

Fair Work Commission
Level 10, Terrace Tower, 80 William Street
East Sydney NSW 2011
Via email: AMOD@fwc.gov.au

8 March 2018

Re: AM2016/35 Abandonment of Employment – Common Issue

BACKGROUND

1. We refer to the matter above and the Decision of 23 January 2018 and in particular the proposal at paragraph [35] to invite interested parties to file proposals for a provision to replace the current *Abandonment of Employment* clauses in the six awards in which they appear.
2. The following parties have filed proposed replacement clauses:
 - 2.1. The Australian Manufacturing Workers' Union (**AMWU**)¹
 - 2.2. The Australian Industry Group (**AIG**)²
3. The following parties have filed submissions in reply to the above proposed replacement clauses:
 - 3.1. The AIG³
 - 3.2. The Australian Services Union (**ASU**)⁴
4. The Australian Workers' Union (**AWU**) submissions in reply appear below.
5. A proposed clause in the form of a Draft Determination is attached to these submissions.

¹ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201635-sub-amwu-200218.pdf>

² <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201635-sub-aig-210218.pdf>

³ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201635-sub-reply-aig-260218.pdf>

⁴ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201635-sub-asu-020318.pdf>

THE AIG SUBMISSION AND PROPOSED CLAUSE

6. The AWU submits that the replacement clause proposed by the AIG (**AIG clause**) does not adequately address the requirements of the replacement provision as sought by the Full Bench of the Fair Work Commission (**Full Bench**) and should therefore be rejected.
7. The Full Bench stated at paragraph [33] of the 23 January 2018 Decision⁵ (**the Decision**) that any proposed clause:

“...would primarily be concerned with the steps the employer might take to attempt to consult with the employee about the reasons for the absence before taking action against the employee.”
8. We note that the AIG clause is not primarily concerned with steps an employer may take to attempt to consult an employee, and does not consider the element of action taken against an employee.
9. On the contrary, the AIG clause is primarily concerned with defining abandonment of employment as a concept in a manner that we would consider quite convoluted, and characterising the termination of an employee’s employment as action taken *by* the employee, not against.
10. It is our understanding that the action taken *against the employee* as stated at paragraph [33] of the Decision refers to action taken by the employer to terminate the employee’s employment. We do not consider that “confirming the termination of employment by the employee⁶” would be properly characterised as *taking action against the employee*.
11. The portion of the AIG clause that is reserved for any actual consultation process⁷ is too vague for a reader of the clause to be certain about his or her rights and obligations. For example, an employer’s obligation to “make reasonable endeavours to provide an opportunity” is entirely nebulous.

⁵ [2018] FWCFB 139

⁶ s.21.3 of AIG proposed clause

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12. The result is a complicated clause seemingly drafted to ensure that any termination arising from the operation of the clause is characterised as anything but a termination at the initiative of the employer.

13. Additionally, the AWU submits that the clause proposed by AIG:

13.1. Is not sufficiently concerned with a consultative process to be considered a term “about” consultation as required by s.139(1)(j) of the *Fair Work Act 2009* (**Act**); and

13.2. Does not meet the modern awards objective, specifically s134(1)(g) of the Act.

AWU SUBMISSIONS

14. Broadly, the AWU doesn't believe it *necessary* to insert a replacement provision in the awards that currently contain an abandonment of employment clause; we see merit in having the provisions of the Act prevail in such circumstances.

15. However, we note that the Full Bench was clear at paragraph [35] of the Decision that a replacement provision is sought.

16. In response to that request, the replacement provision proposed by the AWU is attached to these submissions in the form of a Draft Determination.

17. The AWU submits that the replacement provision attached is appropriately about a procedure for consultation as required by s.139(1)(j).

Yours faithfully,



Zachary Duncalfe
NATIONAL LEGAL OFFICER
The Australian Workers' Union

DRAFT DETERMINATION

Fair Work Act 2009

s.156 – 4 Yearly Review of Modern Awards

Abandonment of Employment

(AM2016/35)

MANUFACTURING AND ASSOCIATED INDUSTRIES AND OCCUPATIONS

AWARD 2010

[MA000010]

Manufacturing industry

VICE PRESIDENT

SYDNEY, XX XX 2018

4 yearly review of modern awards – Manufacturing and Associated Industries and Occupations Award 2010 – ‘abandonment of employment’

A. Pursuant to section 156(2)(b)(i) of the Fair Work Act 2009, the *Manufacturing and Associated Industries and Occupations Award 2010* is varied as follows:

[1] By deleting clause 21 and inserting the following:

21 Unexplained continuous absence from work

21.1 If an employee is absent from work for a continuous period exceeding 3 working days and the employer is unaware of the reason for this absence, the consultation procedure in this clause applies.

21.2 In the circumstances described in clause **21.1**, the employer must provide the employee with an opportunity to explain this absence before the employer takes any action against the employee. For this purpose, the employer must:

(a) Allow a period of 14 days after the employee’s last attendance at work or notified absence from work for contact to be made with the employee or for the employee to make contact with the employer; and

(b) Attempt to contact the employee during the above 14-day period using all reasonable means available to the employer.

21.3 This clause only applies in the circumstances described in clause **21.1**. Nothing in this clause detracts from the rights of an employee to access any legal remedies arising from any action taken against the employee or from the rights of an employer to lawfully terminate the employment of an employee in other circumstances.

Note: Section 352 of the Fair Work Act 2009 provides that an employer must not dismiss an employee if the employee is temporarily absent from work due to an illness or injury of a kind prescribed.

B. This determination comes into operation from XX XX 2018.

VICE PRESIDENT