**From:** Stephen Smith [mailto:Stephen.Smith@aigroup.com.au]
**Sent:** Tuesday, 8 August 2017 2:25 PM
**To:** AMOD; Chambers - Hatcher VP
**Cc:** smaxwell@cfmeu.org
**Subject:** AM2016/35 - Abandonment of Employment

Dear Vice President Hatcher

A further submission in the above matter is attached. The submission has been prepared to advise the Members of the Full Bench and the other parties of the various authorities upon which Ai Group will seek to rely at the hearing on Monday 14 August 2017 in Melbourne, and key arguments.

We note that Mr Maxwell of the CFMEU requested this information in recent correspondence.

Yours sincerely

**Stephen Smith**
**Head of National Workplace Relations Policy**

The Australian Industry Group
51 Walker St, North Sydney 2060
**T:** 02 9466 5521 or 0418 461183
**E:** stephen.smith@aigroup.com.au
www.aigroup.com.au

Australian Industry Group

# 4 YEARLY REVIEW OF MODERN AWARDS

**Submission**

Abandonment of Employment – Common Issue

(AM2016/35)

**8 August 2017**

# 4 YEARLY REVIEW OF MODERN AWARDS

# ABANDONMENT OF EMPLOYMENT – COMMON ISSUE (AM2016/35)

## 1. INTRODUCTION

1. This submission updates and expands upon Ai Group's submission of 19 May 2017. It is provided for the purposes of assisting the Full Bench and interested parties to understand the arguments that Ai Group intends to pursue at the hearing on 14 August 2017.

2. Ai Group opposes the complete removal of all references to abandonment of employment from the six awards referred to in the Directions, but we accept that changes are necessary to the awards to avoid inconsistency with various provisions of the *Fair Work Act 2009* (**FW Act**).

3. The six awards are:

- The *Manufacturing and Associated Industries and Occupations Award 2010* (**Manufacturing Award**);
- The *Business Equipment Award 2010*;
- The *Contract Call Centres Award 2010*;
- The *Graphic Arts, Printing and Publishing Award 2010*;
- The *Nursery Award 2010*; and
- The *Wool Storage, Sampling and Testing Award 2010*.

4. For the reasons set out in this submission, we propose that the following amendment be made to the Manufacturing Award with similar amendments made to the other 5 awards:

a. Delete clause 21 – Abandonment of employment.

b. Amend subclause 22.2 as follows:

**22.2 Notice of termination by an employee**

(a) The notice of termination required to be given by an employee is the same as that required of an employer except that there is no requirement on the employee to give additional notice based on the age of the employee concerned.

(b) If an employee fails to give the required notice the employer may withhold from any monies due to the employee on termination under this award or the NES, an amount not exceeding the amount the employee would have been paid under this award in respect of the period of notice required by this clause less any period of notice actually given by the employee.

(c) Subclause (b) applies in circumstances where termination is at the initiative of the employee, including circumstances where an employee abandons his or her employment.

## 2. ABANDONMENT OF EMPLOYMENT CONSTITUTES REPUDIATION OF THE EMPLOYMENT CONTRACT AND "TERMINATION AT THE INITIATIVE OF THE EMPLOYEE"

5. It is well established that abandonment of employment constitutes repudiation by the employee of the employment contract.

6. In *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 (***"Koompahtoo")*** (at paragraph [44]) described repudiation of a contract (emphasis added):

> "44. In its letter of termination, Koompahtoo claimed that the conduct of Sanpine amounted to repudiatory breach of contract. The term repudiation is used in different senses. First, it may refer to conduct which evinces an unwillingness or an inability to render substantial performance of the contract. This is sometimes described as conduct of a party which evinces an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with the party's obligations. It may be termed renunciation. The test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it… Secondly, it may refer to any breach of contract which justifies termination by the other party…"

7. *Macken's Law of Employment*, Seventh Edition (published in 2011) sets out the above extract from *Koompahtoo* as the definition of "repudiation" and then states at pp.336 and 337 (footnotes omitted):

> "The test is objective. It is not necessary to prove a subjective intention to repudiate. Whether there has been a repudiation of the contract in the individual case is not a question of law but a question of fact. It is not to be inferred lightly. A refusal to perform contractual obligations if sufficiently serious will suffice. Similarly, misconduct of a serious nature inconsistent with the fulfilment of express or implied conditions of service will constitute repudiation. Repudiation will exist, for example, where there has been a wrongful dismissal of an employee or an employee leaves the job without notice or with insufficient notice, or where an employee has accepted an offer of employment which is then withdrawn by the employer before commencement of the employment, or where an employer reduces the wages of an employee without that person's consent, or a serious non-consensual intrusion on the nature of the employee's status and responsibilities in a way that is not permitted by the contract."

8. The following extract from the judgment of Lord Oliver of Aylmerton in *Rigby v Ferodo Ltd* [1988] ICR 29 at 34-35 is cited in the judgment of Gummow, Heydon, Crennan, Kiefel and Bell JJ of the High Court of Australia in *Visscher v The Honourable President Justice Giudice* [2009] HCA 34 ("***Visscher***"). The extract highlights that "walk-out" (as abandonment is commonly referred to in the UK) constitutes repudiation of an employment contract:

> "Whatever may be the position under a contract of service where the repudiation takes the form either of a walk-out by the employee or of a refusal by the employer any longer to regard the employee as his servant, I know of no principle of law that any breach which the innocent party is entitled to treat as repudiatory of the other party's obligations brings the contract to an end automatically. No authority has been cited for so broad a proposition and indeed [counsel for the appellant] has not contended for it. What he has submitted is that where there is a combination of three factors, that is to say, (a) a breach of contract going to an essential term, (b) a desire in the party in breach either not to continue the contract or to continue it in a different form and (c) no practical option in the other party but to accept the breach, then the contract is automatically brought to an end. My Lords, for my part, I have found myself unable either to accept this formulation as a matter of law or to see why it should be so. I entirely fail to see how the continuance of the primary contractual obligation can be made to depend upon the subjective desire of the contract-breaker and I do not understand what is meant by the injured party having no alternative but to accept the breach. If this means that, if the contract-breaker persists, the injured party may have to put up with the fact that he will not be able to enforce the primary obligation of performance, that is, of course, true of every contract which is not susceptible of a decree of specific performance. If it means that he has no alternative to accepting the breach as a repudiation and thus terminating the contract, it begs the question. For my part, I can see no reason in law or logic why, leaving aside for the moment the extreme case of outright dismissal or walk-out, a contract of employment should be on any different footing from any other contract as regards the principle that 'an unaccepted repudiation is a thing writ in water and of no value to anybody' …".

9. In *Visscher*, the High Court considered the circumstances of an employee of Teekay Shipping Australia who had lodged an unfair dismissal claim with the Australian Industrial Relations Commission (AIRC) but the Commission had held that the termination was not at the initiative of the employer. The following facts are relevant:

- Mr Visscher was promoted from the position of Third Mate to the position of Chief Officer (also known as First Mate) in early September 2001. The Australian Maritime Officers' Union immediately objected to the promotion and a few days later (on 7 September 2001) Teekay notified a dispute to the AIRC. On 11 September 2001, Commissioner Raffaelli recommended that Teekay rescind the promotion, which it did on 20 September 2001.

- Mr Visscher continued to be paid as a Chief Officer between September 2001 and January 2004. There were conflicting accounts between Mr Visscher and Teejay regarding the classifications in which Mr Visccher was engaged between 2001 and 2004. In January 2004, Teekay required Mr Visscher to undertake the duties of Second Mate, i.e. the classification in which Teekay alleged Mr Visscher was engaged at the time.

- Mr Visscher filed an unfair dismissal application with the AIRC in March 2004, arguing that termination had occurred at the initiative of the employer.

- Commissioner Redmond decided that Mr Visscher resigned and therefore termination was not at the initiative of the employer. A Full Bench of the AIRC did not grant leave to Mr Visscher to appeal. The Full Federal Court (remitted from the High Court) held that Commissioner Redmond had not fallen into jurisdictional error.

- The matter was then considered by the High Court. A key issue addressed by the High Court was whether Mr Visscher's contract of employment as a Chief Officer remained in force after September 2001 if he did not accept the repudiation of the employment contract.

10. The Majority (Gummow, Heydon, Crennan, Kiefel and Bell JJ) of the High Court held that:

- In Australia, where one party repudiates the employment contract, the doctrine of 'automatic determination' does not apply. Acceptance by the victim is necessary to terminate the contract (see paragraphs [53]-[55]).

- Repudiation of an employment contract by the employer (which is accepted by the employee) amounts to termination at the initiative of the employer: (see paragraph [81] - emphasis added):

> Conclusion
>
> 81. Teekay's notice of rescission did not automatically bring the contract appointing Mr Visscher a Chief Officer to an end. It was necessary that Mr Visscher accept the repudiation before the contract could be terminated. Nothing said in *Automatic Fire Sprinklers Pty Ltd v Watson* suggests any different contractual principle as applying to a contract of employment. In order to decide whether Teekay had repudiated Mr Visscher's contract of employment in January and February 2004 it was necessary for the AIRC to determine the true contractual position between the parties at that time. It was necessary then to determine whether what was said by Teekay at that time amounted to a repudiation such that the termination of the employment relationship could be said to be at its initiative; or whether it amounted to a demotion within the meaning of s 170CD(1B). The correct legal starting point was not that Teekay had rescinded the agreement. Neither the Commissioner nor the Full Bench of the AIRC asked the correct question, as to the contract under which the parties continued after September 2001. This was an error going to jurisdiction.

11. It is clear from the reasoning of the High Court in *Visscher* that the same principles would apply in circumstances where an employee repudiates his or her employment contract (including where an employee abandons his or her employment).

12. This is also confirmed by the New South Wales Court of Appeal decision in *Purcell v Tullett Prebon (Aust) Pty Ltd* [2010] NSWCA 150). Justice Ward's decision at first instance in this case (*Tullett Trebon (Australia) Pty Ltd v Purcell* (2008) 175 IR 414) is cited in the seventh edition of *Macken's Law of Employment* in respect of repudiation in circumstances where "an employee leaves the job without notice or with insufficient notice" (see extract in paragraph 7 above)

13. A useful article about the appeal decision in this case by barrister Matt Moir was published in the Australian Journal of Labour Law ((2011) 24 *Australian Journal of Labour Law* 173).

14. A key fact in this case was that Mr Purcell left his employment with Tullett Prebon and began working for a competitor. The New South Wales Court of Appeal held that even though the employee repudiated his employment contract, the employer did not accept the repudiation and consequently the employment contract was not terminated. Both Justice Ward and the Court of Appeal recognised that the general principles of contract law concerning repudiation apply equally to employers and employees.

15. The decision of Commissioner Spencer in *Erbacher v Golden Cockerel* [2007] AIRC 491 (and the decision of the Full Bench of the Tasmanian Industrial Relations Commission in *Sharam v Blue Tier Logging* [1] as cited by Commissioner Spencer) confirms that abandonment constitutes repudiation of the employment contract: (emphasis added)

> **"[56]** On the material before the Commission, the Applicant elected to leave his duties. That is, to take leave without the appropriate authorisation from his supervisors. The taking of this leave must be seen in the context that he had indicated that he wanted time off to undertake interviews to attain jobs "with gyms".
>
> **[57]** He had expressed his dissatisfaction with the decision of management not to authorise his leave and the fact that his name clearly appeared on the roster to work.

[1] T10436 of 2002, 3/4/2003 per President Leary, Deputy President Watling and Commissioner Shelley – an appeal from a decision of Commissioner Abey, T10228 of 2002, 23/8/2002.

**[58]** These combined facts indicated an intention on the part of the Applicant to, in fact, leave his job and seek employment elsewhere. These actions give rise to an intention to repudiate this contract of employment.

- - -

**[60]** The Commission has no jurisdiction in relation to an application pursuant to s.643 unless the termination of employment occurs at the initiative of the Employer. If, on the facts the employment terminates due to the Employee abandoning his employment, there is no termination at the initiative of the Employer and the jurisdiction of the Commission is not enlivened.

- - -

**[66]** The Respondent relied on the case of *Sharam v Blue Tier Logging*, as a persuasive authority. The case deals with similar circumstances and the decision of Commissioner Abey at first instance was affirmed by the Full Bench of the Tasmanian Commission.

**[67]** The Respondent relied on that decision, in support of the abandonment of employment, as follows:

> *"At first instance in Sharam v Blue Tier Logging, Commissioner Abey dismissed the applicant's unfair dismissal application in analogous circumstances of unauthorised absence for a limited period. The applicant in that case argued that, although he was absent from work from early Thursday morning, missed a meeting with the employer's representatives later that day at his home because he was 'asleep' and only contacted the employer on the next Monday when he left a message, this did not justify his employment being terminated. The employer in that case claimed that the applicant had abandoned his employment by his 'irresponsible' conduct and his failure to attempt to contact the employer, and that this constituted a repudiation of his employment contract. Commissioner Abey found that it was reasonably open to the employer to conclude that he had abandoned his employment.*
>
> *The Full Bench affirmed Commissioner Abey's decision and held:*
>
> > *'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.'*
>
> *The Applicant submits that the Employer must have known why the Applicant did not attend work and that it was not entitled to treat the Applicant as having abandoned his employment. In Sharam v Blue Tier Logging, arguments by the Applicant that:*
>
> *the non attendance of the applicant for a few days was no more than absenteeism and could not be construed as a repudiation of his employment contract; and*

*only in the case of prolonged and unexplained absenteeism, when it was apparent that an employee was not going to return to work within a reasonable time could a finding of abandonment be justified; were rejected by the Full Bench."*

**[68]** On the material that is presented to the Commission, whilst there is a disparity between the parties, the relevant facts are discernable. On the critical elements, the Applicant concedes that there was no approval for the annual leave, even though he considered that there may have been a misunderstanding.

**[69]** The Applicant's actions were the causal responsibility for the outcome in relation to his contract of employment. He had indicated he wanted time to undertake interviews. There was no confirmation of the original leave application or a reduced period of leave.

**[70]** The Applicant took the situation into his own hands. The Applicant's decision to take the leave, when it had not been approved indicated a repudiation of his contract.

**[71]** It is clear that the Commission does not have jurisdiction in an application filed pursuant to s.643 where there has not been a termination of employment at the initiative of the Employer. In this matter, it was clear that the Applicant did not have approval to take annual leave. He had earlier received a final warning. In not turning up to work for his rostered hours and taking leave of his own volition, he abandoned his employment."

16. **Accordingly, abandonment of employment results in repudiation of the employment contract by the employee. Upon acceptance of the repudiation by the employer, termination is at the initiative of the employee.**

17. Ai Group accepts that abandonment, in the Australian context, does not result in automatic termination of employment. This was clarified in *Visscher* and in various other decisions referred to in *Visscher*, including *Byrne v Australian Airlines* [1995] HCA 24 and *Automatic Fire Sprinklers v Watson* (1946) 72 CLR 435.

18. Further support for the argument that abandonment of employment is termination at the initiative of the employee, can be found in the decision of the Federal Court of Australia in *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* (1995) 62 IR 200 at 205 – 206. The Court held that termination of employment occurs at the initiative of the employee if the employment relationship is "voluntarily left by the employee". Where an employee abandons his or her employment, the employment has obviously been "voluntarily left by the employee".

19. When an employee abandons his or her employment, the question arises as to what date the termination takes effect.

20. It could be argued that the employment of an employee who abandons employment ends at the time when the employee decides not to return to work, notwithstanding that the employment contract continues until the employer accepts the employee's repudiation of the employment contract.

21. The decision of Gostenknic DP in *Ishan D'Souza v Henry Schien Halas* [2014] FWC 5864 highlights this type of argument. In this case the issue concerned termination by an employer and whether the date of termination was the date when the employer intended the termination to take effect, or a later date. The following extract is relevant (emphasis added):

> **"[33]** Wilcox CJ makes clear that ultimately termination of employment will usually be inferred from the date on which the employer intended the termination of employment to take effect. It seems to me that the reasoning of Wilcox CJ is consistent with the reasoning on the question of when employment under a contract of employment ends as set out in a decision of the High Court of Australia *Automatic Fire Sprinklers v Watson*, and in particular the conclusion of Dixon J at 469 when his Honour said:
>
> > "For the reasons I gave earlier in this part of the judgment, I think that there is nothing in the general law preventing a wrongful dismissal of a servant operating to discharge him from his service notwithstanding that he declines to accept the dismissal as absolving him from further performance...-"
>
> **[34]** Similar observations to those of His Honour were made by the other Justices of the court in that judgment. So it is that the decisions referred to by the Applicant are of no assistance and the decision in *Siagian* is contrary to the proposition that he advances. Likewise under the common law, a failure by an employer to give notice of a termination or to make payment in lieu of notice would be a wrongful dismissal but a dismissal nonetheless. An employee's remedy lies in damages. <u>The employment relationship under the contract does not continue even though the contract of employment may well do so</u>.
>
> **[35]** Even if I were to accept for a moment the Applicant's proposition at least in so far as it relates to the contract of employment, <u>the failure to give notice or to make payment in lieu of notice at the time of purporting to terminate the contract would likely amount to a repudiation on the employer's part, and that puts the employee at an election either to accept the repudiation and bring the contract to an end or to continue the contract notwithstanding the repudiation</u>."

22. Often nothing much turns on the precise date of termination for an employee who abandons employment because the employee would not typically be entitled to be paid for unauthorised absences and such absences do not count as service under the FW Act (s.22(2)).

23. The steps that an employer may logically take to confirm that an employee has indeed abandoned his or her employment (e.g. writing to the employee and asking for an explanation of why he or she has not turned up for work) do not disturb the fact that, in cases of abandonment, termination is at the initiative of the employee.

## 3. THE HISTORY OF THE ABANDONMENT OF EMPLOYMENT CLAUSES IN AWARDS

24. An abandonment of employment clause has been in the Metal Industry Award since at least 1971.

25. The *Industrial Information Digest* (updated to 18 July 1967) provides the following account of the difficulties that employers were commonly experiencing in the late 1960's in establishing that an employee who "walked off the job" had actually terminated his or her employment: (This is no doubt the reason why abandonment of employment provisions were inserted into the Metal Industry Award a few years later in 1971):

- **Pages 1264 and 1265 within the topic – *Termination of Employment – Absenteeism – For*:**

  "When dealing with a case in which an employee fails to attend for work without communicating any reason for his absence to his employer, it is generally considered advisable for the latter to allow a reasonable period of time to elapse (e.g., one week) and then to communicate personally or by post with the employee inquiring as to the reason for the absence. If the reason is not forthcoming within a reasonable time, or if, when tendered, it is found to be unsatisfactory, it is customary for a further communication to be forwarded terminating the employment forthwith.

  - - -

  Where there is reason to believe that an absent employee has no intention of returning to work, many employers adopt the practice of forwarding a

communication to the employee advising that unless he reports for duty or furnishes a reason for his absence, together with advice as to the estimated duration thereof, within a specified timeframe, he will be regarded as having terminated his services on the date that he last attended for duty (i.e., without notice). Where the award provides for forfeiture of a week's wages in lieu of notice, any moneys in hand, to the value of a week's wages, are then forfeited if the employee fails to comply with this requirement…)."

- **Page 1267 within the topic – *Termination of Employment – Failure to Give Notice – Weekly Hiring*:**

  "Under many weekly hiring provisions of awards, failure by either party to give a week's notice of termination of employment necessitates the payment of forfeiture of a week's wages, as the case may be. The application of this provision, in cases where the employee fails to give notice, has given rise to much uncertainty and difficulty. Apart from the fact that in many cases insufficient moneys are held in hand to enable the employer to take advantage of the provision, in appropriate cases, to impose forfeiture of a week's wages, it is often difficult to establish that an employee who "walks off the job" has actually terminated his employment (but see *Termination of Employment – Absenteeism for*)."

26. In the first consolidated Metal Industry Award in which the abandonment of employment provisions appeared (i.e. in the *Metal Industry Award 1971*) the abandonment of employment provisions and the notice of termination provisions appeared in the same clause (clause 6).

27. The *Metal Industry Award 1984 – Part I* had a similar structure, i.e. both provisions were in clause 6.

28. The abandonment of employment provisions and the notice of termination provisions were relocated to separate clauses in the *Metal, Engineering and Associated Industries Award 1998*, by agreement between Ai Group and the Metal Trades Federation of Unions (**MTFU**) during the award simplification process in 1998.

29. In the 1998 *Metal Industry Award Simplification Decision*,[2] Senior Deputy President Marsh held that the abandonment of employment clause (as agreed between the parties) was an allowable matter. Her Honour said:

> **"4.5 Absence from Duty**
>
> **4.6 Standing Down Employees**
>
> **4.7 Abandonment of Employment**
>
> Clause 4.6 is an allowable matter and consistent with the hospitality decision. Clauses 4.5 and 4.7 were not addressed in the hospitality decision.
>
> No party or intervener argued that these agreed matters are not allowable. I am satisfied they are allowable pursuant to s.89A(2)(n) and s.89A(2)(c) or s.89A(6). They are current award provisions and will be included in the new award."

30. It can be seen from the above extract that, the three provisions of the *Workplace Relations Act 1996* that Marsh SDP referred to, in determining that the abandonment of employment clause (clause 4.7) and the absence from duty clause (clause 4.5) were able to be included in the Award, were:

- s.89A(2)(n) – notice of termination;
- s.89A(2)(c) – rates of pay; and
- s.89A(6) – incidental award provisions.

31. Despite the decision of Marsh SDP, which held that the abandonment of employment clause in the Metal Industry Award was an "allowable award matter", Ai Group accepts that changes are necessary to the abandonment of employment provisions in the relevant modern awards to avoid inconsistency with various provisions of the FW Act.

[2] Print P9311, 11 March 1998, Marsh SDP.

## 4. THE FULL BENCH DECISION IN *BIENIAS V IPLEX PIPELINES AUSTRALIA PTY LIMITED*

32. In *Bienias v Iplex Pipelines Australia Pty Limited* [2017] FWCFB 38 (***"Iplex"***) a Full Bench of the Commission determined that clause 21 of the Manufacturing Award has no effect because it is not a clause that can be included in an award under the FW Act.

33. Clause 21 can be described as having two main purposes:

- First, to determine the point of time when the employment ends; and
- Second, to clarify that the termination has occurred at the initiative of the employee and hence the employer is not required to provide notice of termination to the employee.

34. Ai Group accepts that a clause in a modern award is not able to deem employment to come to an end at a particular point in time. Therefore, we accept that a clause in a modern award cannot deal with the first dot point above. For this reason, clause 21 of the Manufacturing Award cannot remain in the award, as currently drafted.

35. However, there is significant merit in retaining a clause in the Manufacturing Award (and in the other 5 awards involved in these proceedings) to address the second dot point above. That is, to clarify that an employer is not required to provide notice of termination to an employee who has abandoned his or her employment.

36. The unions appear to be citing the Full Bench decision in *Iplex* as authority for the proposition that abandonment of employment constitutes termination at the initiative of the employer because the employer must take some action to confirm termination. We strongly disagree with such proposition for the reasons set out in section 2 of this submission. Such proposition conflicts with several decisions of the High Court and other Courts.

37. The Full Bench decision in *Iplex* primarily dealt with the following questions:

- Does the abandonment of employment clause in the Manufacturing Award have any effect, given s.137 of the FW Act?

- Can an employee's employment be deemed to have ended at a particular point in time as a result of the abandonment of employment clause in the Manufacturing Award?

38. The Full Bench held that the answer to both of the above questions is No. In this regard the Full Bench stated:

> **[38]** The second paragraph of clause 21 is no more than a deeming provision which has the effect of deeming an employee to have abandoned the employment if the employee, relevantly, within 14 days from the last attendance at work has not established to the satisfaction of the employer that the employee was absent for reasonable cause. It seems to us that the employer must take the positive step of concluding that it is not satisfied that the employee was absent for reasonable cause before the deeming provision operates. However, that an employee is deemed to have abandoned his employment within the meaning of the clause does not mean that the employee's employment is thereby at an end.
>
> **[39]** A deeming provision by its nature deems that a thing, act or event having particular characteristics but which may or may not also be another thing, act or event, to be that other thing, act or event. In this case, an employee's absence for the period described in the paragraph is deemed to be abandonment of employment after taking on the characteristics described in the paragraph, whether or not as a matter of fact or law the employee has abandoned his or her employment.
>
> **[40]** The employment has not been terminated by reason thereof, nor does the paragraph suggest that the employment is terminated. In our view, it would be extraordinary for the paragraph to operate as automatically terminating the employment irrespective of the wishes of the employer. Thus under the automatic termination theory, the employer would be prevented from continuing to employ the employee, waiting a further period before deciding whether to terminate the employment of the employee or taking other disciplinary action short of termination of employment.
>
> **[41]** In truth, once an employee is deemed pursuant to clause 21 of the Award to have abandoned his or her employment, the employment of the employee does not come to an end nor is the employer required to end the employment by terminating it. In order to do so, we consider the employer must take the additional step of terminating the employment and if it does not do so employment continues.

39. The only sentence that Ai Group takes issue with in the above extract, with respect, is the second sentence of paragraph [41]. To align with the relevant authorities of the High Court and other courts, the words *"terminating the employment"* in that sentence would more accurately state *"accepting the employee's repudiation of the employment contract"*.

40. The unions are attempting to place undue weight on the second sentence of paragraph [41].

41. When the *Iplex* decision is read in full, the decision primarily dealt with the two questions set out above, and was made on the specific facts surrounding the termination of Mr Bienias by Iplex.

42. We accept of course that, in all cases where repudiation of an employment contract is alleged, a decision-maker must carefully consider the facts and the surrounding circumstances in order to ascertain whether repudiation has actually occurred. As stated in *Macken's Law of Employment*, Seventh Edition at pp.336 and 337:

> "The test is objective. It is not necessary to prove a subjective intention to repudiate. Whether there has been a repudiation of the contract in the individual case is not a question of law but a question of fact."

43. As stated by the Majority of the High Court in *Visscher*, it is necessary for the decision-maker to determine the true contractual position between the parties at the relevant time/s (see paragraph [81] as reproduced at paragraph 10 above).

44. Given the interpretation that the unions (and various commentators) are placing on the Full Bench's *Iplex* decision it would be very worthwhile for the Full Bench to clarify the relevant interpretations of the law, in a decision granting the variation proposed by Ai Group. The legal effect of abandonment of employment is an issue in all industries, not just those covered by an award that currently contains an abandonment of employment clause.

## 5. THE VARIATION PROPOSED BY Ai GROUP

45. As outlined above, the variation that Ai Group proposes to the Manufacturing Award (which similar variations to the other 5 awards) is:

    a. Delete clause 21 – Abandonment of employment.

    b. Amend subclause 22.2 as follows:

> **22.2 Notice of termination by an employee**
>
> (a) The notice of termination required to be given by an employee is the same as that required of an employer except that there is no requirement on the employee to give additional notice based on the age of the employee concerned.
>
> (b) If an employee fails to give the required notice the employer may withhold from any monies due to the employee on termination under this award or the NES, an amount not exceeding the amount the employee would have been paid under this award in respect of the period of notice required by this clause less any period of notice actually given by the employee.
>
> (c) Subclause (b) applies in circumstances where termination is at the initiative of the employee, including circumstances where an employee abandons his or her employment.

46. Paragraphs (a) and (b) above are existing provisions.

47. Paragraph (c) simply clarifies the very longstanding existing rights and obligations of employers and employees in respect of notice of termination by an employee.

48. In circumstances where an employee covered by the Manufacturing Award voluntarily leaves his or her employment, and the employer has not agreed to waive the notice period that the employee is required to give, the employer is entitled to:

> "..withhold from any monies due to the employee on termination under this award or the NES, an amount not exceeding the amount the employee would have been paid under this award in respect of the period of notice required by this clause less any period of notice actually given by the employee."

49. Subclause 22.2 logically applies to any circumstance where an employee voluntarily leaves his or her employment and fails to give the required period of notice, including abandonment of employment.

50. This has long been the effect of provisions in awards which enable employers to deduct from monies owed on termination as highlighted by the extracts from the *Industrial Information Digest* (updated to 18 July 1967) reproduced in section 3 above, particularly (emphasis added):

- **Page 1265 within the topic – *Termination of Employment – Absenteeism – For*:**

  Where there is reason to believe that an absent employee has no intention of returning to work, many employers adopt the practice of forwarding a communication to the employee advising that unless he reports for duty or furnishes a reason for his absence, together with advice as to the estimated duration thereof, within a specified timeframe, he will be regarded as having terminated his services on the date that he last attended for duty (i.e., without notice). Where the award provides for forfeiture of a week's wages in lieu of notice, any moneys in hand, to the value of a week's wages, are then forfeited if the employee fails to comply with this requirement…)."

- **Page 1267 within the topic – *Termination of Employment – Failure to Give Notice – Weekly Hiring*:**

  "Under many weekly hiring provisions of awards, failure by either party to give a week's notice of termination of employment necessitates the payment of forfeiture of a week's wages, as the case may be. The application of this provision, in cases where the employee fails to give notice, has given rise to much uncertainty and difficulty. Apart from the fact that in many cases insufficient moneys are held in hand to enable the employer to take advantage of the provision, in appropriate cases, to impose forfeiture of a week's wages, it is often difficult to establish that an employee who "walks off the job" has actually terminated his employment (but see *Termination of Employment – Absenteeism for*)."

51. Paragraph (c) is able to be included in a modern award under ss.118, 139 and 142 of the FW Act.

## 6. THE MODERN AWARDS OBJECTIVE

52. In exercising its modern award powers, the Commission must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account each of the matters listed at ss.134(1)(a) – (h) of the Act.

53. At the commencement of the 4 Yearly Review of Awards, a Full Bench dealt with various preliminary issues. The Commission's *Preliminary Jurisdictional Issues Decision*[3] provides the framework within which the Review is to proceed.

54. In addressing the modern awards objective, the Commission recognised that each of the matters identified at ss.134(1)(a) – (h) are to be treated "as a matter of significance" and that "no particular primacy is attached to any of the s.134 considerations". The Commission identified its task as needing to "balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net":

> [32] No particular primacy is attached to any of the s.134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.
>
> [33] There is a degree of tension between some of the s.134(1) considerations. The Commission's task is to balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions. The need to balance the competing considerations in s.134(1) and the diversity in the characteristics of the employers and employees covered by different modern awards means that the application of the modern awards objective may result in different outcomes between different modern awards.
>
> [34] Given the broadly expressed nature of the modern awards objective and the range of considerations which the Commission must take into account there may be *no one set* of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective.

55. To comply with s.138 of the FW Act, the terms included in modern awards must be 'necessary to achieve the modern awards objective'. What is 'necessary' in a particular case is a value judgment taking into account the s.134 considerations.[4]

[3] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788.

[4] *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* (2012) 205 FCR 227; and *4 Yearly Review of Awards – Annual Leave* [2016] FWCFB 3177 at [24] and [25]

## A fair safety net

56. The notion of "fairness" in s.134(1) is not confined in its application to employees. Consideration must also be given to the fairness or otherwise of award obligations on employers. So much was confirmed by a recent Full Bench decision of the Commission regarding the annual leave common issues:

> [109] … It should be constantly borne in mind that the legislative direction is that the Commission must ensure that modern awards, together with the NES provide 'a *fair* and relevant minimum safety set of terms and conditions'. Fairness is to be assessed from the perspective of both employers and employees.[5]

57. Similarly, in the recent 4 Yearly Review decision concerning the payment of wages common issues, the Full Bench decided to vary a number of payment of wage provisions in particular awards on the basis that they were not "fair" to employers, and hence did not reflect the requirement in s.134 that awards provide a "fair… safety net". For example, in its decision the Full Bench stated: (emphasis added)

> [93] But we also accept that there is considerable force in the 'impracticability' argument advanced by ABI and Ai Group. <u>It is not fair to employers to require all termination payments to be made either at the time of termination or within a few days thereafter</u>
>
> - - -
>
> [181] The issue for us is whether the modern award, together with the NES, provides a fair and relevant safety net of terms and conditions. <u>Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question</u>.
>
> [182] We have concluded that clauses 32.2 and 32.3 do not provide a 'fair … safety net'.[6]

58. Along similar lines, when considering the appropriate penalty rate for the performance of ordinary hours of work on Sundays by employees covered by the *Shop, Distributive and Allied Employees' Association – Victorian Shops Interim (Roping-in No 1) Award 2003*, Justice Giudice observed that in making safety net awards, the AIRC was to be guided by s.88B of the *Workplace Relations Act 1996* (WR Act). That provision stated that in performing its

[5] *4 yearly review of modern awards* [2015] FWCFB 3177 at [109].

[6] *4 Yearly review of modern awards* [2016] FWCFB 8463

functions under Part VI of the WR Act, the AIRC was to ensure that a safety net of fair minimum wages and conditions of employment is established and maintained having regard to, amongst other factors, the need to provide fair minimum standards for employees in the context of living standards generally prevailing in the Australian community. Having referred to s.88B, His Honour stated:

> "In relation to the question of fairness it is of course implicit that the Commission should consider fairness both from the perspective of the employees who carry out the work and the perspective of employers who provide the employment and pay the wages and to balance the interests of those two groups. …[7]

59. It would not be fair to employers to remove all references to abandonment of employment in the awards because:

- This would most likely lead to employers forming the incorrect belief that circumstances of abandonment of employment constitute termination at the initiative of the employer, with all of the consequent costs and risks of this such as: the provision of notice of termination to the employee (or pay in lieu), and exposure to a potential unfair dismissal or adverse action claim.

- The Full Bench *Iplex* decision is being widely cited (by the unions and commentators) as authority for the above proposition and, unless the variation is made, this is likely to continue to occur.

- Abandonment of employment by an employee amounts to a repudiation of the employee's employment contract. This is a serious matter and such conduct should be deterred.

- The inclusion of clause 21 – Abandonment of employment, in the Manufacturing Award was agreed between Ai Group and the Metal Trades Federation of Unions (MTFU) when the modern award was made as part of a package in which compromises were made by both parties.[8]

[7] *Re Shop, Distributive and Allied Employees' Association* (2003) 135 IR 1 at [11].

[8] See clause 4.5 in the joint draft Manufacturing Award dated 1 August 2008 that was submitted to the AIRC during Stage 1 of the Award Modernisation process.

Similar circumstances exist in various other affected awards.

60. Also, it would not be fair upon employees to remove all references to abandonment of employment in the awards. The award variation would send an incorrect signal to employees, i.e. that abandonment of employment no longer has the adverse consequences that it previously had. An employee who acts upon such incorrect signal and abandons his or her employment would be exposed to the consequences of repudiating the employment contract.

61. The abandonment of employment clause is a very longstanding award provision. It was first inserted into the Metal Industry Award nearly 50 years ago. The Commission should not completely remove all references to abandonment of employment from the relevant awards when the awards can be readily redrafted, in the manner proposed by Ai Group, to retain a useful and practical reference to abandonment of employment in the awards that would be beneficial for employers and employees.

## A relevant safety net

62. The variation proposed by Ai Group will make the Award more relevant, as it will better clarify the rights and obligations of employers and employees. In this regard, the proposed clause is more relevant than either the current award provisions or the provisions that would exist if all references to abandonment of employment were deleted from the awards.

## Section 134(1)(a) to (h)

### Section 134(1)(a) – Relative living standards and needs of the low paid

63. This is a neutral consideration in this matter.

### Section 134(1)(b) – The need to encourage collective bargaining

64. The variations proposed are consistent with s.134(1)(b).

65. Increased clarity regarding the rights and entitlements of employers and employees when employment is abandoned will assist the bargaining process.

**Section 134(1)(c) – The need to promote social inclusion through increased workforce participation**

66. The variations proposed are consistent with s.134(1)(c).

67. The proposed provisions will discourage employees from abandoning their employment and hence will encourage workforce participation,

**Section 134(1)(d) – The need to promote flexible modern work practices and the efficient and productive performance of work**

68. The variations proposed are consistent with s.134(1)(d).

69. Abandonment of employment by an employee typically results in a loss of efficiency and productivity for the relevant business. This adverse effect is likely to be particularly pronounced in a small business with only a few employees.

**Section 134(1)(da) – The need to provide additional remuneration**

70. This is a neutral consideration in this matter.

**Section 134(1)(e) – The principle of equal remuneration for work of equal or comparable value**

71. This is a neutral consideration in this matter.

**Section 134(1)(f) – The likely impact on business including productivity, employment costs and the regulatory burden**

72. The variations proposed are consistent with s.134(1)(f).

73. Abandonment of employment by an employee results in obvious costs for the employer, including recruitment costs, training costs and the costs associated with reduced efficiency and productivity until the replacement employee is fully trained. This adverse effect is likely to be particularly pronounced in a small business with only a few employees.

**Section 134(1)(g) – The need to ensure a simple, easy to understand, stable and sustainable modern award system that avoids unnecessary overlap of modern awards**

74. The variations proposed are consistent with s.134(1)(g).

75. The proposed variation would ensure that the Award is simpler and easier to understand.

76. If the abandonment of employment clause is simply deleted, it will not be at all clear to employers or employees how the Notice of Termination of Employment by Employee clause operates in circumstances where an employee abandons his or her employment.

77. Currently, the Notice of Termination by Employee clause is widely regarded as being applicable in circumstances where termination is at the initiative of the employee and the employee fails to give the required period of notice. The variation will simply clarify the very longstanding existing practice.

78. The variation is necessary because the deletion of the abandonment of employment clause is likely to create confusion and uncertainty unless the proposed variation is made.

**Section 134(1)(h) – The likely impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy**

79. The proposed variation is consistent with s.134(1)(b), (d), (f) and (g) and therefore the variation will consequently have a positive impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

80. In summary, the specific factors comprising the modern awards objective weigh strongly in favour of granting the proposed variation.

## 7. CONCLUSION

81. For the above reasons, the six awards should be varied in the manner proposed by Ai Group.