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)

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 response to the directions in the Statement of the Full Bench 16 August 2017 [2017] FWCFB 4250.[1]

2. The proceedings identified that the Full Bench had previously decided in an unfair dismissal jurisdictional appeal *Boguslaw Bienias, v Iplex Pipelines Australia Pty Limited*[2] *(Bienias v Iplex)*, that clause 21 of the *Manufacturing and Associated Industries and Occupations Award* 2010 did not operate to give effect to an automatic termination.[3] The Full Bench determined that an "abandonment of employment" clause operated in such a way as to require an employer to take an active step to terminate the employment, which leads to the conclusion that the termination was "at the initiative of the employer."[4]

3. The Full Bench has asked parties to turn their minds specifically to "whether clause 21 is a permitted matter under the FW Act having regard to the interpretation that the Full Bench placed upon the clause in the Decision."[5]

4. Clause 21 provides as follows:

> "21. Abandonment of employment
>
> 21.1 The absence of an employee from work for a continuous period exceeding three working days without the consent of the employer and without notification to the employer is prima facie evidence that the employee has abandoned their employment.
>
> 21.2 If within a period of 14 days from their last attendance at work or the date of their last absence in respect of which notification has been given or consent has been granted an employee has not established to the satisfaction of their employer that they were absent for reasonable cause, the employee is deemed to have abandoned their employment.
>
> 21.3 Termination of employment by abandonment in accordance with clause 21—Abandonment of employment operates as from the date of the last attendance at work or the last day's absence in respect of which consent was granted, or the date of the last absence in respect of which notification was given to the employer, whichever is the later."

5. These submissions will address the question posed by the Full Bench and propose a new clause to replace the current clause 21.

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[1] [2017] FWCFB 4250
[2] [2017] FWCFB 38 at paragraph [45]
[3] [2017] FWCFB 38 at paragraph [45]
[4] [2017] FWCFB 38 at paragraphs [43] – [46]
[5] [2017] FWCFB 4250 at paragraph [4]

Relevant Legislative Provisions

6. Section 136 sets out the broad framework for terms permitted, required or not permitted to be in awards and provides the following:

"136 What can be included in modern awards

Terms that may or must be included

(1) A modern award must only include terms that are permitted or required by:

(a) Subdivision B (which deals with terms that may be included in modern awards); or

(b) Subdivision C (which deals with terms that must be included in modern awards); or

(c) Section 55 (which deals with interaction between the National Employment Standards and a modern award or enterprise agreement); or

(d) Part 2-2 (which deals with the National Employment Standards).

Note 1: Subsection 55(4) permits inclusion of terms that are ancillary or incidental to, or that supplement, the National Employment Standards.

Note 2: Part 2-2 includes a number of provisions permitting inclusion of terms about particular matters.

Terms that must not be included

(2) A modern award must not include terms that contravene:

(a) Subdivision D (which deals with terms that must not be included in modern awards); or

(b) Section 55 (which deals with the interaction between the National Employment Standards and a modern award or enterprise agreement).

Note: The provisions referred to in subsection (2) limit the terms that can be included in modern awards under the provisions referred to in subsection (1)."

7. Section 138, is relevant as it places a further boundary on the permitted terms. Section 138 provides the following:

"138 Achieving the modern awards objective

A modern award may include terms that it is permitted to include, and must include terms that it is required to include, **only to the extent necessary to achieve the modern awards objective** and (to the extent applicable) the minimum wages objective." (**Emphasis Added**)

8. Section 139 provides further detail to section 136(1)(a) about the permitted matters in addition to the NES matters (s.136(1)(c) and (d)). The parts of s.139 that appear relevant from a worker perspective include paragraphs (c) arrangements for when work is performed etc, (d) overtime rates, (h) leave etc and (j) procedures for consultation etc. In order for these matters to operate effectively for the benefit of an employee, there may be a need for a clause which ensures adequate engagement by an employer. Businesses may argue that the clause falls within (a) minimum wages. The full section 139 provides the following:

"139 Terms that may be included in modern awards—general

(1) A modern award may include terms about any of the following matters:

(a) **minimum wages** (including wage rates for junior employees, employees with a disability and employees to whom training arrangements apply), and:

(i) skill-based classifications and career structures; and

(ii) incentive-based payments, piece rates and bonuses;

(b) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work, and the facilitation of flexible working arrangements, particularly for employees with family responsibilities;

(c) **arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours;**

(d) **overtime rates;**

(e) penalty rates, including for any of the following:

(i) employees working unsocial, irregular or unpredictable hours;

(ii) employees working on weekends or public holidays;

(iii) shift workers;

(f) annualised wage arrangements that:

(i) have regard to the patterns of work in an occupation, industry or enterprise; and

(ii) provide an alternative to the separate payment of wages and other monetary entitlements; and

(iii) include appropriate safeguards to ensure that individual employees are not disadvantaged;

(g) allowances, including for any of the following:

(i) expenses incurred in the course of employment;

(ii) responsibilities or skills that are not taken into account in rates of pay;

(iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations;

(h) **leave, leave loadings and arrangements for taking leave**;

(i) superannuation;

(j) **procedures for consultation, representation and dispute settlement**.

(2) Any allowance included in a modern award must be separately and clearly identified in the award." (**emphasis added**)

9. Section 55 provides the interaction rules for the NES and Awards and is relevant to the extent clause 21 excludes any part of the NES or has an interaction with the NES. The full section 55 provides as follows:

"55 Interaction between the National Employment Standards and a modern award or enterprise agreement

National Employment Standards must not be excluded

(1) A modern award or enterprise agreement **must not exclude the National Employment Standards** or any provision of the National Employment Standards.

Terms expressly permitted by Part 2-2 or regulations may be included

(2) A modern award or enterprise agreement may include any terms that the award or agreement is expressly permitted to include:

(a) by a provision of Part 2-2 (which deals with the National Employment Standards); or

(b) by regulations made for the purposes of section 127.

Note: In determining what is permitted to be included in a modern award or enterprise agreement by a provision referred to in paragraph (a), any regulations made for the purpose of section 127 that expressly prohibit certain terms must be taken into account.

(3) The National Employment Standards have effect subject to terms included in a modern award or enterprise agreement as referred to in subsection (2).

Note: See also the note to section 63 (which deals with the effect of averaging arrangements).

Ancillary and supplementary terms may be included

(4) A modern award or enterprise agreement may also include the following kinds of terms:

(a) terms that are ancillary or incidental to the operation of an entitlement of an employee under the National Employment Standards;

(b) terms that supplement the National Employment Standards;

but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the National Employment Standards.

Note 1: Ancillary or incidental terms permitted by paragraph (a) include (for example) terms:

(a) under which, instead of taking paid annual leave at the rate of pay required by section 90, an employee may take twice as much leave at half that rate of pay; or
(b) that specify when payment under section 90 for paid annual leave must be made.

Note 2: Supplementary terms permitted by paragraph (b) include (for example) terms:
(a) that increase the amount of paid annual leave to which an employee is entitled beyond the number of weeks that applies under section 87; or
(b) that provide for an employee to be paid for taking a period of paid annual leave or paid/personal carer's leave at a rate of pay that is higher than the employee's base rate of pay (which is the rate required by sections 90 and 99).

Note 3: Terms that would not be permitted by paragraph (a) or (b) include (for example) terms requiring an employee to give more notice of the taking of unpaid parental leave than is required by section 74.

Enterprise agreements may include terms that have the same effect as provisions of the National Employment Standards

(5) An enterprise agreement may include terms that have the same (or substantially the same) effect as provisions of the National Employment Standards, whether or not ancillary or supplementary terms are included as referred to in subsection (4).

Effect of terms that give an employee the same entitlement as under the National Employment Standards

(6) To avoid doubt, if a modern award includes terms permitted by subsection (4), or an enterprise agreement includes terms permitted by subsection (4) or (5), then, to the extent that the terms give an employee an entitlement (the ***award or agreement entitlement***) that is the same as an entitlement (the ***NES entitlement***) of the employee under the National Employment Standards:
(a) those terms operate in parallel with the employee's NES entitlement, but not so as to give the employee a double benefit; and
(b) the provisions of the National Employment Standards relating to the NES entitlement apply, as a minimum standard, to the award or agreement entitlement.

Note: For example, if the award or agreement entitlement is to 6 weeks of paid annual leave per year, the provisions of the National Employment Standards relating to the accrual and taking of paid annual leave will apply, as a minimum standard, to 4 weeks of that leave.

Terms permitted by subsection (4) or (5) do not contravene subsection (1)

(7) **To the extent that a term of a modern award or enterprise agreement is permitted by subsection (4) or (5), the term does not contravene subsection (1).**

Note: A term of a modern award has no effect to the extent that it contravenes this section (see section 56). An enterprise agreement that includes a term that contravenes this section must not be approved (see section 186) and a term of an enterprise agreement has no effect to the extent that it contravenes this section (see section 56)." **(emphasis added)**

10. The express provision provided in s.55(7) above is worth noting as it indicates expressly, which of the terms that may interact with the NES that do not contravene s.55(1).

11. There is also a similar section to s.55(4)(a) for Award terms which is s.142. Section 142 is relevant for considering whether clause 21 may be permitted because it is incidental or provides for how a particular Award term is to operate. Section 142 provides as follows:

"142 Incidental and machinery terms

Incidental terms

(1) A modern award may include terms that are:

(a) incidental to a term that is permitted or required to be in the modern award; and

(b) essential for the purpose of making a particular term operate in a practical way."

12. It is also relevant to consider Subdivision D, which provides for terms that are not permitted to be in Awards. This is relevant for considering whether clause 21 is a term that purports to permit an employer to contravene any part of Part 3-1 which deals with General Protections.

13. Section 150 provides as follows:

"**Subdivision D—**Terms that must not be included in modern awards

150 Objectionable terms

A modern award must not include an objectionable term."

14. An "objectionable term" is defined in the Act's dictionary at section 12 as follows:

"***objectionable term*** means a term that:

(a) requires, has the effect of requiring, or purports to require or have the effect of requiring; or

(b) permits, has the effect of permitting, or purports to permit or **have the effect of permitting**;

either of the following:

(c) **a contravention of Part 3-1 (which deals with general protections);**

(d) the payment of a bargaining services fee." (**Emphasis Added**)

15. The parts of the NES which deal with termination of employment are relevant to considering whether clause 21 purports to exclude or results in detriment to the employee when compared to the entitlement, or is permitted by an express provision. Section 117 and 118 provides as follows:

"117 Requirement for notice of termination or payment in lieu

Notice specifying day of termination

(1) An employer must not terminate an employee's employment unless the employer has given the employee written notice of the day of the termination (**which cannot be before the day the notice is given**).

Note 1: Section 123 describes situations in which this section does not apply.

Note 2: Sections 28A and 29 of the *Acts Interpretation Act 1901* provide how a notice may be given. In particular, the notice may be given to an employee by:
(a) delivering it personally; or
(b) leaving it at the employee's last known address; or
(c) sending it by pre-paid post to the employee's last known address.

Amount of notice or payment in lieu of notice

(2) The employer must not terminate the employee's employment unless:

(a) the time between giving the notice and the day of the termination is at least the period (the ***minimum period of notice***) worked out under subsection (3); or

(b) the employer has paid to the employee (or to another person on the employee's behalf) payment in lieu of notice of at least the amount the employer would have been liable to pay to the employee (or to another person on the employee's behalf) at the full rate of pay for the hours the employee would have worked had the employment continued until the end of the minimum period of notice.

(3) Work out the minimum period of notice as follows:

(a) first, work out the period using the following table:

Period		
	Employee's period of continuous service with the employer at the end of the day the notice is given	**Period**
1	Not more than 1 year	1 week
2	More than 1 year but not more than 3 years	2 weeks

Period		
	Employee's period of continuous service with the employer at the end of the day the notice is given	**Perio d**
3	More than 3 years but not more than 5 years	3 weeks
4	More than 5 years	4 weeks

(b) then increase the period by 1 week if the employee is over 45 years old and has completed at least 2 years of continuous service with the employer at the end of the day the notice is given.

118 Modern awards and enterprise agreements may provide for notice of termination by employees

A modern award or enterprise agreement may include terms **specifying the period of notice an employee must give in order to terminate his or her employment**." (**Emphasis Added**)

16. Section 118 sets out a very clear scope of what may be included in awards. Because s.118 is a type of term allowed by s.55(2), it does not fall within s.55(7) and therefore is not permitted to contravene s55(1).

17. The General Protections are also relevant to look at more closely if there is a possibility that a term may be "objectionable" under s.150. Section 352 provides for protection from dismissal in circumstances of absence due to illness or injury. Section 352 provides as follows:

"352 Temporary absence—illness or injury

An employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the regulations."

18. Its necessary to look more closely at the relevant regulation 3.01 which provides further guidance and stipulates that an employee may provide a medical certificate or statutory declaration within 24 hours or "a longer period as is reasonable in the circumstances." It also places an outer limit on the length of time of the absence being 3 months. Regulation 3.01 provides as follows:

"**3.01 Temporary absence—illness or injury**

(1) For section 352 of the Act, this regulation prescribes kinds of illness or injury.

Note: Under section 352 of the Act, an employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the regulations.

(2) A prescribed kind of illness or injury exists if the employee provides a medical certificate for the illness or injury, or a statutory declaration about the illness or injury, within:

(a) 24 hours after the commencement of the absence; or

(b) such longer period as is reasonable in the circumstances.

Note: The Act defines ***medical certificate*** in section 12.

(3) A prescribed kind of illness or injury exists if the employee:

(a) is required by the terms of a workplace instrument:

(i) to notify the employer of an absence from work; and

(ii) to substantiate the reason for the absence; and

(b) complies with those terms.

(4) A prescribed kind of illness or injury exists if the employee has provided the employer with evidence, in accordance with paragraph 107(3)(a) of the Act, for taking paid personal/carer's leave for a personal illness or personal injury, as mentioned in paragraph 97(a) of the Act.

Note: Paragraph 97(a) of the Act provides that an employee may take paid personal/carer's leave if the leave is taken because the employee is not fit for work because of a personal illness, or personal injury, affecting the employee.

(5) An illness or injury is not a prescribed kind of illness or injury if:

(a) either:

(i) the employee's absence extends for more than 3 months; or

(ii) the total absences of the employee, within a 12 month period, have been more than 3 months (whether based on a single illness or injury or separate illnesses or injuries); and

(b) the employee is not on paid personal/carer's leave (however described) for a purpose mentioned in paragraph 97(a) of the Act for the duration of the absence.

(6) In this regulation, a period of paid personal/carer's leave (however described) for a purpose mentioned in paragraph 97(a) of the Act does not include a period when the employee is absent from work while receiving compensation under a law of the Commonwealth, a State or a Territory that is about workers' compensation." (**Emphasis Added**)

Is clause 21 a permitted matter?

19. There are three parts to clause 21:

a. A part describing the qualifying circumstances for activating the clause;

b. A part describing a process for an employer to determine whether there has been reasonable cause for an employee's absence and providing for a limited time for the process;

c. A part providing for the date of termination, where termination occurs under the clause.

20. The part of the clause describing the qualifying circumstances is not in and of itself not permitted because it does not provide for any right or obligation. However, the form of the clause and the context of the clause leads to a conclusion that it is not permitted. Taking into account how the Full Bench in *Bienias v Iplex* interpreted the operation of the clause it cannot be separated from the operation of the parts providing for the date of termination.

Does it exclude the NES?

21. Adopting the Full Bench's interpretation of how clause 21 is to operate in *Bienias v Iplex*, the third part of the clause which provides for the date of termination to be earlier than the date of the first absence, the clause appears to exclude the Notice of Termination requirements of s.117. If the term excludes the NES then it falls foul of section 55(1).

22. Providing for a retrospective termination date, where the termination is at the initiative of the employer under the clause would exclude the National Employment Standard (NES) relating to Notice of Termination provided for in s.117.

23. This part of the clause comes into direct conflict with s.117(1) which provides that:

"An employer must not terminate an employee's employment unless the employer has given the employee written notice of the day of the termination (**<u>which cannot be before the day the notice is given</u>**)." (emphasis added)

Does clause 21 supplement the NES?

24. No part of Clause 21 provides any supplementation to any NES entitlement as allowed by section 55(4). Further, the main parts of clause 21 do not appear to be ancillary or incidental to any NES entitlement.

Is the subject matter a permitted matter under s.139?

25. Taking into account the Full Bench's interpretation of how clause 21 is to operate, the subject matter of each of the three parts of the clause does not directly fall within the subject matter in section 139.

26. However, the part of the clause which provides for a process of engaging with an employee may be an incidental term to employee entitlements relating to arrangements for when work is performed, time off instead of payment for overtime (TOIL) or consultation, which are matters enumerated in s.139.

Is clause 21 an Objectionable term?

27. The second part of the clause in conjunction with the third part appears to have the effect of permitting a contravention of the General Protections in Part 3-1 of the Act.

28. In particular, s.352 which provides that an employer "must not dismiss an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the regulations."

29. The time limit of 14 days provided in clause 21 for an employee to contact an employer does not allow for illnesses or injuries which may mean a "reasonable time" for contacting an employer may be longer than 14 days.

30. Regulation 3.01 stipulates that medical certificates or statutory declarations must be provided within 24hours or "*such longer period as is reasonable in the circumstances*." Using the claims of the applicant in *Bienias v Iplex* as an example, the point at which Mr Bienias claims to have become aware that the employer had sent a letter was some time in June 2016, more than 14 days after his last attendance at work on 12 May 2016. He asserts that this was due to a mental health issue.[6]

31. These circumstances appear to match exactly the circumstances which might be caught within the scope of "a longer period as is reasonable in the circumstances" and would be longer than the 14 day period in clause 21.

32. However, the element of the second part of the clause which deals with a process of engagement and consultation with an employee about what could be a misunderstanding about leave or other entitlement to be absent, may be a permitted term, as an ancillary or incidental term.

What about the process provided to the employee by clause 21?

33. To the extent that clause 21 requires a process of discussion or consultation to ensure that an NES or Award entitlement is not being excluded by the employer's assumptions or actions, it may be permitted as ancillary or incidental.

34. However, the second part of the clause in its current form is unable to stand on its own if the first and third parts are removed, because the remaining part lacks the context to operate properly. Clause 21.2 also contains elements which may not be easily understood by a party to the award such as the concept of "abandonment of employment." The part in Clause 21.2, as noted above, which contains the 14 day time limit also requires amendment to be avoid being an "objectionable term" and conflicting with s.150.

A clause to ensure proper discussion and consultation

35. The AMWU proposes a redrafted clause to retain the part of the clause which provides for a process of engagement by the business with the worker.

[6] [2017] FWCFB 38 at paragraph [12]

36. The AMWU's proposed clause and note is as follows and is contained at Attachment A.

"20. Absence from work

20.1 Unless a provision of this award or the Act states otherwise, an employee not attending for duty loses their pay for the actual time of such non-attendance.

20.2 This clause applies where a business is unaware of the reasons for a worker's absence or believes a worker no longer wishes to work for the business. The purpose of the clause is to ensure a business does not take action against a worker who is entitled to be on leave or absent under the National Employment Standards, this Award or another Agreement they have entered into.

20.3 Where clause 20.2 applies, a business must not take any action against the worker (such as giving notice of termination or advising the labour hire business that it no longer wants the labour from the worker) before the business has attempted to use all available methods to contact the worker and provide them with an opportunity to give an explanation to the business.

20.4 Where a business has complied with clause 20.3 but is still unable to communicate with a worker, a business must not give notice of a termination date that is earlier than 3 months from the beginning of the absence.

Note: Section 352 of the Fair Work Act 2009 provides that an employer must not dismiss an employee because the employee is temporarily absent from work because or illness or injury of a kind prescribed by the regulations.

21. Abandonment of Employment"

37. The AMWU's proposed clause is an ancillary or incidental term to the NES entitlements (s.55(4)) and to Award terms (s.142), as they provide a process for determining whether a worker is accessing an entitlement where there is uncertainty. In particular, the NES entitlements a worker may be accessing include Personal Leave/ Carer's leave, Public Holidays or Community Service Leave.

38. Award terms an employee may be accessing an entitlement from include Hours of Work terms which provide for a rostered days off, Time off instead of payment for overtime or Substitute Public Holiday clauses.

39. Other "Agreements" which may provide for entitlements to be absent include:

a. Individual Flexibility Agreements which may stipulate arrangements for when work is performed;

b. A contract of employment which may stipulate other arrangements for when work is performed; or

c. An agreement reached subsequent to successful request for a "request for flexible work arrangement" under the NES entitlement.

40. The first part sets out the circumstances where the clause might apply and sets out the purpose of the process intended by the clause.

41. The second part sets out the process of engagement required by the employer in more detail.

42. The third part ensures that the clause does not purport to allow an employer to contravene section 352.

43. In drafting the clause, the AMWU has retained the "Absence from Duty" clause and renumbered it 20.1. However, the AMWU does not agree that this clause is necessary, as it does not appear to have any effect. The current Clause 20 provides as follows:

"20. Absence from duty

Unless a provision of this award or the Act states otherwise, an employee not attending for duty loses their pay for the actual time of such non-attendance."

44. The clause is simply stating the obvious, which is that an employee will not be paid for work they haven't performed unless there is an entitlement to be absent and paid for that absence. If this is the interpretation, then it doesn't appear to be "necessary" to achieve the modern awards objective as required by s.138. It is simply stating the obvious, but in a manner which places the focus on an employer's right to make an employee lose pay. From a regulatory perspective, the clause's focus on employee's losing pay for being absent goes against the primary focus of the NES and other minimum safety net entitlements in Awards which are about clearly creating entitlements, rights or obligations and providing a safety net for workers.

45. Given the narrow scope of the proceedings identified by the Full Bench, the AMWU is not seeking the deletion of the clause through this process. However, for the record, the inclusion of clause 20.1 in the proposed draft should not be read to indicate the Union's support for the clause as a term that is permitted to be in a Modern Award.

Why should the Commission include the proposed clause?

46. With most of the abandonment of employment clause unable to be included in Modern Awards, the part of the clause which provides for a process should be redrafted and retained.

47. The Commission should include the AMWU's proposed clause because it ensures that there is a process which a business is required to undertake before taking any action against a worker.

48. Most importantly, the process ensures that the NES and Award entitlements operate as effectively as possible, by avoiding any decisions by businesses, that may in the short term undermine the NES entitlement and potentially require reversal.

49. The process protects workers who may be accessing legitimate entitlements or be entitled to be absent. It also protects businesses by guiding them through a process to avoid making decisions that may be in breach of the National Employment Standards, Award terms or the General Protections.

50. The decision in *Bienias v Iplex* highlights the need for termination to be at the initiative of the employer in order for an application to be heard. The process provides by the AMWU's proposed clause ensures that the business is required to take the initiative in terminating the employment of the worker, and ensures the protection of the Unfair Dismissal regime is present.

51. The legislation appears to permit an absence of up to three months in circumstances of illness or injury. This sets a legislative minimum standard which any process provided for in awards should take into account. In the circumstances where an employee is not contactable and missing, then the employer should not provide a notice of termination date that is earlier than the period which is set by the legislation.

52. These will be very rare circumstances and in most instances, the business and the worker will make contact with each other in a very short amount of time and be able to establish the circumstances surrounding the absence for work or actions which lead the business to believe the worker no longer wished to work for the business. However, providing the for the example, such as that in *Bienias v Iplex*, ensures that the clause does not fall foul of s.150 and purport to allow for breach of the general protections.

53. From a regulatory perspective, providing for an engagement process that affords natural justice before adverse decisions are made encourages parties to behave in a cooperative and mutually supportive manner.

Conclusion

54. The AMWU submits that the current clause 21 about Abandonment of employment cannot be retained in modern awards in its current form as it contravenes s.55(1) and s.150.

55. The current clause 21 is also not:

    a. ancillary or incidental to the operation of an entitlement under the NES.

    b. Supplementary to the NES in a manner that is not detrimental to the employee.

56. The AMWU submits that there is a process outlined in the clause, which may be able to be included and which may serve a positive purpose after redrafting.

57. The AMWU submits that the current clause 20 about Absence from Duties also cannot be included in the Manufacturing and Associated Industries and Occupations Award 2010 as it serves no purpose. However, given the Full Bench directions, the Union will be seeking that clause's removal outside of this Full Bench process.

58. We propose an alternative clause to replace the current clause 20 and 21, which provides for a process of engagement by the business with the absent worker. The process proposed ensures the NES and Award entitlements have an opportunity to operate where relevant and avoid business decisions that result in NES or Award entitlements being breached inadvertently or because the business is unaware of the facts or circumstances surrounding the absence.

End

4 September 2017

Attachment A - Proposed Draft Clause

DRAFT DETERMINATION

Fair Work Act 2009
Part 2-3 Division 4 – 4 Yearly Review of Modern Awards
s.156(2)(b)(i)

Manufacturing and Associated Industries and Occupations Award 2010
(MA000010)

Manufacturing and associated industries

AM2016/35 Abandonment of Employment

VICE PRESIDENT SYDNEY, X XXX 2017

Review of modern awards to be conducted.

[1] Further to the decision and reasons for decision <<decision reference>> in AM2016/35, it is determined pursuant to section 156(2)(b)(i) of the Fair Work Act 2009, that the Manufacturing and Associated Industries and Occupations Award 2010 be varied as follows.

[2] Delete clause 20 and 21 and replace with the following:

20. Absence from work

20.1 Unless a provision of this award or the Act states otherwise, an employee not attending for duty loses their pay for the actual time of such non-attendance.

20.2 This clause applies where a business is unaware of the reasons for a worker's absence or believes a worker no longer wishes to work for the business. The purpose of the clause is to ensure a business does not take action against a worker who is entitled to be on leave or absent under the National Employment Standards, this Award or another Agreement they have entered into.

20.3 Where clause 20.2 applies, a business must not take any action against the worker (such as giving notice of termination or advising the labour hire business that it no longer wants the labour from the worker) before the business has attempted to use all available methods to contact the worker and provide them with an opportunity to give an explanation to the business.

20.4 Where a business has complied with clause 20.3 but is still unable to communicate with a worker, a business must not give notice of a termination date that is earlier than 3 months from the beginning of the absence.

Note: Section 352 of the Fair Work Act 2009 provides that an employer must not dismiss an employee because the employee is temporarily absent from work because or illness or injury of a kind prescribed by the regulations.

21. **Abandonment of Employment”**

[3] This determination will operate on and from 1 XXX 2017.

VICE PRESIDENT