

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

1 June 2017

Re: AM2016/35 Abandonment of Employment – Common Issue

BACKGROUND

1. We refer to the matter above and the Directions of 27 April 2017 and in particular Direction 2 – interested parties are to file written reply submissions by 5:00pm 1 June 2017.
2. The following parties have filed submissions in this matter:
 - 2.1. The Australian Workers' Union (**AWU**)¹
 - 2.2. The Australian Manufacturing Workers' Union (**AMWU**)²
 - 2.3. The Construction, Forestry, Mining and Energy Union – Construction and General Division (**CFMEU C&G**)³
 - 2.4. The Community and Public Sector Union (**CPSU**)⁴
 - 2.5. The Australian Industry Group (**AIG**)⁵
3. The AWU submissions in reply appear below.

REPLY SUBMISSIONS

4. The AWU notes that the question posed by the Commission – if the Abandonment of Employment provisions ('the provisions') may be included in

¹ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201635-sub-awu-180517.pdf>.

² <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201635-sub-amwu-180517.pdf>.

³ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201635-sub-cfmeu-180517.pdf>.

⁴ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201635-sub-cpsu-190517.pdf>.

⁵ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201635-sub-aig-180517-amended.pdf>.

modern awards – has been unanimously answered in the negative.

5. All parties have proposed that the provisions in the six awards identified by the Commission should be deleted. The AWU agrees with and supports all submissions to that effect.

THE AIG SUBMISSION

6. The AIG submission can be divided into two limbs. In the first limb, the AIG has agreed with the AWU, AMWU, CFMEU C&G and the CPSU that the provisions are not terms that may be included in modern awards, and should be deleted.
7. The second limb of the AIG submission is a lengthy attempt to convince the Commission that it is necessary and advantageous for the relevant awards to retain at least some of the effect of the provisions that will be removed.
8. We note that at Paragraph 11 the AIG submission states:

“When an employee abandons his or her employment, termination of employment automatically occurs...”

9. This assertion, which seems to form the basis of the amendment proposed by the AIG, is incorrect. It is also contrary to the Decision in *Iplex*,⁶ which triggered these proceedings.

Relevance to Proceedings

10. Although aware that abandonment of employment provisions are not terms that may be included in modern awards, the AIG has proposed an amendment to *another* clause in each award in an attempt to retain the effect of such provisions.
11. Parties were not directed to propose amendments to the awards that contain abandonment of employment provisions – they were directed to make submissions in relation to the abandonment of employment provisions in those awards. All parties have done so, and all parties have made the same submission – the provisions must be removed.

⁶ *Mr Boguslaw Bienias v Iplex Pipelines Australia Pty Limited TA Iplex Pipelines Australia [2017] FWCFB 38 at [36].*

12. The AIG proposal to amend a separate clause that is not the focus of this matter is outside of the scope of this matter. The proposal is irrelevant and should be disregarded.

The Proposed Amendment

13. In the event that the AIG submissions related to the proposed amendment are considered relevant to the proceedings at hand, the AWU makes the following reply submissions.

14. The amendment proposed by the AIG is a crude attempt to circumvent the consequences of the Decision in *Iplex* by re-introducing the term ‘abandonment of employment’ in a different clause and redefining it as ‘termination at the initiative of the employee’.

15. In relation to abandonment of employment, the Full Bench in *Iplex* stated (emphasis added):

*“In truth, once an employee is deemed...to have abandoned his or her employment...**the employer must take the additional step of terminating the employment and if it does not do so employment continues.**”⁷*

16. Termination of employment cannot be automatic and without notice. The proposed AIG amendment assumes that the employer-employee relationship is terminated when an employee is deemed to have abandoned his or her employment. This is inconsistent with the notice requirements in the *Fair Work Act*.

17. Further, we note that the proposed AIG amendment makes no effort to provide for clarification in the award regarding how abandonment of employment is to be deemed. This is discussed in more detail below.

18. In addition to the above inconsistencies with *Iplex* and the *Fair Work Act*, the justifications given by AIG in proposing the amendment are feeble.

⁷ *Mr Boguslaw Bienias v Iplex Pipelines Australia Pty Limited TA Iplex Pipelines Australia [2017] FWCFB 38 at [41].*

19. It is asserted by the AIG that this amendment will make the award simpler and easier to understand.⁸ We disagree.
20. If the proposed amendment were to be accepted, we note that:
- 20.1. The Abandonment of Employment provision will have been removed from the award (consistent with the AIG proposal);
- 20.2. Abandonment of employment is not a defined term in the award; and
- 20.3. As the award will contain no guidance as to what amounts to abandonment of employment, the phrase “circumstances where an employee abandons his or her employment” is vague, uncertain, and confusing.
21. If a deeming provision were proposed by the AIG in order to remedy this uncertainty – which is evidently necessary – such a provision would be subject to the Decision of *Iplex*. The deeming provision:
- 21.1. Could not trigger automatic termination of employment; and
- 21.2. Could not characterise the circumstances where an employee abandons his or her employment as termination at the initiative of the employee.
22. The inevitable result is that the deeming provision will be inconsistent with the proposed amendment.
23. It is contradictory of the AIG to assert that the current subclause 22.2 of the *Manufacturing and Associated Industries and Occupations Award* “logically applies” to cases of an employee abandoning his or her employment⁹ in a submission seeking to amend subclause 22.2 to include cases of an employee abandoning his or her employment.
24. Subclause 22.2 does not apply to cases of an employee abandoning his or her employment, and cannot by virtue of *Iplex*¹⁰ and notice requirements in the *Fair*

⁸ AIG submission, paragraph 27.

⁹ AIG submission, paragraphs 13, 14.

¹⁰ *Mr Boguslaw Bienias v Iplex Pipelines Australia Pty Limited TA Iplex Pipelines Australia [2017] FWCFB 38 at [58]*.

Work Act.

25. AIG claims that that the suggested amendment will discourage employees from abandoning their employment, which will promote both the efficient and productive performance of work and increased productivity.¹¹
26. This claim is baseless. The AWU is not aware of – and the AIG did not provide – any evidence that suggests abandonment of employment is of a higher incidence in any one of the vast majority of industries covered by awards that do not currently mention abandonment of employment for that reason alone.
27. The amendment proposed by the AIG is outside of the scope of this matter and is therefore irrelevant and should be disregarded.
28. In the event that the Commission does not disregard the proposal for reasons of irrelevance, the amendment must be rejected as an obvious attempt to avoid the consequences of the Decision in *Iplex* and the requirements of the *Fair Work Act*. The unconvincing arguments for the necessity and utility of such an amendment only add to the proposal's implausibility.

Yours faithfully,



Zachary Duncalfe
NATIONAL LEGAL OFFICER
The Australian Workers' Union

¹¹ AIG submission, paragraphs 27, 28.