**IN THE FAIR WORK COMMISSION**

**Matter No.:** AM2016/15 Plain Language Standard Clauses
**Re Application by:** "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)

# Submissions of the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)

## 4 Yearly Review of Modern Awards

# COVER SHEET

### About the Australian Manufacturing Workers' Union

The Australian Manufacturing Workers' Union (AMWU) is registered as the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union". The AMWU represents members working across major sectors of the Australian economy, including in the manufacturing sectors of vehicle building and parts supply, engineering, printing and paper products and food manufacture. Our members are engaged in maintenance services work across all industry sectors. We cover many employees throughout the resources sector, mining, aviation, aerospace and building and construction industries. We also cover members in the technical and supervisory occupations across diverse industries including food technology and construction. The AMWU has members at all skills and classifications from entry level to Professionals holding degrees.

The AMWU's purpose is to improve member's entitlements and conditions at work, including supporting wage increases, reasonable and social hours of work and protecting minimum award standards. In its history the union has campaigned for many employee entitlements that are now a feature of Australian workplaces, including occupational health and safety protections, annual leave, long service leave, paid public holidays, parental leave, penalty and overtime rates and loadings, and superannuation.


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## Introduction

1. The Australian Manufacturing Workers' Union (AMWU) makes the following submissions to the Fair Work Commission in accordance with the Full Bench Statement 18 October 2017[1], which arose out of the Full Bench Decision 18 October 2017.[2]

2. The AMWU supports and adopts the submissions of the Australian Council of Trade Unions (ACTU) dated 22 November 2017.

3. Specifically, these submissions will address other issues arising out of other parties' submissions, not addressed in the ACTU Submission, about the provisional views expressed by the Full Bench in the 18 October 2017 Statement and Decision.

4. The issues to be addressed include:

    a. Availability of pecuniary penalties to applicants.

    b. The obligation on the employer to confirm that an employee has resigned.

    c. The need to avoid giving employer's the power to determine breach and penalty.

    d. Employee awareness of Award obligations.

5. We acknowledge the significant concessions in the Australian Business Industrial and NSW Business Chamber (ABI and NSW Business Chamber) submissions,[3] which appear to narrow the issues.

## Who Gets Paid Pecuniary Penalties

6. On the issue of pecuniary penalties – the AiGroup in their submissions claim that "penalties associated with award breaches are typically paid into consolidated revenue, rather than to an aggrieved party.[4] The ABI and NSW Business Chamber seem to indicate that there is no ability for legal proceedings to address inconvenience experienced by the employer.[5] The National Road Transport Association noted in their submission at paragraph [18] that in *Jetgo Australia Holdings Pty Ltd v Goodsall (no.2)* [2015] FCCA 1911 (*Jetgo Australia*), Vasta J declined to award the payment of the penalty to the Applicant or the Respondent, instead awarding the payment to the Commonwealth. The National Road Transport Association say that this makes the potential gain for employers through the payment of a penalty unclear.

7. We note the ACTU has already addressed the issue of damages in their submission. This submissions will only address the issue of penalties.

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[1] [2017] FWCFB 5367
[2] [2017] FWCFB 5258
[3] Australian Business Industrial and NSW Business Chamber submission 14 November 2017
[4] AiGroup Submission 14 November 2017 at paragraph 23.c.
[5] Australian Business Industrial and NSW Business Chamber submission 14 November 2017 at paragraph 7.7(b)

8. It is relevant to note that the *Jetgo Australia* decision cited a decision *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCAFC 59 (*FWBI v CFMEU*), which dealt with pecuniary penalties sought by the then Director of the Fair Work Building Inspectorate. There was no consideration in the *FWBI v CFMEU* about whether or not it was appropriate to pay the penalty to a person other than the Commonwealth, because the regulator was the party seeking the agreed pecuniary penalty.

9. The substantive part of the decision concerned whether or not a High Court decision about criminal penalties agreed between the prosecutor and the defendant applied to civil pecuniary penalties. The *FWBI v CFMEU* decision to apply the principle for criminal proceedings to civil proceedings was ultimately appealed to the High Court, which overturned the decision and unanimously found that courts are able to consider submissions from the regulator about an agreement between the parties on penalties in civil proceedings.

10. Taking the context of the decision in ***FWBI v CFMEU***, which *Jetgo Australia* sought to rely upon to order penalties payable to the Commonwealth, it is reasonably clear that the decision in *Jetgo Australia* may have been founded on a premise, which was overturned or differently conceived.

11. The *Jetgo Australia* decision should have followed the decision of Rangiah J in the Federal Court in *United Voice v MDBR 123 Proprietary Limited (No.2)*[6] which noted that the ""*usual order" is that the pecuniary penalty is paid to the applicant in a proceedings for breach of provisions… this recognises the trouble, risk and expense of bringing proceedings which are in the public interest*."[7]

12. The *United Voice v MDBR 123 Proprietary Limited* decision came after another decision of the Federal Court in *CFMEU v BHP Coal Pty Ltd (No 5)*[8], which was not referenced in *Jetgo Australia*.

13. In *CFMEU v BHP Coal Pty Ltd (No 5)*, the decision of Collier J set out an extensive list of authorities which discuss and confirm the "usual order," at [26] as follow:

> "*There is extensive authority supporting the proposition that, in circumstances where penalty proceedings in an industrial context were commenced by a party other than an enforcement agency, any pecuniary penalties ordered payable by the Court are ordinarily be paid to the party prosecuting the proceedings. Such an order has been referred to as the "usual" order: Woodside Burrup Pty Ltd v Construction, Forestry, Mining and Energy Union [2011] FCA 949 at [148], Gibbs v The Mayor, Councillors and Citizens of the City of Altona [1992] FCA 374; (1992) 37 FCR 216 at 223, Seven Network (Operations) Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (No 2) (2001) 110 IR 372; [2001] FCA 672 at [8], and Plancor Pty Ltd v*

[6] [2015] FCA 76 (which was incorrectly referenced in the Jetgo Australia decision as being in the Federal Circuit Court)
[7] [2015] FCA 76 at [24]
[8] [2013] FCA 1384

*Liquor, Hospitality and Miscellaneous Union [2008] FCAFC 170; (2008) 171 FCR 357 at [44], [65]*."

14. This line of authorities on the "usual order" was not considered in *Jetgo Australia*.

15. The decision in *Jetgo Australia* also did not consider or mention the Explanatory Memorandum, which evinces a clear intention at paragraphs 2157 that:

> *"Ordinarily, any pecuniary penalty awarded by the court is paid to the applicant or, in the case of proceedings brought by a Commonwealth official such as an inspector, to the Commonwealth (on the basis that the applicant represents the Commonwealth)."*[9]

16. The part of the *Jetgo Australia* decision about who may be paid pecuniary penalties did not consider a range of relevant authorities and materials relevant to the issue of what is the "usual order."

## Employer obligation to confirm an employee's resignation

17. The National Road Transport Association correctly point to a requirement from Unfair Dismissal decisions, that an employer may not be able to act on a resignation in certain circumstances.[10] There may be circumstances where an employer has a "duty to clarify a resignation."[11]

18. However, this is not an argument for deducting money from an employee because they gave notice verbally and not in written form. In whatever form, in some circumstances the employer should take care to confirm a worker's intention and clarify the resignation, whether it was orally or in written form.

19. Workers spend between a quarter and a third of their working lives at work. Work is central to a person's ability to meet their individual and family needs and wants and is often central to a person's identity and place in society. A decision to resign has the potential to have very significant effects on a person's life. In this context, employers should always take care to clarify a resignation, particularly one given in the heat of the moment.

## A practical way, does not mean giving the employer the power to determine breach and penalty

20. The AiGroup uses the argument of "encouraging compliance,"[12] the Australian Business Industrial and NSW Business Chamber (ABI and NSW Business Chamber) uses the argument that the clause would be a "deterrent"[13] and the National Road Transport Association use the argument that the clause would be a practical way to "discourage litigation."[14]

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[9] Explanatory Memorandum to the Fair Work Bill 2008 at page 329 paragraph 2157
[10] National Road Transport Association Submission 13 November 2017 at paragraph 30
[11] *Ngo v Link Printing Pty Ltd* (1999) 94 IR 375 at paragraph 12
[12] AiGroup Submission 14 November 2017 at paragraph 23.a.
[13] Australian Business Industrial and NSW Business Chamber submission 14 November 2017 at paragraph 7.7
[14] National Road Transport Association Submission 13 November 2017 at paragraph 35 to 40

21. The ABI and NSW Business Chamber note that the deterrent effect arises because there is a clearly quantifiable financial impact for the employee if they fail to give the required notice. They also say by inference that without this clause, there is no other deterrent. The critical assertions the ABI and NSW Business Chamber rely upon to make these statements are that legal proceedings are unsatisfactory for employers because, "it is unduly onerous and costly" and "does not remedy the inconvenience."[15]

22. It is unclear on what basis the ABI and NSW Business Chamber say that any inconvenience cannot be remedied by proceedings in the courts, where penalties and damages are available. The issue of damages being ordered by courts for breaches is discussed in the ACTU submissions about damages[16] and question of where penalties are paid is addressed in earlier paragraphs of these submissions. These penalties and damages would be an effective deterrent to law abiding Award-reliant workers. Australia is a predominantly law-abiding nation with the rule of law. The increasing wage theft by employers who calculate the risk of litigation into their business model, does not mean that workers have the resources to be similarly minded.

23. "Discouraging litigation" is a worthy objective of interest, particularly from an alternative dispute resolution perspective where all parties involved may secure an outcome satisfactory to their interests. However, this cannot be achieved, by putting the employer in the position of judge and jury, where the worker's interests are totally disregarded and will never be taken into account or satisfied.

24. Litigation in the courts ensures, an independent process to resolve disputes and ensures that an individual's political power or the size of their bank account does not determine the outcome of the dispute. An Award-reliant business already has significant power in the employment relationship and relatively more resources at their disposal than an Award-reliant worker.

25. "Avoiding litigation" is not a relevant objective in the present context, where the proposed clause will confer on an employer something they would otherwise have to go to a court to obtain.

## Employee Awareness of Award obligations is low

26. The AiGroup makes an assertion at paragraph 40 of their submission that "given there is no evidence before the commission that employees do not widely understand the effect of Clause E.1(c), there is no basis for a finding by the Commission that employees do not widely understand the very longstanding award obligation of employees to give the required period of notice to their employer."[17]

27. There has been evidence before the Commission about the knowledge of Award terms in the present review. The FWC commissioned a report which was

[15] Australian Business Industrial and NSW Business Chamber submission 14 November 2017 at paragraph 7.7(b)
[16] ACTU Submissions 22 November 2017at paragraph 13
[17] AiGroup Submission 14 November 2017 at paragraph 40

produced by EY Sweeney and published on the Commission's website in May 2016, which found the following about employees:

> "*When compared to employers, employees had lower levels of knowledge about the modern award system. While the majority of employees were aware that there was a system in place to provide minimum wages and a set of minimum conditions, many could not confidently explain how the modern award system operates to provide that safety net*
>
> > *"I don't really know much about the awards. I pretty much just look at my payslip and see how much I have been paid. I don't know what else is out there"*
> >
> > *(Employee, small business – Health Care and Social Assistance)*
> >
> > *"I think we are on an award, you have to be on an award legally, but what that specific award is, I have no idea"*
> >
> > *(Employee, medium business – Transport, Postal and Warehousing)"*
>
> *Older employees tended to be more aware and knowledgeable about the modern award system, with many comparing it to the previous systems.*
>
> *Those employees that were able to provide some information, tended to be aware and knowledgeable about the modern award that covers them, in their current role.*
>
> > *"As far as I know, it [classification levels] is judged by the age and the experience of the person and also what qualifications they have"*
> >
> > *(Employee, small business – Manufacturing)*
>
> *In some cases, an employee's primary experience actively interacting with the modern award system was prompted by commencing a new job or role, or if they had a concern that they were being underpaid or not receiving their correct or full entitlements. If employees thought they were receiving their correct wages, conditions and entitlements, then they had no reason to review their applicable modern award.*
>
> *Participating employees' low levels of involvement with the modern award system was also reflected in their perceptions of workplace conditions, entitlements and their conceptualisation of pay. For them, the key aspect of any remuneration package was the "end-of-week" pay. It was difficult for employees to separate wages rates, entitlements and conditions. For this reason, employees' discussions regarding the modern award system and majority clauses tended to focus on pay*."[18]

28. The report seems to support common sense, which would suggest that Award-reliant workers, particularly younger workers without any workplace or disputes

[18] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/report.pdf at page 22

experience are less likely to know what Award applies to them or even know the specific obligations that Awards might require them to comply with.

29. The ACTU's submissions addressing the demographics of Award-reliant workers is also relevant to the question of the extent to which workers' might be aware of Award obligations.

**End**

**27 November 2017**