

IN THE FAIR WORK COMMISSION

Matter No.: AM2016/35 Abandonment of Employment
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) in Reply to the AiGroup Submission 18 May 2017 (Amended 22 May 2017)

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.

Lodged by: Michael Nguyen AMWU National Research Centre Address for Service: Level 3, 133 Parramatta Rd, Granville NSW 2142	Telephone: +61 2 8868 1500 Fax: +61 2 9897 9275 Email: Michael.nguyen@amwu.asn.au
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Introduction

1. The Australian Manufacturing Workers' Union (AMWU) makes the following Submissions to the Fair Work Commission in reply to the Australian Industry Group's (AiGroup) submission dated 18 May 2017 amended 22 May 2017.
2. The AMWU has reviewed the CFMEU Construction and General Division submissions dated 1 June 2017 and supports the submissions of the CFMEU C&G Division. In particular, the AMWU supports CFMEU's analysis of the relevant case law which is also supported by the Full Bench decision in *Bienias v Iplex Pipelines Australia Pty Ltd*.¹
3. This submission will outline two further submissions which are that:
 - a. An employer's assessment that an employee has abandoned their employment does not equate to an employee terminating their employment; and
 - b. It is not necessary for the AiGroup's proposed term to be included in a modern award to achieve the modern awards objective.

An employer's assessment that an employee has "abandoned his or her employment" should not equate to an employee terminating their employment

4. The decisions referred to by the AiGroup in their submissions equate abandonment of employment with a repudiation of the employment contract and therefore also equate abandonment with an employee terminating their employment.²
5. Firstly, this conflation of abandonment of employment with termination of employment by an employee is in direct conflict with the Full Bench decision in *Bienias v Iplex Pipelines*, which concluded that an abandonment of employment does not mean that the employee's termination is thereby at an end.³
6. Secondly, the decision relied upon by the AiGroup is a single member decision of the Australian Industrial Relations Commission (AIRC) in *Erbacher v Golden Cockerel*,⁴ which cites a Full Bench decision of the Tasmanian Industrial Commission (TIC) in *Sharam v Blue Tier Logging Pty Ltd*⁵. The Full Bench decision of the Fair Work Commission (FWC) is to be preferred over the single member decision of the AIRC.
7. Thirdly, the Full Bench TIC decision did not attempt to define the concept of abandonment of employment in clear terms which makes it a much weaker foundation upon which to establish an easy to understand award term.

¹ [2017] FWCFB 38

² Paragraph [9] to [11] of the AiGroup Submission dated 18 May 2017 amended 22 May 2017

³ [2017] FWCFB 38 at paragraph [38]

⁴ <https://www.fwc.gov.au/documents/decisionssigned/html/2007airc491.htm>

⁵ http://www.tic.tas.gov.au/decisions_issued/appeals/t10436

8. The Full Bench of the TIC, agreed with Abey's DP decision⁶ which found that it was open to the employer to conclude that the employee had abandoned his employment. However, no clear principles or definition was set out in the decision which would provide any guidance about when an abandonment of employment occurs. The closest paragraph in the Full Bench decision to a description of when abandonment of employment occurs is the following paragraph:

"[33] We find no error or that the Commissioner acted on any wrong principle. Abandonment of employment is not quantified in time but requires an analysis of what happened at the time and a consideration of the intent of the employee. The behaviour in this case was irresponsible and somewhat cavalier, the lack of any attempt to explain such behaviour to the respondent in a reasonable period of time, particularly when such opportunity was provided, was in the view of the Commissioner a repudiation of the contract of employment." (emphasis added)

9. The emphasis added above, is also the emphasis made by the AiGroup when they cited this paragraph. Taken on its own, it is apparent that this vague concept of how a tribunal or arbiter is to determine when abandonment of employment occurs cannot be the basis of a simple and easy to understand modern award system.
10. It is also relevant that the Full Bench of the TIC did reference a clause in the Graphic Arts Award:

"[30] It was noted by the appellant that the Graphic Arts Award provides that an employee can be deemed to have abandoned their employment after two continuous and unexplained working days of absence and in this case the appellant was, in reality, absent from 3.30pm on one day and the following working day."

11. The reliance on these decisions of the TIC becomes increasingly questionable when the only clear definition of when abandonment of employment occurs is provided by a clause in an award, which would not be able to exist in a modern award.

The AiGroup's proposed term is not necessary to achieve the modern awards objective

12. There is no current ability for an employer to withhold monies where there is an abandonment of employment. The current abandonment of employment clause is a deeming clause. It does not transmit an abandonment of employment into a termination of employment by the employee. The clause proposed by the AiGroup appears to be an entirely new right of the employer to withhold monies. This new right is not supported by any evidence about why this right should exist.
13. Further, the term proposed by the AiGroup has an unclear application and has a highly questionable basis for interpretation. It is unclear what type of situation

⁶ http://www.tic.tas.gov.au/decisions_issued/2002/t10228 at paragraph (80]

would not already be comprehended by the existing clauses regarding notice of termination that would warrant this new term.

14. Currently, if an employee's intention is to terminate their employment and they do so, then the employer would have the right under 22.2(b) to withhold monies.
15. The only circumstances which come to mind where an employee's intention may not be clear or their ability to communicate their intention is hindered is if they were severely injured, in a coma or had passed away. In such circumstances, it would be unfair for an award to allow an employer to withhold monies from the employee and compound the unfortunate circumstance that they find themselves in.
16. It is not necessary for the AiGroup's proposed term to be included in a modern award for the modern award to achieve the modern awards objective. The AiGroup have presented no evidence about a circumstance which they say results in the modern awards objective not being achieved unless their proposed term is accepted.
17. The responsibilities of an employer to communicate with an employee and enter into discussions prior to making any decisions involving termination of employment are important to maintain.
18. The AiGroup's proposal is an attempt to not only excuse an employer from engaging with an employee, who may be ill, injured from an accident or succumbed to some unfortunate turn of event where the employer concludes that they "abandon their employment," but also to take money owed to an employee.

End

2 June 2017