Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission on FWC Draft Clause

Abandonment of Employment – Common Issue

(AM2016/35)

28 August 2018

4 YEARLY REVIEW OF MODERN AWARDS

ABANDONMENT OF EMPLOYMENT – COMMON ISSUE (AM2016/35)

1. This short submission is made in response to the Commission's directions of 7 August 2018 in the *4 Yearly Review of Modern Awards – Abandonment of Employment – Common Issue* proceedings (AM2016/35).

2. Ai Group appreciates the efforts made by His Honour Deputy President Gostencnik to draft a "Reasonable inquiries about certain absences" clause for the consideration of interested parties.

3. Ai Group has given the draft clause careful consideration.

4. The draft clause is much better than the clauses proposed by the unions. However, in our view, there is the risk that the Commission's draft clause could be misleading and confusing for employers and employees due to the fact that it would arise out of the *4 Yearly Review - Abandonment of Employment* proceedings and does not clarify the significant point that arose from the proceedings. That is, genuine abandonment of employment constitutes termination at the initiative of the employee, as clarified in the following extract from the Full Bench's decision of 23 January 2018 ([2018] FWCFB 139), and not termination at the initiative of the employer: (emphasis added)

> **[21]** "Abandonment of employment" is an expression sometimes used to describe a situation where an employee ceases to attend his or her place of employment without proper excuse or explanation and thereby evinces an unwillingness or inability to substantially perform his or her obligations under the employment contract. This may be termed a renunciation of the employment contract. The test is whether the employee's conduct is such as to convey to a reasonable person in the situation of the employer a renunciation of the employment contract as a whole or the employee's fundamental obligations under it. Renunciation is a species of repudiation which entitles the employer to terminate the employment contract. Although it is the action of the employer in that situation which terminates the employment *contract*, the employment *relationship* is ended by the employee's renunciation of the employment obligations.
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> **[22]** Where this occurs, it may have various consequences in terms of the application of provisions of the FW Act. To give three examples, first, because the employer has not terminated the employee's employment, the NES requirement in s 117 for the provision of notice by the employer, or payment in lieu of notice, will not be applicable.

> Second, if a modern award or enterprise agreement provision made pursuant to s 118 requiring an employee to give notice of the termination of his or her employment applies, a question may arise about compliance with such a provision. Third, if the employee lodges an unfair dismissal application, then the application is liable to be struck out on the ground that there was no termination of the employment relationship at the initiative of the employer and thus no dismissal within the meaning of s 386(1)(a) (unless there is some distinguishing factual circumstance in the matter or the employee can argue that there was a forced resignation under s 386(1)(b)).

5. Ai Group is of the view that it cannot be legitimately held that the draft clause is *"necessary to achieve the modern awards objective"* and, hence, the inclusion of the draft clause in the awards would be inconsistent with s.138 of the Act.

6. We note that in its 8 March 2018 submission (at paragraph [14]), the AWU expressed the view that the inclusion of a replacement clause is not "necessary". We concur with this view.

7. We also note that His Honour Deputy President Gostencnik made the following remarks at the conference on 3 August 2018, as recorded on the transcript: (emphasis added)

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> THE DEPUTY PRESIDENT: Each of you has constituents that you'd need to talk to about with these things, and I appreciate that I've just floated it without any particular notice, so what I might do is – and perhaps if I draft a set of words, circulate it to the parties, and give the parties, say, three weeks or so to comment on them, and you shouldn't take this as an indication that the Full Bench or I are wedded to any particular words, because we're not. This is literally something that I tried to put together taking into account the different views of the parties last night. So it's to facilitate discussion not as a view because my present inclination, and, again, <u>it's not a final view, but my present inclination is, unless the parties agree to something, we'd prefer to put nothing in. That would be my position, at this stage</u>. So that if we're going to put something in that regulates or creates an obligation to consult then I would prefer it to be an agreed position.

8. We submit that the appropriate course of action is for the Commission to delete the existing abandonment of employment clauses in the relevant awards, and to not insert any alternative clauses. This course of action would be consistent with the modern awards objective in s.134 of the Act (e.g. because the relevant awards would be simpler and easier to understand). This course of action would also be consistent with s.138 of the Act.