary the Award pursuant to s.160 of the Act only if it is first established that there is an ambiguity or uncertainty in the relevant sense. Absent the existence of that jurisdictional fact, the Commission does not have power to vary the Award pursuant to s.160 of the Act.

18. Even if the Commission were to find that clause 32.14 of the Award is 'ambiguous' or 'uncertain', that would not be the end of the matter. A secondary question would then arise as to *how* the Award should be varied to remove the ambiguity or uncertainty. Section 138 applies to the determination of that question. That is, when determining how the Award may be varied, the Commission's discretion is limited by s.138, which requires that the Award may only include terms that are *necessary* to ensure that the Award achieves the modern awards objective. The modern awards objective is set out at s.134(1) of the Act.

SUMMARY OF AI GROUP'S POSITION

19. Ai Group opposes the Application on the basis that clause 32.14 is not ambiguous or uncertain. Accordingly, in our submission, the Commission does not have jurisdiction to vary the Award.

20. Issues concerning the merits of clause 32.14 are, therefore, not relevant to this matter. Neither are contentions concerning s.138 of the Act or the modern awards objective.

21. We have accordingly not sought to deal with such issues in these submissions. If, however, the Commission decides that, despite our submissions, clause 32.14 of the Award is ambiguous and / or uncertain, Ai Group will seek an opportunity to be heard further as to whether the variations proposed by the Applicant should be made. For present purposes we note that even if the Commission were to find that the impugned clause is ambiguous and uncertain, Ai Group would strongly oppose the variations proposed by the Applicant. The variations proposed and in particular, the First Proposed Variation, would result in significant additional

employment costs and would undermine the need to promote flexible modern work practices and the efficient and productive performance of work.

IS CLAUSE 32.14 AMBIGUOUS OR UNCERTAIN?

22. Clause 32.14 is not ambiguous or uncertain. It has a clear and well understood meaning.

23. Clause 32.14 requires that an employee be paid at the employee's ordinary hourly rate for the time that they are standing by if the employee is required regularly to hold themselves in readiness to work after ordinary hours, subject to any custom prevailing at the enterprise. If such a custom is prevailing at an enterprise, the clause does not apply and accordingly, an employee required to hold themselves in readiness to work after ordinary hours at that enterprise is not entitled to payment pursuant to the clause.

24. The alleged ambiguity or uncertainty is said to arise from the opening words of the clause; that is, 'Subject to any custom prevailing at an enterprise' (**Exception**). In order to assess whether there is in fact an ambiguity arising from the Exception, an "objective assessment of the words used in the provision under examination" must first be undertaken, "having regard to their context"[14].

25. The Macquarie Dictionary defines 'custom' as follows: (our emphasis)

> *noun* **1.** a habitual practice; the usual way of acting in given circumstances.
>
> **2.** habits or usages collectively; convention.
>
> **3.** *Law*
>
> **a.** a rule peculiar to a particular locality, trade or profession, which may be recognised as having legal force provided that it does not contradict a general rule of common or statutory law.
>
> **b.** such rules collectively.
>
> **4.** *International Law* the established practice of states, which may be accepted in certain circumstances as evidence of the existence of a legal rule.

[14] *Re Tenix Defence Systems Pty Limited Certified Agreement 2001-2004* (PR917548) at [29].

5. *Sociology* a group pattern of habitual activity usually transmitted from one generation to another.

6. (in medieval times in England and Europe) a customary tax, tribute, or service due by feudal tenants to their lord.

7. toll; duty.

8. (*plural*) customs duties.

9. (*usually upper case*) (*plural*) the government department that collects these duties.

10. habitual patronage of a particular shop, etc.; business patronage.

11. customers or patrons collectively.

12. the aggregate of customers.

–*adjective* **13.** made, built, etc., for a particular individual: *custom shoes*; *custom finish.*

–*adverb* **14.** for a particular individual to a special order: *custom-fitted*; *custom-built.*

26. The plain and ordinary meaning of the word 'custom' is clear. A custom is a 'habitual practice' or a 'convention'.

27. The plain and ordinary meaning of the word 'prevailing' is also unambiguous. It is defined by the Macquarie Dictionary as follows:

adjective **1.** predominant.

2. generally current.

3. having superior power or influence.

4. effectual.

28. Accordingly, the Exception applies where there is a current habitual practice or convention at an enterprise.

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.

30. We note that the Fair Work Ombudsman's advice concerning the proper interpretation of clause 32.14 is consistent with the above: (our emphasis)

> **Standing by**
>
> The Manufacturing Award includes a payment for standing by. This applies where an employee is required regularly to stand by in readiness to work after their ordinary hours have finished. The employee gets paid standing by time at their ordinary time rate for the time they are standing by.
>
> 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.
>
> **Example**
>
> Clive maintains and repairs equipment at his workplace. Along with the other equipment repair technicians, he finishes his shift at 4pm.
>
> Clive's employer keeps a roster of technicians standing by from 4pm until 6pm. This is to ensure there's always one technician standing by during these hours. Clive is normally rostered to be standing by on Mondays and Thursdays, following the end of his normal shift.
>
> Since standing by is a normal part of this work, Clive doesn't get paid standing by time.
>
> When Clive is called in for a repair job, he's paid for a call back, which is a minimum of 4 hours' pay at overtime rates.[15]

[15] Fair Work Ombudsman, *Standing by & call backs in the Manufacturing Award* (accessed 16 July 2020).

31. In *Tenix*, the AIRC said that the Commission "will generally err on the side of finding that there is an ambiguity or uncertainty where there are rival contentions advanced *and* an arguable case is made out for more than one contention"[16]. In our submission, an arguable case has not been made out for any other proposed reading of clause 32.14 of the Award. We address the contentions advanced by the Applicant below.

THE HISTORY PRECEDING CLAUSE 32.14 OF THE AWARD

32. Clause 32.14 of the Award reflects previous iterations of the Award since the 1930s.

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.

34. The *Metal Trades Award 1952*[18] (**1952 Award**) contained the following clause 14(e):

> Subject to any custom now prevailing under which an employee is required regularly to hold himself in readiness for a call back, an employee 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. Provided that the existence of a custom shall not operate to relieve an employer from paying a refrigeration service man the rate herein prescribed.

35. The *Metal Industry Award 1971*[19] (**1971 Award**) contained the following clause 21(f), which was in the same terms as clause 14(e) of the 1952 Award:

> Subject to any custom now prevailing under which an employee is required regularly to hold himself in readiness for a call back, an employee 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 which he is so to hold himself in readiness. Provided that

[16] *Re Tenix Defence Systems Pty Limited Certified Agreement 2001-2004* (PR917548) at [31].

[17] *Consolidated Metal Trades Award* (1937) 38 CAR 875.

[18] *Metal Trades Award 1952* (1952) 73 CAR 324.

[19] *Metal Industry Award 1971* (1971) 141 CAR 384.

the existence of a custom shall not operate to relieve an employer from paying a refrigeration serviceman the rate herein prescribed.

36. The *Metal Industry Award 1984*[20] (**1984 Award**) contained the following clause 21(f), which was in the same terms as clause 21(f) of the 1971 Award:

> Subject to any custom now prevailing under which an employee is required regularly to hold himself in readiness for a call back, an employee 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 which he is so to hold himself in readiness. Provided that the existence of a custom shall not operate to relieve an employer from paying a refrigeration serviceman the rate herein prescribed.

37. In 1999, the Full Court of the Industrial Relations Court of Australia determined[21] an appeal lodged by an employee against an earlier decision made by Moore J (***Logan v Otis***). The appellant was employed by Otis Elevator Company Pty Limited. The matter concerned a claim by the appellant that he was owed amounts under the *National Metal and Engineering On-site Construction Industry Award 1989* (**1989 Award**) for time spent standing by. The appellant relied on the following provision of the 1989 Award:

> Subject to any custom now prevailing under which an employee is required regularly to hold himself in readiness for a call back, an employee 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 which he is so to hold himself in readiness.

38. As can be seen, the provision was relevantly in the same terms as the 1984 Award.

39. The Full Court found as follows about the meaning of the clause: (our emphasis)

> 19. Counsel for Mr Logan contend that Moore J erred in interpreting the word "custom" differently than in cases concerning the implication of a contractual term. They say the word "custom" requires demonstration that the relevant practice is notorious, reasonable and certain. They say it must have existed from time immemorial, or at least from a date before the insertion of a clause like cl 14(g) of the 1989 award in predecessor awards; apparently in the 1930s. The latter proposition stems from the inclusion of the word "now" in the term "custom now prevailing".

[20] Print F4869.

[21] *Logan v Otis Elevator Co Pty Ltd* [1999] IRCA 4.

20. We do not accept these contentions. We agree with Moore J but do not rest our opinion solely on the word "custom". The clause must be construed as a whole. It seems to us that the purpose of cl 14(g) is to provide compensation to employees for being placed on a specific alert. The sub-clause operates where an employee is "required to hold himself in readiness to work after ordinary hours". The employee shall "until released" be paid standing by time at ordinary rates "from the time at which he is to hold himself in readiness". The sub-clause envisages both a requirement by the employer that the employee hold himself in readiness to work on a specific occasion and a release from readiness. Standing by payments apply during the period between those notifications. The sub-clause is to operate on an *ad hoc* bases, as and when stand by instructions are given by an employer.

21. It seems to us the opening words of the sub-clause do no more than emphasise this interpretation; the sub-clause does not apply where there is a "custom" under which the employee is **regularly** required to hold himself in readiness for a call back. In this context the word "custom" means no more than a prevailing and accepted practice. Moore J held there was such a practice in relation to Otis' local representatives.[22]

40. The decision in *Logan v Otis* is relevant to the proper interpretation of clause 32.14 of the Award. The clause that was there considered was in the same terms as the standing by clause in the 1984 Award and is relevantly similar to clause 32.14 of the Award. This is not surprising because the 1984 Award applied to metal and engineering on-site construction work prior to 1989 Award. The relevance of the decision is acknowledged in these proceedings by the AMWU and was recently accepted by the Commission in the context of an application for approval of an enterprise agreement, in which the Commission specifically considered whether the relevant agreement passed the 'better off overall test' having regard to the standing by arrangements under that agreement vis-à-vis the Award.[23]

41. As was found by the Full Court in *Logan v Otis*, the effect of the Exception is to exclude from the application of the clause circumstances in which employees are required to regularly hold themselves in readiness.

[22] *Logan v Otis Elevator Co Pty Ltd* [1999] IRCA 4 at [20] – [21].

[23] *Re Cummins South Pacific Pty Ltd - Laverton Enterprise Agreement 2018* [2019] FWCA 1245.

42. Subsequently, the *Metal, Engineering and Associated Industries Award 1998*[24] (**1998 Award**) contained the following provision, as a result of the 'award simplification' process that was conducted by the AIRC under the *Workplace Relations Act 1996* and *Workplace Relations and Other Legislation Amendment Act 1996*:

> **6.4.6 Standing By**
>
> Subject to any custom prevailing at an enterprise, where an employee is required regularly to hold himself or herself in readiness to work after ordinary hours, the employee is to be paid standing by time at the employee's ordinary rate of pay for the time he or she is standing by.

43. As documented in the AIRC's decision, the wording of the above clause was agreed between the parties (including Ai Group and the AMWU):

> The wording is agreed. It is allowable pursuant to s.89A(2)(b) and s.89A(6). The clause will be inserted into the award.[25]

44. Ai Group had significant involvement in the award simplification process (including through its predecessor organisations – the Metal Trades Industry Association of Australia and the Australian Chamber of Manufactures). It was the primary organisation representing the interests of employers in the manufacturing industry and was extensively involved in detailed negotiations with the union parties. Subject to those provisions in respect of which there was a dispute between the parties or where a change was discussed and agreed upon, a common principle was adopted by the parties in relation to all other provisions; that the process was not intended to result in any material change to the meaning of any clauses included in the award. In our submission, though clause 6.4.6 of the 1998 Award was in somewhat different terms to the corresponding clause in the 1984 Award, the parties did not intend for that redrafting to narrow the scope of the Exception.

[24] AP789529CRV.

[25] *Re Metal Industry Award 1984 – Part 1* (Print P9311).

45. During the subsequent ‘award modernisation’ process, which was conducted by the AIRC pursuant to Part 10A of the *Workplace Relations Act 1996*, the terms of the standing by clause were agreed between Ai Group and the union parties. This can be seen in draft awards filed by Ai Group and the AMWU dated 1 August 2008, which both identified that the following clause was agreed:

> Subject to any custom prevailing at an enterprise, where an employee is required regularly to hold himself or herself in readiness to work after ordinary hours, the employee is to be paid standing by time at the employee's ordinary rate of pay for the time he or she is standing by.

46. As can be seen, the agreed clause was in the same terms as the comparable clause contained in the 1998 Award. It was adopted by the AIRC and included in the Award when it commenced operation in 2010.

47. As can be seen from the above analysis, clause 32.14 reflects a longstanding provision that has applied for several decades. It has at various stages been the subject of agreed drafting between the key industrial associations representing members covered by those awards. The intended meaning of the clause was confirmed in the decision of *Logan v Otis*, which found that the proper interpretation of a relevantly similar term was consistent with our submissions as to the plain and ordinary meaning of clause 32.14 of the Award.

THE SECOND PROPOSED VARIATION

48. It is in our submission clear that the Second Proposed Variation is not directed towards removing an ambiguity or uncertainty from the Award. The Commission accordingly does no have jurisdiction to make the variation proposed pursuant to s.160 of the Act.

THE APPLICANT’S PRIMARY CONTENTIONS

49. The Applicant has filed numerous submissions in this matter. The key contentions advanced by the Applicant appear to be as follows.

50. *First*, the proposed change is not intended to result in an increase to the entitlements of employees required to stand by. This is plainly incorrect. The First Proposed Change would remove the Exception and thereby create an entitlement to payment under clause 32.14 for potentially large numbers of employees employed in enterprises that have a relevant custom prevailing. The cost implications for an employer of such a change would be significant, noting that the clause requires payment at the ordinary hourly rate for all time spent standing by.

51. *Second*, the Exception was intended only to serve as a transitional arrangement applying to enterprises with a standing by arrangement in place before an award required payment for time spent standing by. We contest this assertion. There is no evidence or material before the Commission that establishes that the intention of the Exception was as described by the Applicant; nor is the submission made consistent with the accepted interpretation of the clause, the decision in *Logan v Otis* or Ai Group's understanding of the intended operation of the clause.

52. *Third*, the Applicant submits that the "only enterprises that could satisfy the "custom prevailing" exemption is one that had a standby practice in place prior to the inclusion of this provision in any preceding award and has remained in the same ownership (therefore the same enterprise)". This submission should not be accepted. It misconstrues the application of the Exception, which is not limited in its application to enterprises of the nature described by the Applicant. There is no basis for reading down the Exception in the manner proposed by the Applicant. This appears to have been accepted by the Applicant in his submission of 26 February 2020, at page 3.

53. *Fourth,* the Applicant submits that clause 32.14 is internally inconsistent because it prescribes the same criteria for employees who are included in and excluded from the operation of the clause. This submission misunderstands the clause. The Exception requires a consideration of whether, at an *enterprise level*, employees are regularly required to hold themselves in readiness to work after ordinary hours. The second threshold requires a consideration of the incidence of the relevant *employee* being required to hold themselves in readiness to work

after ordinary hours. Read in this way, no internal inconsistency can be said to arise from the clause.

54. *Fifth*, some of the Applicants' submissions concern the perceived merits of the extant provision. Such arguments are not relevant to the Commission's consideration of whether the provision is ambiguous or uncertain and should therefore be disregarded by the Commission when making its determination as to whether the requisite jurisdictional fact is established in order for the Commission to exercise its direction under s.160 to vary the Award.

THE AMWU'S CONTENTIONS

55. Ai Group agrees with the following submissions made by the AMWU:

    (a) The current clause is not ambiguous or uncertain.

    (b) The extant clause is in substantially the same terms as the clause that was considered in *Logan v Otis*.

    (c) There is no apparent basis to depart from the interpretation of the clause determined in that decision.

    (d) A significant evidentiary case would be required to prove that the extant clause is not consistent with a fair and relevant minimum safety net and that a variation to the provision is necessary to achieve the modern awards objective.