

FAIR WORK COMMISSION

MATTER NO. AM2017/39

Four Yearly Review of Modern Awards

Revocation of the *Registered and Licensed Clubs Award*

**SUBMISSIONS OF UNITED VOICE ON
POTENTIAL TRANSITIONAL ARRANGEMENTS AND RED CIRCLING**

Introduction

1. These submissions are filed pursuant to the leave granted by the Full Bench on 1 November 2018. They address the following matters:
 - (a) The appropriate transitional arrangements for any changes to award terms that may occur as a result of the decision of the Full Bench to not dismiss the application of CAI.
 - (b) Red circling and particularly whether ‘red circling’ of the type described in the first dot point of paragraph 7 of the Statement of the Full Bench dated 11 July 2018¹ satisfies the ‘appropriateness’ test in s 164(b) of the Act.
2. United Voice will, on 29 November 2018, file reply submissions to the submissions of CAI filed 14 November 2018 regarding the *Industry Profile* and related matters, and the schedule attached to the final submissions of United Voice dated 1 November 2018.²

Transitional arrangements

3. The submissions that follow about potential transitional arrangements are made in the alternative to United Voice’s primary submission, which is that the Full Bench should dismiss CAI’s application and conclude the four yearly review of the *Clubs Award*. CAI has failed to make out a merit case on the evidence in support of its application,

¹ [2018] FWCFB 4116.

² Per PN8555.

and has neither properly addressed nor satisfied the statutory requirements for revocation and variation under Part 2-3 of the FW Act.³

4. Further, United Voice repeats and maintains its submission that transitional arrangements are outcome-specific, and so it is premature to consider them before the Full Bench has determined whether, and if so in what form, the application should be granted.⁴ If the Commission determines not to dismiss the application, any transitional arrangements should depend on the effect of the *whole terms* of any award made. United Voice reserves its rights to make submissions about appropriate transitional arrangements if the Commission determines to grant the application in some form other than the forms addressed below.
5. Subject to that position, United Voice has identified four possible outcomes, other than dismissal of the application, based on the numerous submissions filed by CAI to date, and on a matter raised by the Full Bench in the Statement [2018] FWCFB 4116:
 - (a) The *Clubs Award* is revoked, and the *Hospitality Award* is amended to the effect that penalty rates for permanent workers are cut as sought by CAI.
 - (b) The *Clubs Award* is revoked, and the *Hospitality Award* is amended to the effect that penalty rates for permanent workers are cut as sought by CAI, but penalty rates for current employees are preserved via ‘red circling’.
 - (c) Further to (a) or (b), the *Clubs Award* is revoked, and the *Hospitality Award* is amended to include some or all of the other amendments proposed by CAI.
 - (d) Further to (a) or (b) and/or (c), the *Clubs Award* is revoked and the *Hospitality Award* is amended, and CAI’s ‘alternative position’ is granted, whereby clauses 20.5(c), 29.1(b)(ii), 31.7 and 31.8 expire from 1 January 2020.⁵

³ See submissions of United Voice dated 1 November 2018, [5]–[49].

⁴ See submissions of United Voice dated 12 September 2018, [68].

⁵ CAI originally included clauses 31.9, 31.10, 31.11 and 31.12 in the list of proposed sunset clauses first identified on 11 July 2018. Clauses 31.11 and 31.12 were dropped from the alternative proposal by email from Moray & Agnew to the Fair Work Commission on 13 July 2018. Clauses 31.9 and 31.10 were dropped from the alternative proposal at the hearing on Tuesday 30 October 2018, per PN7776.

The need for appropriate transitional arrangements

6. In the Penalty Rates Case, the Full Bench stated that there was “plainly a need for appropriate transitional arrangements” to “mitigate the hardship caused to employees who work on Sundays.”⁶ The hardship was explained by the Full Bench as arising from the fact that “a substantial proportion of the employees” covered by the relevant awards are “‘low paid’ within the meaning of s 134(1)(a)”.⁷ The Commission stated that it was conscious of the adverse impact that the cuts to penalty rates would have on those employees, especially where unexpected expenses “produce considerable financial distress.”⁸ For the reasons ventilated in closing submissions, it cannot properly be expected or assumed that safety net increases in the minimum wage will adequately compensate any affected workers.⁹
7. The same considerations apply here, with more force, because:
- (a) The cuts to weekend penalty rates sought by CAI apply to Saturdays *and* Sundays, whereas the cuts granted in the *Penalty Rates* case applied to Sundays only. The order of magnitude of the cuts in this case, and accordingly the impact on employees, is therefore far greater.
 - (b) It is not contested that employees under the *Clubs Award* are low paid,¹⁰ and that permanent clubs employees whose income will be cut will *not* have any opportunity to work more hours to make up for their lost pay.¹¹
 - (c) Unlike in the *Penalty Rates Case*, no claim was made by CAI that cuts to penalty rates would have any corresponding positive effect in the form of, eg, increased trading hours, a reduction in the hours worked by owner/operators, an increase in the level and range of service offerings, and an increase in the overall hours worked (leading to more employment), all of which were factors

⁶ *Penalty Rates Decision*, [2000], [2021].

⁷ *Penalty Rates Decision*, [1998]; and see Chart 24 at [735]; [817]; [818]–[824].

⁸ *Penalty Rates Decision*, [1999].

⁹ See United Voice submissions dated 1 November 2018, [121]; PN7838–7848;

¹⁰ See United Voice submissions dated 1 November 2018, [132]–[133].

¹¹ See United Voice submissions dated 1 November 2018, [131].

that favoured the Full Bench’s decision to implement a ‘shorter’ three year transitional arrangement.¹²

(d) In this case, the only ‘positive effect’ identified by CAI is to clubs’ bottom line.

8. Accordingly, any transitional arrangements should be directed to minimising, as far as possible, the impact on affected employees. Given the terms of CAI’s application (employees will not be able to make up lost pay or otherwise ameliorate the loss of beneficial terms and conditions of employment), the only available form of harm minimisation is delay.

(a) Penalty rates are cut for permanent workers under the *Clubs Award*

9. Clubs Australia Industrial have proposed a three year transitional arrangement whereby cuts to penalty rates are made from 1 July each year commencing in 2019 at a rate of 5, 10 and 10 per cent each year. CAI has not made any submissions in support of its proposed transitional arrangement.¹³
10. In light of the matters identified above, and in particular because there will be no opportunity for permanent employees to mitigate lost wages, United Voice proposes a five year transitional arrangement incorporating a notice period of 12 months from 1 July 2019, as follows:

Year	Reduction – weekends and public holidays
1 July 2019	0
1 July 2020	5 per cent
1 July 2021	6 per cent
1 July 2022	7 per cent
1 July 2023	7 per cent

¹² 4 *Yearly Review of Modern Awards – Penalty Rates – Transitional Arrangements* [2017] FWCFB 3001, [82], [147], [197].

¹³ The submissions dated 15 August 2018 at [84]; and 30 October 2018 at [16], simply assert that this Full Bench should adopt the transitional arrangements ordered by the Full Bench in the *Penalty Rates Decision*, without explanation.

(b) Penalty rates are cut for permanent workers under the *Clubs Award*, but with red circling

11. United Voice opposes any red circling provisions. Such provisions cause disharmony between current and new employees. Further, red circling provisions expose existing employees to the risk that they will lose weekend shifts because it will be cheaper for employers to roster new employees at those times. That is, the harm that red circling is intended to prevent – a reduction in income for current employees – may nonetheless be prompted by the introduction of red circling.
12. Because red circling has the potential to adversely impact current employees, a transitional arrangement is appropriate. Consistent with the transitional arrangements proposed elsewhere in these submissions, including to non-penalty rate clauses, any red circling should not take effect until 1 July 2020. New permanent employees engaged prior to that date would have their penalty rates preserved under the red circling arrangements.

(c) Other variations are made to the amended *Hospitality Award*

13. CAI has proposed an additional 30 changes to the terms and conditions of employment for clubs employees.¹⁴ These changes are identified in the table at Annexure A to the submissions of United Voice dated 1 November 2018.
14. The number of additional variations proposed by CAI, and the copious possible combinations of variations, illustrates the challenges with proposing appropriate transitional arrangements before a decision has been made. United Voice reserves its right to make further submissions on appropriate transitional arrangements in the event that the Commission determines to make any of the variations in Annexure A, including any combination of variations.
15. For the reasons set out in those submissions at paragraphs 34 to 49 (particularly 45 to 49), the proper application of s 164(b) of the FW Act means that when considering whether an award should be revoked, the Commission must consider whether the different modern award proposed to cover those employees is ‘appropriate for them’. United Voice identified four relevant considerations to the assessment of ‘appropriateness’ under s 164(b) of the Act. When considering individual terms and conditions, the relevant limb of the ‘appropriateness test’ is the assessment of whether

¹⁴ There are 29 entries in the table at Annexure A (not including the CAI Alternative Claim entries that start on page 68), but clause 21.3 (on page 64) has both a detrimental and beneficial effect.

the terms of the different modern award are better or worse than under the revoked award. If employees are worse off under the proposed different award, then that award is not ‘appropriate’ for them, within the meaning of s 164(b), and the variation should not be made.

16. The vast majority – 21 out of 30 – of the proposed additional variations are detrimental to clubs employees. Nine out of the 30 proposed variations are beneficial to clubs employees.
17. For these reasons:
 - (a) The variations identified in Annexure A as beneficial should come into effect on the revocation of the *Clubs Award* and the variation of the *Hospitality Award*.
 - (b) The variations identified in Annexure A as detrimental should not be made.
 - (c) In the event that the Commission determines to make some or all of the variations identified in Annexure A as detrimental (excluding penalty rates, which are addressed above), those variations should not have effect until 1 July 2020, consistent with the notice period for cuts to penalty rates proposed above.

(d) Other variations are made to the amended *Hospitality Award*

18. By its ‘alternative position’, CAI seek to abolish cll 20.5(c), 29.1(b), 31.7 and 31.8 of the proposed amalgamated award with effect from 1 January 2020.
19. As set out in the submissions of United Voice dated 12 September 2018 at paragraph 40, there is a complete lack of evidence and submission from CAI about the operation of these clauses, the basis for selection of these clauses for expiry, and other relevant matters. The material filed by CAI concerning the alternative position does not approach the jurisdictional threshold established by the *Preliminary Jurisdictional Issues* decision. In such circumstances, the Commission should not further consider the ‘alternative position’.
20. However, if the Commission determines that it is appropriate within the meaning of s 164(b) to apply sunset clauses to the clauses identified in the ‘alternative position’, then the appropriate period of expiry should be no earlier than 1 July 2020, consistent with the submissions above.

Red circling

21. United Voice opposes the introduction of ‘red circling’ provisions. No party to the application supports the introduction of ‘red circling’ and it forms no part of the application made by CAI.
22. ‘Red circling’ arrangements have the potential to create a two-tier workforce, and to create a risk that longer-term and more expensive employees would be rostered less hours than newer employees. In the *Penalty Rates – Transitional Arrangements Decision* [2017] FWCFB 3001, the Full Bench formed the view that:
 - (a) the introduction of a ‘red circling’ term would create significant potential for disharmony and conflict between employees performing the same work at the same time but receiving different Sunday penalty rates (contrary to s 577(d));¹⁵
 - (b) the introduction of a ‘red circling’ term would make the transition to ‘fair and relevant’ Sunday penalty rates more complex (adding to the ‘regulatory burden’ on business (s 134(1)(f)) and making the modern award system less simple and easy to understand (s 134(1)(g));¹⁶ and
 - (c) there was a risk that ‘red circled’ employees may suffer disadvantage in comparison with new employees and that safeguarding such employees may be difficult.¹⁷
23. United Voice agrees with the conclusions of the Full Bench in the *Transitional Arrangements Decision*.
24. The unchallenged evidence of Neale Genge,¹⁸ as to the potential for workforce disharmony, is relied on in support of this position.

Red circling and s 164(b)

25. During the hearing on 1 November 2018 the Commission sought the parties response to the question: “If there was a red circling arrangement, so that everybody employed as at the date of revocation maintained their existing penalty rates...[would that] satisfy the appropriateness test of [section] 164(b)?”¹⁹

¹⁵ *Penalty Rates - Transitional Decision* [2017] FWCFB 3001, [119].

¹⁶ *Penalty Rates - Transitional Decision* [2017] FWCFB 3001, [119].

¹⁷ *Penalty Rates - Transitional Decision* [2017] FWCFB 3001, [120].

¹⁸ See statement of Neil Genge date 12 September 2018 at [11]-[13].

¹⁹ PN8254, PN8480 and PN8556.

26. For the reasons set out above, United Voice opposes red circling. For those same reasons United Voice submits red circling would not satisfy the appropriateness test contained in s 164(b), that is:

- (a) Red-circled penalty rates would not ensure that the proposed merged award is appropriate for the employees covered by it because it would create disharmony and conflict between employees performing the same work at the same time but receiving different weekend penalty rates (contrary to s 577(d));²⁰
- (b) Red-circled penalty rates would mean that the proposed merged award would not be appropriate because it would create two tiers of penalty rates, making the award less simple and easy to understand by employees (s 134(1)(g));²¹
- (c) Red-circled penalty rates would not ensure that the proposed merged award is appropriate for employees because it would create a risk that ‘red circled’ employees may suffer disadvantage in comparison with new employees.²² The risk is that they will lose weekend shifts because it will be cheaper for employers to roster new employees on weekends. That risk was recognised by the Full Bench in the two-year review of the *Restaurant Industry Award 2010* where a special condition was inserted, to protect existing employees, in the following terms:²³

34.1A Special condition regarding existing employees

No existing employee classified as Level 3 or above shall be moved down to pay grade Levels 1 or 2 or be discriminated against in the allocation of work as a result of the variation of clause 34.1 by the Full Bench of the Fair Work Commission in proceedings number C2013/6610.

27. In all of those circumstances United Voice submits that a red circling arrangement, for employees employed as at the date of revocation, would not satisfy the appropriateness test in s 164(b).

15 November 2018

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²⁰ *Penalty Rates - Transitional Decision* [2017] FWCFB 3001, [119].

²¹ *Penalty Rates - Transitional Decision* [2017] FWCFB 3001, [119].

²² *Penalty Rates - Transitional Decision* [2017] FWCFB 3001, [120].

²³ [2014] FWCFB 1996