

**STRONGER
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NATIONAL OFFICE

Level 1, 16-20 Good Street Granville NSW 2142

T: (02) 8005 3333

E: members@nat.awu.net.au

W: www.awu.net.au

Daniel Walton National Secretary



ABN 28 853 022 982

IN THE FAIR WORK COMMISSION

AM2017/39 – APPLICATION BY CLUBS AUSTRALIA (INDUSTRIAL)

Section 156 – Fair Work Act 2009 – 4 yearly review of modern awards

ADDITIONAL SUBMISSIONS ON s.164(b)

Lodged by: Zachary Duncalfe

The Australian Workers' Union, National Office

Address for service: Level 1, 16-20 Good Street,
Granville NSW 2142

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Telephone: (02) 8005 3333

Fax: (02) 8005 3300

Email: zach.duncalfe@nat.awu.net.au

BACKGROUND

1. These submissions are made in accordance with leave granted by the Full Bench on 1 November 2018, the final day of hearing for this matter.
2. The Australian Workers' Union (**AWU**) understands that the Full Bench requested submissions from the parties regarding the impact of red circling – the process whereby current employees' conditions are maintained, and any reduction in conditions granted by the Fair Work Commission are applicable only to employees employed subsequent to such cuts being made – particularly in relation to the satisfaction of 'appropriateness' in s.164(b) of the *Fair Work Act (Act)*.

POSITION REGARDING APPLICATION

3. The AWU maintains its strong, global opposition to the application by Clubs Australia Industrial (**CAI**).
4. As explored in previous submissions throughout this matter, the AWU maintains that the CAI application suffers from a number of fatal flaws and accordingly should be dismissed in its entirety.
5. There are two flaws in the CAI application that are of particular note. Firstly, the CAI application is patently inadequate in terms of evidence. CAI has failed to present evidence of a relevance and quality to allow the Fair Work Commission to grant its application, including a failure to present relevant and persuasive evidence that shows what benefit the granting of the application will provide to employers or employees, and the quantum of that benefit.
6. Secondly, CAI has failed to establish that its application is consistent with the relevant legislative framework, including the modern awards objective at s.134 of the Act, and the special criteria for the revocation of modern awards at s.164(b) of the Act.
7. The potential red circling of current employees at the time of the proposed reduction in conditions does not assist CAI in meeting the requirements of s.134 or s.164(b) of the Act.

RED CIRCLING – GENERAL

8. The AWU is opposed to the introduction of red circling provisions generally, and opposes any suggestion that such provisions could possibly assist CAI in its current application. The AWU also notes that red circling has not formed part of the CAI application to date.
9. The major flaw with the introduction of red circling of penalty rates is clear: whilst current employees' penalty rates are maintained, new employees will be entitled to less and will therefore be cheaper to employ. A realistic outcome of such a

situation is that current employees may suffer a different harm than reduced penalty rates – they may lose shifts or, in certain circumstances, their jobs entirely (perhaps to be invited to re-apply under the inferior conditions).

10. Red circling may appear to reduce the *immediate* impact of a decision to reduce the minimum conditions that apply to an industry, but arguably such provisions create additional potential impacts that are just as harmful to current employees.
11. Additionally, red circling of penalty rates unavoidably creates a two-tier workforce whereby two people performing the same work for the same employer at the same time are being remunerated at different levels. This is plainly undesirable.

RED CIRCLING – APPROPRIATENESS

12. The AWU submits that red circling of current conditions for current employees would not assist the CAI application to satisfy the appropriateness test of s.164(b) of the Act.
13. On the contrary, red circling provisions would introduce additional issues including those described above, which in the submission of the AWU weighs directly against the appropriateness of the proposed amalgamated award for s.164(b).
14. CAI has failed to establish that an award that contains conditions inferior to the award being revoked is capable of being considered an ‘appropriate’ modern award for the purposes of s.164(b). The proposal of red circling will not assist in achieving the required appropriateness.
15. The CAI application must be dismissed in its entirety.



Zachary Duncalfe
National Legal Officer
THE AUSTRALIAN WORKERS' UNION

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