

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Reply Submission

Abandonment of Employment –
Common Issue
(AM2016/35)

26 February 2018

Ai
GROUP

4 YEARLY REVIEW OF MODERN AWARDS

ABANDONMENT OF EMPLOYMENT – COMMON ISSUE (AM2016/35)

1. This short submission is made in reply to the AMWU's submission and draft determination of 20 February 2018 in the *4 Yearly Review of Modern Awards – Abandonment of Employment – Common Issue* proceedings (AM2016/35).
2. Ai Group strongly opposes the AMWU's draft determination.
3. The current proceedings relate to the topic of Abandonment of Employment. Any award clause that arises from these proceedings should be limited to an aspect or aspects of this topic such as providing a procedure for consultation in circumstances where it appears that an employee may have abandoned his or her employment.
4. Existing clause 20 – Absences from Duty in the *Manufacturing and Associated Industries and Occupations Award 2010 (Manufacturing Award)*, which the AMWU is seeking to vary, is a longstanding provision from the Metal Industry Award and Manufacturing Award.
5. Clause 20 is not directly related to the topic of abandonment of employment, and should not be disturbed as a result of these proceedings. For example, the clause applies in circumstances where an employee arrives for work one hour late one morning.
6. Clause 20 is closely related to the payment of wages provisions in the Award. It would be confusing to employers and employees if the current simple clause, about pay deductions when an employee is absent, is complicated through the inclusion of content related to abandonment of employment.
7. The AMWU's proposal would undoubtedly disturb existing clause 20. However, the extent of the impact is not clear because:
 -) Subclause 20.1 in the AMWU's draft determination refers to subclause 20.2 but there does not appear to be a subclause 20.2;

-) The draft determination would add the words “**21. Abandonment of Employment**” but the determination does not propose any content for clause 21.
8. The AMWU’s proposal is inconsistent with the modern awards objective in s.134 of the *Fair Work Act 2009 (FW Act)* for the following reasons:
- a. The AMWU’s proposed clause is not simple or easy to understand (s.134(1)(g)), for the reasons outlined in paragraph 7 above.
 - b. The AMWU’s proposed clause would lead to decreased productivity, increased employment costs and an increased regulatory burden (s.134(1)(f)) because:
 -) The clause would prohibit “*any action*” being taken against an absent employee, which would include actions that have an adverse, positive or neutral impact upon the employee;
 -) The requirement to use “*(a)ll available means*” to contact the employee is extremely broad and would include both practicable and impracticable means;
 -) The proposed prohibition on termination of employment for a 21-day minimum period is excessive, particularly in an award that applies to hundreds of thousands of employees, and an extremely wide range of employment circumstances; and
 -) The clause is not limited to full-time and part-time employees, and would equally apply to casuals. A 21-day prohibition on terminating the employment of a casual employee who is absent without explanation is inconsistent with the nature of casual employment.

9. The AMWU's proposed clause offends s.136 of the FW Act because the clause does not deal with any matters that are permitted or required to be in a modern award.
10. The AMWU's clause is, in effect, a prohibition on termination of employment in certain circumstances. The clause cannot be legitimately characterised as a procedure for consultation or any other provision that can be lawfully included in an award under ss.139 or 142.
11. The AMWU argues in its submission that its proposed clause is incidental or ancillary to NES leave provisions.¹ As held by the Full Bench in its decision of 23 January 2018, s.142 provides only a 'discrete and limited power to include incidental terms in awards'. The AMWU's proposed clause is a very long way short of meeting the requirements of s.142.
12. Ai Group's proposed clause should be adopted by the Full Bench in preference to the AMWU's proposed clause because:
 -) For the reasons set out above, the AMWU's proposed clause cannot, and should not, be included in awards.
 -) Ai Group's proposed clause deals with an aspect of the topic of Abandonment of Employment – the topic that is the subject of these proceedings.
 -) Ai Group's proposed clause sets out a simple and fair consultation process where it appears that an employee may have abandoned his or her employment.
 -) In order to understand the circumstances in which the consultation process applies, Ai Group's proposed clause defines Abandonment of

¹ AMWU submission. para 11.

Employment in the manner determined by the Full Bench in its decision of 23 January 2018.²

) Ai Group’s clause is consistent with the modern awards objective. It is simple and easy to understand (s.134(1)(g) and would not increase costs or reduce productivity (s.134(1)(f)).

13. Subclauses 21.1 and 21.3 of Ai Group’s proposed clause are allowable under s.139(1)(j): “*procedures for consultation...*”.
14. Subclause 21.2 is allowable under s.142 because it defines the concept of abandonment of employment in order to clarify the circumstances in which the consultation process in clause 21.3 applies.
15. Subclause 21.4 is allowable under s.142 because it provides further clarity about the scope of the consultation process in subclause 21.3.
16. If, despite, Ai Group’s submissions, the Full Bench is not convinced that Ai Group’s proposed clause can be included in an award under ss.139 or 142, we submit that the appropriate course would be for the Commission to delete clause 21 – Abandonment of Employment from the Manufacturing Award (and the equivalent clauses in the other awards) and to leave clause 20 – Absence from Duty in its present form.

² [2018] FWCFB 139.