



Fair Work Commission: 4 yearly review of modern awards

AM2016/35 ABANDONMENT OF EMPLOYMENT

SUBMISSION ON FWC DRAFT CLAUSE

AUSTRALIAN BUSINESS INDUSTRIAL

- and -

THE NSW BUSINESS CHAMBER LTD

29 AUGUST 2018

1. BACKGROUND

- 1.1 Pursuant to the Fair Work Commission's (**Commission**) Directions on 7 August 2018, parties were directed to file submissions regarding whether the "Reasonable inquiries about certain absences" clause (**Draft Clause**) prepared by the Commission would make an appropriate replacement to the current abandonment of employment clause that appears in six Modern Awards (**Relevant Awards**).¹
- 1.2 This submission should be read alongside the earlier submissions of Australian Business Industrial (**ABI**) and New South Wales Business Chamber Ltd (**NSWBC**) dated 1 June 2017 and 4 September 2017.

2. RESPONSE TO THE COMMISSION'S DRAFT CLAUSE

- 2.1 The position of ABI and NSWBC is that the Draft Clause is not necessary to meet the modern awards objective and accordingly should not be included in the Relevant Awards. This position is based on two principal contentions:
- (a) Firstly, the Draft Clause no longer contains any substantive benefit as it no longer addresses the subject matter of abandonment of employment.
 - (b) Secondly, the Draft Clause compels the taking of general steps pertaining to the relationship between employers and employees which are not necessarily appropriate to the individual circumstances that might arise in any given case.

3. NO LONGER ANY SUBSTANTIVE BENEFIT

- 3.1 For ABI and NSWBC members, the benefit of the original abandonment of employment clause was two-fold:
- (a) firstly, it provided a set of steps to follow in the event of an abandonment of employment situation prior to termination; and
 - (b) secondly, an employer was able to rely on the taking of such steps to help support an argument that any dismissal was not '*harsh, unjust or unreasonable*' (for the purposes of defending unfair dismissal litigation).
- 3.2 As the Draft Clause no longer addresses abandonment of employment giving rise to termination, the above benefits no longer arise.
- 3.3 By removing any reference in the Commission's Draft Clause to abandonment of employment (and termination of employment), the Draft Clause now simply prescribes for the taking of some generic consultative steps in the case of every absence contemplated in the Draft Clause 21.1 - regardless of whether there is a desire or need for such steps be taken in any given case.
- 3.4 Given that the clause prepared by the Commission no longer pertains to termination, and that employers can make enquiries about their employees' whereabouts at any time, the utility of the clause and its purpose is somewhat unclear. Specifically, we note that:

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.

- (a) for employers, no award power is needed in order to contact employees who have not presented for work; and
- (b) for employees, it is difficult to understand why they would desire to be contacted by their employer in circumstances where the employee has not reached out to the employer or sought to explain their absence.

4. TAKING GENERAL STEPS NOT NECESSARILY APPROPRIATE TO EACH CASE

- 4.1 The second difficulty with the Draft Clause is that it compels employers to make enquiries with employees about their whereabouts regardless of the circumstances of any particular case.
- 4.2 If employers do not comply with the Draft Clause, they can face prosecution for award breaches and pecuniary penalties under the civil remedy provisions of the FW Act.
- 4.3 However, it may not be the case that employees should always be contacted as prescribed by the Draft Clause in every circumstance. There may be personal circumstances that employers are aware of that render it insensitive, premature or unnecessary to reach out to employees regarding absences within the timeframe specified by the Commission.
- 4.4 For instance, employers may be aware of personal circumstances such as family illnesses, relationship breakdowns, personal litigation (including criminal matters) or other events which might cause an employer to *speculate* that additional time away from the workplace has been needed. Whilst there may be no current “*explanation*” or “*notification*” for an employee’s absence, the employer may speculate that personal issues have arisen and withhold contacting the employee for a period.
- 4.5 The same applies to natural weather events such as flood, bushfire, tropical cyclones, significant snowfalls and plane delays. An employer may not know why an employee is absent, nor have an “*explanation*” or “*notification*” as contemplated by the Draft Clause, but might *speculate* that some external issues have arisen and withhold contacting the employee for a period.
- 4.6 Given the wide variety of events that might cause unexplained employee absences in any given case, and the lack of any evidence filed in the proceedings in relation to such events, ABI and NSWBC consider that there is an insufficient merit basis to be satisfied that the generic steps prescribed by the Draft Clause are desirable or required in order for the Award to meet the modern awards objective.
- 4.7 Accordingly, ABI and NSWBC respectfully submit that the inclusion of the Draft Clause in the Relevant Awards would be inconsistent with section 138 of the FW Act.

5. HOW SHOULD THE COMMISSION PROCEED IN RELATION TO THIS MATTER?

- 5.1 Having regard to the above, ABI and NSWBC submit that no clause should be inserted into the Relevant Awards to replace the to-be deleted abandonment of employment clauses.
- 5.2 This submission is made primarily by reference to the fact that the benefits associated with the abandonment of employment clauses (identified in paragraph 3.1 above) are no longer available following the decision in these proceedings on 23 January 2018.



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

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