

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

18 May 2017

Re: AM2016/35 Abandonment of Employment – Common Issue

BACKGROUND

1. These submissions of the Australian Workers' Union (AWU) are made pursuant to the Directions of Vice President Hatcher issued on 27 April 2017.
2. Parties are directed to file submissions on whether the abandonment of employment provisions in the six awards identified at Attachment A to the Statement of Justice Ross of 1 February 2017¹ are terms that may be included in modern awards under Subdivision B of Division 3 of Part 2-3 of the *Fair Work Act 2009*.
3. Of the six awards identified by the Commission, the AWU has an interest in the following:
 - 3.1. The *Manufacturing and Associated Industries and Occupations Award 2010*;
 - 3.2. The *Nursery Award 2010*; and
 - 3.3. The *Wool Storage, Sampling and Testing Award 2010*.
4. However, these submissions have a general application to all the identified abandonment of employment provisions.

¹ [2017] FWC 669

² *Mr Boguslaw Bienias v Iplex Pipelines Australia Pty Limited TA Iplex Pipelines Australia* [2017]

THE FULL BENCH DECISION IN *Iplex*²

5. In its decision handed down on 13 January 2017, the Full Bench of the Fair Work Commission determined that Clause 21 of the *Manufacturing and Associated Industries and Occupations Award 2010* – an abandonment of employment clause – does not have the effect of automatically terminating employment³.
6. The Full Bench further determined that if Clause 21 did operate to automatically terminate an employee's employment, the clause would be rendered ineffective as such a term is neither required nor permitted by s136 of the *Fair Work Act 2009*⁴.

APPLYING *Iplex*

7. Applying the decision and reasoning of *Iplex* to the other abandonment of employment clauses can only yield the same result as that of *Iplex*. This is significantly due to the clauses in four of these awards being essentially verbatim of Clause 21 of the *Manufacturing and Associated Industries and Occupations Award 2010*.
8. The only differences between the clauses are cosmetic: the *Business Equipment Award 2010* reduces the number of absent working days from three to two and the notice period from 14 days to seven; and the *Nursery Award 2010* treats an employee's absence as 'evidence' rather than 'prima facie evidence' of abandonment.
9. The abandonment of employment clause in the *Wool Storage, Sampling and Testing Award 2010* is the only clause of the six that appears significantly different from the others. However, this difference is again cosmetic; the clause purports to do the same as the others, just in fewer words.

² *Mr Boguslaw Bienias v Iplex Pipelines Australia Pty Limited TA Iplex Pipelines Australia* [2017] FWCFB 38.

³ *Ibid* at [36-40].

⁴ *Ibid* at [49].

SECTION 117 OF THE *FAIR WORK ACT 2009*

10. Now that it is established that termination of employment by way of an abandonment of employment provision is at the employer's initiative⁵, we can examine the interaction between s117 notice requirements of an employer in terminating an employee's employment under such a provision.
11. Section 117(1) of the *Fair Work Act 2009* states that an employer must give an employee written notice of the day of the employee's termination, and that this day of termination must not be before the day notice is given. Section 117 is a provision of the National Employment Standards.
12. All six abandonment of employment clauses state that once an employee is deemed to have abandoned his or her employment, termination will have taken effect on either the employee's last attendance at work or the last explained absence of the employee. Both of these days occur before the employee has been deemed to have abandoned their employment, and, relevantly, well before the employee will receive notice of termination.
13. Consequently, all six of the abandonment of employment provisions, by excluding s117(1), contravene s55(1) of the *Fair Work Act*.
14. An abandonment of employment provision – even when characterised as not operating to automatically terminate an employee's employment – contravenes s55(1) of the *Fair Work Act* by excluding s117(1). Such a provision is therefore a term that must not be included in a modern award under s136(2).
15. The consequence of a contravention of s136 is that the term will have no effect to the extent of the contravention⁶. This would mean that for five of the six awards, sub-clause (3) would have no effect, and for the *Wool Storage, Sampling and Testing Award 2010*, the last sentence would have no effect.

⁵ *Mr Boguslaw Bienias v Iplex Pipelines Australia Pty Limited TA Iplex Pipelines Australia* [2017] FWCFB 38 at [45].

⁶ *Fair Work Act 2009* (Cth), s 137.

REMEDYING INCONSISTENCIES

16. The AWU submits that the abandonment of employment provisions in all six of the awards identified by the Commission must be removed.
17. These provisions – when characterised as operating to automatically terminate employment or not – contravene s136 of the *Fair Work Act 2009*. Any process undertaken to modify the provisions to ensure consistency with the *Fair Work Act* would be so extensive that what was left of the provisions would only serve to make each award document longer.

Yours faithfully,

A handwritten signature in black ink, appearing to be 'ZD', with a long horizontal flourish extending to the right.

Zachary Duncalfe
NATIONAL LEGAL OFFICER
The Australian Workers' Union