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To: AMOD
Subject: 4 Yearly Review - AM2016/35 - Abandonment of Employment - Common Issue

An updated version of the submission filed on Friday 19 May is attached. Minor amendments have been made to paragraphs 7, 21, 29 and 30.

Yours sincerely

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Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Abandonment of Employment – Common Issue

(AM2016/35)

18 May 2017

4 YEARLY REVIEW OF MODERN AWARDS

ABANDONMENT OF EMPLOYMENT – COMMON ISSUE (AM2016/35)

1. INTRODUCTION

1. This submission is made in response to the Directions issued by the Full Bench on 27 April 2017 in AM2016/35 (Abandonment of Employment – Common Issue).

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. WHAT IS "ABANDONMENT OF EMPLOYMENT" AND WHAT IS THE LEGAL EFFECT OF IT?

5. When an employee abandons his or her employment, the termination of the employment occurs at the initiative of the employee.

6. Of course it is necessary to consider the circumstances in each case to ascertain whether or not an employee has in fact abandoned his or her employment.

7. Termination of employment occurs at the initiative of the employee if the employment relationship is "voluntarily left by the employee" (see *Mohazab v Dick Smith Electronics Pty Ltd (No 2).*[1]

8. Where an employee abandons his or her employment, the employment has been "voluntarily left by the employee". In such circumstances, the employee has repudiated his or her employment.

[1] (1995) 62 IR 200 at 205 – 206.

9. The decision of Commissioner Spencer in *Erbacher v Golden Cockerel*[2] provides a useful account of the concept of abandonment of employment, the key legal principles that apply, and some of the key cases. The following extract is relevant: (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".
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> **[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.
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> **[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.
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> - - -
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> **[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.
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> **[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.
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> **[67]** The Respondent relied on that decision, in support of the abandonment of employment, as follows:
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> > *"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.*

[2] [2007] AIRC 491.

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."

10. When an employee abandons his or her employment, the employee repudiates the employment contract, as highlighted by Commissioner Spencer in the above extract and by the Full Bench of the Tasmanian Industrial Relations Commission in *Sharam v Blue Tier Logging*[3] (the key authority cited by Commissioner Spencer).

[3] 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.

11. When an employee abandons his or her employment, termination of employment automatically occurs at the point in time when the employee voluntarily left the employment. In such circumstances, it is not necessary for the employer to take any steps to terminate the employee's employment. To require an employer to take any steps to terminate the employee's employment would be unjust because it could be argued that the taking of such steps would potentially convert a legitimate "termination at the initiative of the employee" into a "termination at the initiative of the employer", with consequent potential risks and liabilities for the employer.

12. Of course when the employment of any employee comes to an end, it is necessary for the employer to calculate whether or not any monies are owing to the employee.

13. 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 under subclause 22.2, 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."*

14. 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.

3. THE HISTORY OF THE ABANDONMENT OF EMPLOYMENT CLAUSE IN THE MANUFACTURING AWARD

15. An abandonment of employment clause has been in the Metal Industry Award since at least 1971. A very similar provision to the current clause in the Manufacturing Award was contained within:

- The *Metal Industry Award 1971* (subclause 6(g));

- The *Metal Industry Award 1984 – Part I* (subclause 6(g));
- The *Metal, Engineering and Associated Industries Award 1998* (subclause 4.7).

16. 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). The *Metal Industry Award 1984* had a similar structure; both provisions were in clause 6.

17. 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.

18. In the 1998 *Metal Industry Award Simplification Decision*,[4] 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."

19. It can be seen from the above extract that, the three provisions of the *Workplace Relations Act 1996* that Her Honour 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:

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

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

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

20. In *Bienias v Iplex Pipelines Australia Pty Limited*,[5] 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.

21. 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.

22. 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.

23. 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.

[5] [2017] FWCFB 38

5. THE VARIATION PROPOSED BY Ai GROUP

24. 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.

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

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

27. The inclusion of the proposed provision is consistent with the modern awards objective as it would make the award simpler and easier to understand (s.134(1)(g)).

28. The proposed clause would also operate to discourage employees from abandoning their employment and hence would promote the efficient and productive performance of work (s.134(1)(d)), and promote increased productivity (s.134(1)(f)).

29. The inclusion of clause 21 – Abandonment of employment, in the Manufacturing Award was agreed between Ai Group and the MTFU when the modern award was made.[6] The clause is a very longstanding provision. The Commission should not completely remove all references to abandonment of employment from the Manufacturing Award when the Award can be readily redrafted, in the manner proposed by Ai Group, to retain an abandonment of employment provision in the Award.

30. Abandonment of employment by an employee amounts to a repudiation of the employee's employment contract.[7] This is a serious matter and such conduct should be deterred. The removal of all references to abandonment of employment in the six awards would send entirely the wrong signal to employees and employers:

- The potential signal sent to employees would be that abandonment of employment no longer has the adverse consequences that it previously had.

- The potential signal sent to employers would be that they are required to terminate an employee's employment if the employee has abandoned his or her employment. This would be unjust, and is not legally correct (as discussed above).

31. The removal of all references to abandonment of employment in the six awards is not appropriate and would not be consistent with the modern awards objective.

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

[7] See *Erbacher v Golden Cockerel,*[2007] AIRC 491, Spencer C at paras [58] and [70]; and *Sharam v Blue Tier Logging*, 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.

6. CONCLUSION

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

33. At this stage, Ai Group has not decided whether to seek an opportunity to make oral submissions in these proceedings. Consistent with the Full Bench's Directions, Ai Group will advise the Commission of whether we wish to make oral submissions after the other parties have filed their reply submissions.