



Fair Work Commission: 4 yearly review of modern awards

AM2016/35 ABANDONMENT OF EMPLOYMENT

AUSTRALIAN BUSINESS INDUSTRIAL

- and -

THE NSW BUSINESS CHAMBER LTD

4 SEPTEMBER 2017

1. BACKGROUND

- 1.1 Pursuant to the Fair Work Commission's (**Commission**) Statement [2017] FWCFB 4250, parties were directed to file further submissions regarding whether the "abandonment of employment" provisions in the six identified Modern Awards¹ are terms that may be included in Modern Awards.
- 1.2 The Full Bench also asked the parties to have regard to the interpretation that the Full Bench placed upon the abandonment of employment clause in the *Boguslaw Bienias v Iplex Pipelines Australia Pty Limited* [2017] FWCFB 382 (**Boguslaw v Iplex**) decision.
- 1.3 This submission should be read alongside the Australian Business Industrial (**ABI**) and New South Wales Business Chamber Ltd (**NSWBC**) submission dated 1 June 2017.

2. ABI/NSWBC POSITION

- 2.1 Consistent with the previous submissions filed by ABI/NSWBC in these proceedings, ABI and NSWBC submit that "abandonment of employment" clauses (in their current form) are not terms permitted or required by the *Fair Work Act 2009* (Cth) (**FW Act**) to be in Modern Awards.

3. THE FINDINGS OF THE FULL BENCH IN THE BOGUSLAW V IPLEX DECISION

- 3.1 First, for abundant clarity, we note that the Full Bench found that the abandonment of employment clause (clause 21) of the *Manufacturing and Associated Industries and Occupations Award 2010* (**Manufacturing Award**) does not have the effect of automatic termination of employment as evidenced by paragraphs [37] to [41] of the decision.
- 3.2 Instead, clause 21 of the Manufacturing Award:
- (a) firstly, sets out matters which prima facie constitute evidence of abandonment (clause 21.2); and
 - (b) secondly, deem certain circumstances as constituting abandonment of employment (clause 21.2).
- 3.3 *Boguslaw v Iplex* did not expressly identify the operation of clause 21.3 of the Manufacturing Award. The Full Bench determined, in *Boguslaw v Iplex*, that the clause does not have the effect of terminating an employee's employment. Rather, some act from the employer is needed to effect termination. It is possible the only effect of clause 21.3 is to explain when a termination operates from in circumstances where an employer has carried out a termination based on abandonment of employment.

4. SUMMARY

- 4.1 In order for abandonment of employment clauses (in the form of clause 21 of the Manufacturing Award) to remain in Modern Awards, the prerequisites outlined in Part 2-3 of the FW Act must be satisfied.

¹ Manufacturing and Associated Industries and Occupations Award 2010; Business Equipment Award 2010; Contract Call Centres Award 2010; Graphic Arts, Printing and Publishing Award 2010; Nursery Award 2010; and the Wool Storage, Sampling and Testing Award 2010.

- 4.2 Section 136 (1) of the FW Act prescribes that terms may only be included in a Modern Award if they are permitted or required by:
- (a) Subdivision B of Part 2-3 of the Act (specifically section 139 and section 142);
 - (b) Subdivision C of Part 2-3 of the Act;
 - (c) Section 55 of the Act (which deals with interaction rules pertaining to the National Employment Standards); or
 - (d) Part 2-2 of the Act (which deals with the National Employment Standards).
- 4.3 For the reasons outlined below, ABI and NSWBC submit that clause 21 of the Manufacturing Award does not currently satisfy the prerequisites.

5. SUBDIVISION C, SECTION 55 AND PART 2-2 OF THE ACT

- 5.1 It appears uncontroversial that the subject matter of clause 21 of the Manufacturing Award does not relate to any of the terms specified in subdivision C of Part 2-3 of the Act, section 55 of the Act or Part 2-2 of the Act.
- 5.2 This means that, to be included in a modern award at all, clause 21 must be a term permitted by subdivision B of Part 2-3 of the Act.

6. SUBDIVISION B OF PART 2-3 OF THE ACT

Section 139

- 6.1 Section 139 of the Act is the opening provision in Subdivision B of Part 2-3.
- 6.2 Section 139 of the Act empowers the Commission with a discretion² to insert terms into modern awards that are “*about*” any of the following matters:
- (a) minimum wages (including wage rates for junior employees, employees with a disability and employees to whom training arrangements apply), and:*
 - (i) skill-based classifications and career structures; and*
 - (ii) incentive-based payments, piece rates and bonuses;*
 - (b) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work, and the facilitation of flexible working arrangements, particularly for employees with family responsibilities;*
 - (c) arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours;*
 - (d) overtime rates;*
 - (e) penalty rates, including for any of the following:*
 - (i) employees working unsocial, irregular or unpredictable hours;*
 - (ii) employees working on weekends or public holidays;*
 - (iii) shift workers;*
 - (f) annualised wage arrangements that:*

² This discretion is conditioned by section 134 and section 138 of the Act

(i) have regard to the patterns of work in an occupation, industry or enterprise; and

(ii) provide an alternative to the separate payment of wages and other monetary entitlements; and

(iii) include appropriate safeguards to ensure that individual employees are not disadvantaged;

(g) allowances, including for any of the following:

(i) expenses incurred in the course of employment;

(ii) responsibilities or skills that are not taken into account in rates of pay;

(iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations;

(h) leave, leave loadings and arrangements for taking leave;

(i) superannuation;

(j) procedures for consultation, representation and dispute settlement.”

6.3 The initial question that arises for consideration is when a term is “*about*” any of the subject matters prescribed above.

6.4 The word “*about*” is a preposition which is defined by the Macquarie Dictionary as meaning:

“1. Of, concerning, in regard to... 2. connected with...”³

6.5 However, the power to create terms “*about*” a particular matter should be distinguished from the power to create terms “*with respect to*” or “*in relation to*” a particular matter. The phrases “*with respect to*” and “*in relation to*” have been judicially held to constitute some of the broadest phrases which could denote a relationship between one subject matter and another.⁴ The same cannot be said for the word “*about*”.⁵

6.6 Ultimately, when determining the extent to which a preposition such as “*about*” operates, the context within which it appears will be critical, just as has been held to be the case with phrases such as “*in relation to*”.⁶

6.7 In this case, the context within which section 139 operates indicates that the legislature not only deliberately chose the term “*about*” in section 139, but also intended there to be limits on the extent of the term’s operation.

6.8 This is borne out by an analysis of the entirety of Subdivision B of Part 2-3 of the Act:

³ Macquarie Concise Dictionary, 3rd edition, page 3

⁴ See *Bank of NSW v the Commonwealth* 1947 76 CLR 1 per Latham CJ at 187; *Nordland Papier AG v Anti-Dumping Authority* (1999) 93 FCR 454 per Lehane J at 461.

⁵ The only judicial analysis that we have been able to identify regarding the meaning of the term “*about*” simply notes that the term is no broader than the term “*with respect to*”- see *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 per Gleeson CJ at [11]

⁶ *Workers' Compensation Board of Queensland v Technical Products Pty Ltd* (1988) 165 CLR 642 per Deane, Dawson and Toohey JJ at 653

- (a) Section 139 creates the general power to include certain terms in awards, provided the terms are “*about*” specified subject matters.
- (b) Section 140(1) then entitles the Commission to include terms “*relating to*” the conditions of outworkers.
- (c) Section 142 then provides that:

“A modern award may include terms that are:

*(a) **incidental** to a term that is permitted to be included in a modern award; **and***

*(b) **essential** for the purpose of making a particular term operate in a practical way.” (emphasis added)*

- 6.9 The notion of a term being incidental should be reasonably well settled.
- 6.10 The meaning of the word “*essential*” imports a high bar; “...*absolutely necessary, indispensable...*”⁷
- 6.11 The second limb (practical operation) is more than simply “*operate*” as the word “*operate*” is coloured by the word “*practical*” which means “...2. *consisting of, involving, or resulting from practice or action: a practical application of a rule...*”⁸
- 6.12 The following conclusions can be drawn from the above:
- (a) Firstly, it is noteworthy that the Act does not empower the Commission to include terms “*about*” outworkers, despite the use of the word “*about*” in the previous subsection. Instead the Act states that the Commission may include terms “*relating to*” outworkers.

The choice of different phraseology when describing the scope of the Commission’s powers in adjacent sections of the Act (namely, sections 139 and 140), tellingly suggests that the breadth of the powers conferred by sections 139 and 140 differs.

Given the well documented breadth of the phrase “*relates to*”⁹, we submit that the use of the phrase “*about*” in section 139 is intended to have more limited operation than the phrase “*relates to*” in subsection 140.
 - (b) Secondly, the requirement that “*incidental terms*” must be both incidental and also essential for the practical operation of other award terms prior to being included in modern awards stands in contradistinction to the operation of sections 139 and 140 of the Act. Sections 139 and 140 impose no requirement to consider the essentiality of a term prior to its inclusion. Although section 138 requires the term to be included only in so far as is necessary to achieve the modern awards objective.

⁷ Macquarie Concise Dictionary, 3rd edition, page 377

⁸ Macquarie Concise Dictionary, 3rd edition, page 904

⁹ See *Bank of NSW v the Commonwealth* 1947 76 CLR 1 per Latham CJ at 187; *Nordland Papier AG v Anti-Dumping Authority* (1999) 93 FCR 454 per Lehane J at 461.

6.13 This difference in approaches necessarily leads to the conclusion that the phrase “*about*” in section 139 requires a more than “*incidental*” connection between an award term and the subject matters listed in section 139, prior to a term’s inclusion in an award pursuant to the powers granted in section 139.

Is clause 21 about any of the above subject matter?

6.14 There is a very limited connection between clause 21 of the Manufacturing Award and the subject matters listed in s 139.

6.15 At best, one might contend that parts of clause 21 could possibly be linked to consultation, as the clause discusses steps an employer should take to be satisfied whether an employee is absent for reasonable cause.

6.16 However, the essence of clause 21 cannot be characterised as a clause about consultation. The character of the clause is as set out in the submissions at paragraphs 3.2 and 3.3 above. These subject matters do not fall within the subject matters identified in section 139.

Section 142

6.17 If the Commission accepts that clause 21 is not about one of the subject matters outlined in section 139 of the Act, it must be satisfied that the term can be included in a modern award pursuant to section 142 of the Act.

6.18 Section 142 allows a term to be included in modern awards if the term is:

- (a) incidental to a term that is permitted to be included in a modern award; and
- (b) essential for the purpose of making a particular term operate in a practical way.

6.19 The requirement to establish that the clause is essential for the purpose of making another provision of the award operate in a practical way is a self-evidently high threshold.

6.20 “*Essential*” is defined by the Macquarie Dictionary to mean:

“1. Absolutely necessary; indispensable...”¹⁰

6.21 Section 142 accordingly requires the Commission to be satisfied that the award cannot operate in a practical way without clause 21, if the term is to be included in the Award pursuant to section 142.

6.22 We have been unable to identify another term in the Manufacturing Award which clearly requires the operation of clauses 21.1 to 21.3 in order to operate in a practical manner.

6.23 It is possible that the operation of clause 34 - Payment of Wages - is to some extent assisted although any assistance appears confined to clause 21.3 only. This is because:

- (a) clause 34.3 requires payments to be made on an employee’s termination date or within 1 working day; and
- (b) clause 21.3 assists in determining the effective date of termination of employment in abandonment circumstances.

¹⁰ Macquarie Concise Dictionary Third ed, p.377

6.24 However, the current form of clause 21.3 is rather difficult to understand. It is not clear how an award can change the effective date of termination when, as identified in *Boguslaw v Iplex*, it is the act of the employer in accepting the employee's repudiation that will bring the employment to an end and consequently determine the termination date.

7. CONCLUSION

7.1 For the reasons outlined above, clauses 21.1 to 21.3 (in their current form) are not permitted or required terms that can be included in any Modern Award.



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On behalf of Australian Business Industrial and the NSW Business Chamber Ltd

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