

# CFMEU

## CONSTRUCTION

**IN THE FAIR WORK COMMISSION**  
**Matter Number: AM2016/35**

*Fair Work Act 2009*  
s.156 - 4 yearly review of modern awards

**4 yearly review of modern awards – Abandonment of Employment**  
**(AM2016/35)**

---

**SUBMISSION OF THE CONSTRUCTION, FORESTRY, MINING AND ENERGY  
UNION (CONSTRUCTION & GENERAL DIVISION)**

---

18<sup>th</sup> May 2017

<b>Construction, Forestry, Mining and Energy Union (Construction and General Division)</b>  ABN 46 243 168 565	<b>Contact Person:</b>  Stuart Maxwell, Senior National Industrial Officer	<b>Address for Service:</b>  Level 9, 215-217 Clarence Street Sydney NSW 2000	<b>T:</b>  <b>F:</b>  <b>E:</b>	(02) 8524 5800  (02) 8524 5801  <a href="mailto:hearings@fed.cfmeu.asn.au">hearings@fed.cfmeu.asn.au</a> <a href="mailto:smaxwell@cfmeu.org">smaxwell@cfmeu.org</a>
--	--	--	---	--

## Introduction

1. The Fair Work Commission (the Commission) is currently undertaking a 4 yearly review of modern awards (the Review) as required by s.156 of the *Fair Work Act 2009* (the FW Act). On the 1<sup>st</sup> February 2017, the President, Justice Ross, issued a Statement<sup>1</sup> regarding the review of the ‘abandonment of employment’ terms in a number of modern awards, and that the review of those terms would be referred to the Full Bench that dealt with the appeal in *Boguslaw Bienias v Iplex Pipelines Australia Pty Limited* ([2017] FWCFB 38) (hereinafter referred to as *Iplex*).
2. The matter was listed for Mention/Directions on 27<sup>th</sup> April 2017, following which Directions were published by the Full Bench<sup>2</sup>. The Directions invited interested parties to file in the Commission any written submissions they wished to make in relation to whether the “abandonment of employment” provisions in the six identified awards<sup>3</sup> are terms that may be included in modern awards. Such submissions were required to be filed by 5pm on Thursday 18<sup>th</sup> May 2017.
3. The CFMEU Construction and General Division (the CFMEU C&G) has an interest in one of awards that currently contains an abandonment of employment clause, the *Manufacturing and Associated Industries and Occupations Award 2010* (the Manufacturing Award) at clause 21, and makes this submission in accordance with the directions of the Full Bench.

## **Abandonment of Employment Provisions are not Terms that May be Included in Modern Awards**

4. The CFMEU C&G submits that abandonment of employment provisions are not terms that may be included in modern awards. As noted in the Statement of 1<sup>st</sup> February 2017<sup>4</sup>, a Full bench in *Iplex* determined that clause 21 of the Manufacturing Award, if read as effecting an automatic termination of employment in specified circumstances, is not a term that is either permitted or required in a modern award. The CFMEU C&G agrees with that conclusion.
5. The Full Bench in *Iplex* considered whether or not clause 21 of the Manufacturing Award was ancillary or incidental to the operation of an entitlement of an employee under the National Employment Standards (s.55(4)(a) of the FW Act), and whether or not the terms supplemented the National Employment Standards to the extent that any of the terms were not detrimental to an employee in any respect compared when compared with the National

---

<sup>1</sup> [2017] FWC 669

<sup>2</sup> <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201635-dir-270417.pdf>

<sup>3</sup> See Attachment A of [2017] FWC 669

<sup>4</sup> [2017] FWC 669 at paragraph [3]

Employment Standards (s.55(4)(b) of the FW Act). The Full Bench found in the negative on both issues, deciding that,

*“[56] It is self-evidently the case that s.117 deals with termination of the initiative of the employer and the employer’s obligation to an employee in those circumstances. It seems to follow that a provision in an award which would operate to automatically terminate employment cannot reasonably be described as ancillary or incidental to the operation of a provision which deals with the obligations of an employer when the employer seeks to terminate the employment of an employee. Nor can it reasonably be said that such a provision supplements that National Employment Standard or for that matter, any other of the National Employment Standards.*

.....

*[58] ...The effect of the clause operating this way would be to deprive an employee of both the written notice of the day of termination requirement in s.117(1), and except in the case of serious misconduct, the receipt of notice or compensation in lieu of notice as required ss.117(2) and (3). On any view, the effect of such a term would be detrimental to an employee in the respects we have identified.”*

6. The CFMEU C&G is not aware of any other decisions on this issue that would warrant a different conclusion being reached.

### **Remedy**

7. The CFMEU C&G submits that in this review of the ‘abandonment of employment’ terms, the Full Bench should follow the approach taken by the *Alleged NES Inconsistencies* Full Bench<sup>5</sup> and delete clause 21 from the Manufacturing Award.

---

<sup>5</sup> See 2015 FWCFB 3023 at [49]