Proposed Variation under section 160 of the Fair Work Act 2009 to:
*Manufacturing and Associated Industries and Occupations Award 2010 - Clause 32.14 and Clause 32.13*

Submitted by Garry Whackett: 21/09/2020
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This proposed change is not to bring about any increase to the entitlements of those engaged to be on standby. It merely seeks to correct a long standing misinterpretation of this award provision.

**Hearing Questions to establish consensus:**

Whilst all of the other interested parties are employed to appear here today, I have had to take a day's annual leave to be with you. My time is valuable and I really don't wish to waste a day's leave listening to someone with a filibustering narrative about how we have always done it this way, we like doing it this way and we see no need to change.

The following questions provide a focus on the issues necessary to enable the Commission to have all the information it needs to make an informed decision about the merit of my application.

Adherence to this script will enable me and the Commission to save time. These questions will provide an opportunity for those opposed to my application to introduce their evidence to rebuke each of the points I have used to justify my amendment to Clause 32.14.

Further, I have no experience with skype or facetime etc and may have technical issues that would prevent me appearing. If that were to occur I trust the Commission may invite anyone opposed to my application to answer each question below and challenge my interpretation.

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

1. If an award clause contains ambiguity or uncertainty are we all in agreeance that Section 160 of the Act is the most appropriate vehicle to correct that ambiguity or uncertainty?

2. Does everybody accept that a contradiction in an award clause would create ambiguity and uncertainty in that award clause? If you do not agree please provide an example that contains a contradiction that does not lead to ambiguity or uncertainty to demonstrate the basis of your belief.

**From MA00010 Clause 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.

EVERY employee that qualifies to be paid for being placed on standby is employed by an employer that regularly engages employees on standby. THEREFORE 100% of those that enliven the Standing by Clause for being on standby then have that entitlement extinguished by being employed by an employer that regularly engages staff on standby. It is my assertion that the accepted interpretation creates a CONTRADICTION within Clause 32.14 and not just an exception.

AN EXCEPTION CONDITION MUST HAVE TWO POSSIBLE OUTCOMES to be an exception; the rule and the exception. The accepted interpretation leads to only one outcome.

3. Are we in agreeance that every employee that is regularly required to be on standby is employed by an employer that regularly engages staff to be on standby?

4. Can anybody identify a class of employees that can enliven the rule in Clause 32.14 to be paid the award rate, which does not then have that entitlement extinguish by the contradiction in those first eight words? If no one is entitled to be paid the award rate for being on standby, there is no exception, it is just a contradiction.

5. Are we in agreeance that the accepted interpretation of Clause 32.14 creates a contradiction in that every employee must be paid the award rate for being on standby yet every employer is exempt from paying the award rate?

Having established that Clause 32.14 does contain ambiguity or uncertainty and Sect 160 is the best vehicle to correct that ambiguity, we must now agree what will be an acceptable outcome when the ambiguity is removed. It is my position that if it is possible to know the intention of the author of this provision then the revised Clause 32.14 should reflect the intensions of the author before the misinterpretation created the ambiguity. Within MA00010 there are only two possible outcomes, either you get paid your normal hourly rate for every hour you are engaged on Standby or by way of the exception, the employer meets the exception criteria and no payment is necessary.

6. Are we in agreement that the Clause 32.14 has only two possible rates of pay for being on Standby, the employee's normal hourly rate for every hour engaged on standby or no payment?

7. Does anybody think that the Commission would welcome and accept an application to renegotiate the rate of pay for being on Standby in Clause 32.14 under section 160? It is my understanding that Section 160 is not the appropriate section to lodge a claim to renegotiate an award condition.

8. Do we all agree Section 160 is not the appropriate vehicle to renegotiate the rate of pay for being on Standby?

THE HISTORY PRECEDING CLAUSE 32.14 OF THE AWARD

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 Clause 11(d) above, the exception condition allows any employer with an existing practice to continue to use that existing practice.

9. Are we in agreement that in the above Clause 11(d), when this was introduced in 1937, only those employers that had a Standing By practice that predated the introduction of this Standing by clause were eligible to continue their existing Standing by practice?

10. Are we in agreeance that in 1937, any employer starting a new practice of engaging employees on Standby was obliged to pay the hourly rate stated in the award for every hour an employee was engaged on Standby?

11. Are we in agreement that in 1938, any employer starting a new practice of engaging employees on standby was required to pay the hourly rate for the period the employees is engaged on Standby?

12. Are we in agreeance that after 1937, every employer starting a new practice of engaging employees on standby whilst the exception was expressed thus in this, or later awards was obliged to pay the hourly rate for every hour the employee was engaged on standby?

13. Are we in agreement that only those employers that had an existing Standing by practice in place prior to the 1937 introduction of this regulation of Standing By practice, were eligible to claim to be exempt from paying the nominated hourly rate for being on Standby?

The modern form of the exception is "Subject to any custom prevailing at an enterprise". The earlier form of the exception was "BUT ANY CUSTOM NOW PREVAILING under which an employee is required regularly to hold himself in readiness for a call back SHALL CONTINUE."

I put forward the view that there is nothing in the WRITTEN form of the exception in MA00010 Clause 32.14 that would make it impossible for the earlier form of the exemption being interchanged as a plausible substituted.

14. Are we in agreeance that there is nothing in the current **WORDING** of the exception in Clause 32.14 that makes it impossible for the 1937 form of the exception to be a plausible substitute for the later form?

There is nothing in the written form of the current exception that would suggest that the 1937 form of the exception is no longer a valid expression of the exception. The interpretation of the exception has changed significantly from the time the practice of standing by first became regulated in 1937. Then no interpretation was necessary as the meaning was obvious and impossible to misinterpret from the simple English language used. In 1937, “any employer with an existing practice of engaging employees on standby may continue to use that practice”, to the currently accepted interpretation being, if an employer regularly engages staff on standby that enterprise is exempt from the standing by provision in the award.

15. If there is nothing in the wording of the exception condition, can anyone provide a legislative reason as to why the earlier form of the standing by exception would not still be a valid way to express the standing by exception? If not, are we in agreeance that the earlier form of the exception is still a valid way to express the exception condition for employers?

LOGAN vs OTIS ELEVATORS appeal decision.

Much of the accepted interpretation of Clause 32.14 comes from the Logan appeal decision. Indeed, in 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”.

16. As a generalisation, are we in agreeance that a judicial decision based on an assumption or speculation rather than evidence would be considered unreasonable?

Referring back to my question 13, only employers that had a standing by practice in place prior to the regulation of Standing by practices in 1937 can satisfy the criteria to be exempt from paying the award rate for engaging staff on standby.

In Logan the court satisfied itself that a custom did exist at Otis Elevators, but by failing to investigate and establish the legality of Otis’s practice of paying other than the award rate for being on standby, the court’s decision to accept that custom as the basis for an exception can only be based on speculation or an assumption and therefore is unreasonable.

17. Are we in agreeance that a breach of an award, even a long standing breach, does not constitute evidence of a valid employment custom in an enterprise?

The vulnerability in using Logan as the basis for interpreting the exception condition in 32.14 is the Logan case NEVER EXAMINED any new start up companies, **not even Otis**. Otis was a mature employer that was once a start up enterprise, but the court rejected the idea that it needed to look back further than the immediate past to establish if a custom prevailed.

18. Given that the current interpretation of the exception condition in 32.14 either comes from or is reflected in the Logan appeal decision. Are we all in agreeance that Logan never examined any new start up enterprises and as such there is nothing in Logan that can be used to aid the interpretation of the exception condition for engaging staff on standby for **any new start up employer?**

The currently accepted interpretation as expressed in page reference No: K600586 by the Fairwork Ombudsman says that an enterprise is exempt from paying the award rate if it has a custom prevailing. 'Custom prevailing' means that standing by is a routine, regular and expected part of the work.

19. Are we in agreeance that planning to do something, such as a start up enterprise planning to engage staff on standby, is not the same as actually having engaged staff on standby in the law?

20. Are we in agreeance that it is impossible for any start up enterprise to meet the Fairwork Ombudsman's criteria of having a standing by practice that is routine and regular on the first instance that it engages an employee on standby?

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?

<u>When we apply the wording and interpretation from the 1937 form of the standing by exception:</u>
Only those organisations that had a Standing By practice in place prior to the regulation of this practice in 1937 are exempt and entitled to continue their local practices. All other employers starting up since regulation must pay the rate stated in the award for every hour on standby. When the award is read with this interpretation, the award is complete and legible with no errors or anomalies encountered.

<u>When we read the award with the accepted interpretation:</u>
Five (5) anomalies are created when this interpretation is applied to the actual words written in Clause 32.14. This interpretation makes clause 32.14 fatally flawed.

a) This interpretation states that an employer need not pay the award rate for engaging an employee on standby, regardless of whether a custom prevailing can be demonstrated or not.
b) 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.
c) A cross reference within Clause 32.13 (c) in the award is wrong.
d) A contradiction exists within Clause 32.14. There is only one group of employees referred to in 32.14, those that are regularly required to be on Stand By. The same criterion is used to both include and exclude employees for payment.
e) An employee on standby is not entitled to be paid any extra for this standby 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.

21. Are we all in agreeance that no enterprise that has started a practice of engaging employees on standby since the practice was regulated in 1937 can meet the criteria to be entitled to be exempt from paying the employee's hourly rate and as such, the exception condition in MA00010 Clause 32.14 is redundant and should be deleted as its continued inclusion creates ambiguity in the Clause?

22. Does anybody opposed NOT wish to withdraw their objection to my proposed amendment part 1 to MA00010 Clause 32.14?

**Proposed Variation to 32.14 Standing by Part 1**

~~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.

**Proposed Variation to 32.14 Standing by Part 2**

**My original intent was to add to Clause 32.14 but my revised position is to suggest the following paragraph be included as a substitute for the existing flawed 32.13 (g) below.**

**32.13 Call back**

**(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.

The Clause 32.13 (g) above states, that if I am on standby, any call backs to work of less than 3 hours in duration each cannot be considered overtime for the purpose of determining rest breaks after overtime. Hence I could find myself recalled to work 2 or even 3 times between shifts, for say 8hrs total duration, and as long as no recall exceed 3 hours in duration I am expected to start work at my normal start time, 7:30 am.

23. Are we in agreeance that Clause 32.13 (g) is unreasonable and unworkable?

24. Are we in agreeance that engaging an employee on standby, to work a normal dayshift from 7:30am – 4:00pm, enjoy some free time at home, go to bed at 11:00pm only to be awoken at midnight to return to work is an unacceptable work practice?

In an industrial environment within NSW it is everybody's responsibility to be responsible for not only our own safety but also we have a duty of care to be alert to hazards that might impact the safety of others.

25. Are we in agreeance that it is everybody's responsibility to take action to intervene when they become aware of an unsafe act or practice?

26. Are we in agreeance that the situations described in Questions 23 and 24 are in conflict with other regulations and guidelines about managing fatigue in the work place?

27. Are we in agreeance, that if Clause 32.13 (g) is in conflict with other legislation, that creates ambiguity or uncertainty or exposes an error in 32.13 (g)?

28. Are we in agreeance that Section 160 amendment is the appropriate vehicle to correct an error, ambiguity or uncertainty in Clause 32.13 (g)?

**Proposed Variation to 32.14 Standing by Part 2** now revised to substitute this following paragraph for the existing **Clause 32.13 (g).**

**"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."**

29. Are we in agreeance that the suggested change of wording above for Clause 32.13 imposes no new obligations on employers?

Sincerely,

Garry Whackett