

AM2016/36

Shop, Distributive and Allied Employees' Association

Fair Work Commission

Four Yearly Review of Modern Awards

– Common Issues

BLOOD DONOR LEAVE

Outline of Reply Submission by the

Shop Distributive and Allied Employees Association



**THE UNION FOR WORKERS IN
RETAIL.FAST FOOD.WAREHOUSING.**

In the Fair Work Commission

Four Yearly Review of Modern Awards – Common Issues

AM2016/36 – Blood Donor Leave and Bone Marrow

BLOOD DONOR LEAVE

Outline of Reply Submission by the Shop Distributive and Allied Employees Association ('SDA')

Date: 10 July 2017

[1] This outline of reply submission ('SDA reply submission') is filed pursuant to the directions issued by the Fair Work Commission ('FWC') at the Directions Hearing on 3 April 2017. This submission is made in reply to the submissions made by the employer organisations in respect of the Shop, Distributive and Allied Employee's Association ('SDA') claim as part of the 4-yearly review of modern awards (2014 Review) to insert paid Blood Donor Leave ('BDL') provision in 5 modern awards listed below:

- General Retail Industry Award 2010 ('GRIA')
- Fast Food Industry Award 2010 ('FFIA')
- Pharmacy Industry Award 2010 ('PIA')
- Hair & Beauty Industry Award 2010 ('H&BIA')
- Mannequins and Models Award 2010 ('M&MA')

[2] On 5 April 2017, the SDA withdrew its claim to bone marrow leave in all the awards listed above and on 27 April 2017, the SDA filed a final amendment to the draft determinations in its continued pursuit to insert BDL.

[2.1] In reply to the employer organisations' submissions on matters of statutory framework; the history of the Award Modernisation process¹, the requirement of section 138 of the Fair Work Act 2009 ('FW Act'), the SDA relies on the SDA submission filed on 2 May 2017 ('SDA submission') at paragraphs [15] to [21], [44] and [45]. In the *4-yearly review of modern awards – Penalty Rates Decision*², the Full Bench summarised and adopted *the 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues Decision*³ with regards to the scope of this review, '*being broader*' and '*variations to modern awards are founded on merit based arguments. The extent of the argument and material required will depend on the circumstances*'. The '*floodgates argument*⁴ is not a matter that must be considered by the Commission in this review, since all applications are considered on their individual merit.

¹ For example, Master Grocers Australia Limited submission at paragraph [8]

² [2017] FWCFB 1001 at paragraphs [110] and [111]

³ [2014] FWCFB 1788 at paragraphs [19] – [24]

⁴ For example, Australian Business Industrial and NSW Business Chamber Ltd Submission at paragraph [2.9], Australian Industry Group Submission at paragraph [107]

[2.2] The majority of the Full Bench in the 4 -yearly review of modern awards - Family & Domestic Leave Case⁵ (FDVL Case') have rejected the AIG Submission⁶ and Australian Business Industrial and NSW Business Chamber Ltd Submission ('ABI & NSWBC submission')⁷ that Parliament intended that all leave is to be dealt with by the NES, '*It is clear that the Commission may include terms in a modern award that provide for leave other than those currently provided in the NES as well as supplement the leave provisions in the NES*'.⁸

[2.3] In the FDVL Case, the majority of the Full Bench also noted *that since the making of the modern awards there have been significant variations to some of the awards including matters which were expressly considered and rejected by the AIRC award modernisation Full Bench*⁹. All applications before a Full Bench must be assessed on its merits having regard to the statutory requirements and the same majority further noted that '*to the extent that the AIRC expressed the view at the time about the appropriateness of including certain leave provisions in particular modern awards or about supplementing the NES, we do not consider that it intended by those comments to make any rulings of general application. So much is clear from the fact that some modern awards included terms dealing with dispute resolution training leave and ceremonial leave*'.¹⁰

[3] Historical Context and pre-Modern Awards:

[3.1] The SDA relies on the evidence provided in the SDA submission filed on 2 May 2017¹¹, in reply to the National Retail Association submission ('NRA submission')¹²; AIG submission¹³; Pharmacy Guild of Australia's submission ('PGA submission') and ABI & NSWBC submission¹⁴ regarding the historical context, such as the prevalence of BDL proposed. Today, BDL is an entitlement available to a multitude of employees in many enterprise agreements in retail and fast food.

[3.2] Notwithstanding BDL provisions in pre-modern awards in South Australia were confined to full time employees, the quantitative elements of the entitlement to BDL in the preceding awards to the modern awards listed above, did not vary in terms of the payment, period of absence and maximum number of occasions¹⁵. The SDA rejects the NRA's assertion that where BDL existed, the content of the entitlement varied substantially.

[3.3] There is an extensive history of BDL in the workplace in more than one jurisdiction in the industries covered by the awards in this application. In Victoria, BDL was removed from predecessor awards by legislative and regulatory changes in 1998. In jurisdictions such as SA, NSW and QLD, BDL was removed not too long ago by legislative and regulatory changes prior to the current statutory framework.

⁵ [2017] FWCFB 3494

⁶ AIG Submission at paragraphs [105], [172], [190], [193] and [194]; ABI & NSWBC submission at paragraph [2.5]

⁷ ABI&NSWBC submission at paragraph [2.5]

⁸ [2017] FWCFB 3494 at paragraphs [17] and [22]

⁹ [2017] FWCFB 3494 at paragraph [34]

¹⁰ [2017] FWCFB 3494 at paragraph [36]

¹¹ SDA submission at paragraphs [17], [24] to [35]

¹² NRA submission at paragraphs [11] to [27]

¹³ AIG Submission at paragraphs [162] to [170]

¹⁴ ABI & NSWBC submission at paragraphs [3.1] and [3.2]

¹⁵ SDA submission in Annexures [1A]- [1H], Annexures [2] to [7]

[4] Section 153 of the Fair Work Act 2009 ('FW Act')

[4.1] The NRA's submission¹⁶ that BDL proposed by the SDA is discriminatory and prohibited from inclusion in a modern award by operation of 153(1) of the FW Act should be rejected by the Full Bench. There is no element in the BDL provision which will lend to such instability.

[4.1.2] The BDL provision is available to all employees who choose to donate blood. The only exclusion, as recognised by the NRA, is where people cannot donate blood on the basis of sound risk management principles and health and safety concerns. Simply because an employee cannot access BDL does not make the term itself discriminatory. For example, there are leave provisions that supplement the NES in awards that an employee will never access due to attributes listed in section 153(1), such as 'ceremonial leave'¹⁷. The existence of such a term in various awards does not make the term discriminatory simply because an employee who does not fall within the religion, national extraction or social origin for which the benefit applies cannot access the entitlement.

[4.1.3] The eligibility of an employee to donate blood is not determined by the employer. It's not the responsibility of the employer to investigate whether or not an employee can donate blood. For example, SDA witness, [REDACTED] has donated blood intermediately over many years due to his health issues. Whether or not he can donate blood is determined by the clinic, not his employer¹⁸.

[4.1.4] As a condition of BDL, an employee needs to provide proof that he/she attended a recognised place for the purpose of donating blood and the duration of the attendance. The employer requires to be satisfied with the proof of attendance. That is where the enquiry by the employer ends. If proof of attendance is not furnished, then the employee is not entitled to BDL. Therefore, the information required is not highly invasive as asserted by the NRA. **(section 134(1)(f))**

[4.1.5] The NRA and AIG have not led any evidence to their assertion that BDL proposed will lend to instability and abuse¹⁹ of the provision and liability under other laws. The NRA ignores the fact that the entitlement had previously existed in pre-modern awards for decades in more than one jurisdiction in industries covered by the awards in this application. No arbitrated cases are brought forward to demonstrate these assertions. BDL currently exists in a number of enterprise agreements that cover a multitude of employees in these same industries. It is expressed clearly in X.4 of the proposed BDL clause that proof is required upon the request of an employer, thus removing any possibility of abuse.

¹⁶ NRA submission at paragraphs at [185] to [204]

¹⁷ Ceremonial leave can be found in many awards, some examples though not exhaustive are the Aged Care Award 2010; Nurses Award 2010; Labour market Assistance Industry Award 2010, and the Social, Community, Home Care and Disability Services Industry Award 2010

¹⁸ At paragraphs [9] and [15]

¹⁹ ARA submission at paragraph [204]; AIG submission at paragraph [161]

[4.1.6] The SDA witnesses evidence shows that when they choose to donate blood, they access the entitlement of BDL for which it is intended under the industrial instrument that operates in their workplace. Many of the witnesses do not use the maximum number of occasions available to them²⁰, provide their employer with sufficient notice²¹ and make an effort to attend a clinic as close as possible to their place of work. For example, SDA witnesses [REDACTED] and [REDACTED] use their rest or meal break during work and both attend a clinic in close proximity to their work to donate blood. By doing so they ensure that an adverse impact on the employer due to their absence is negligible.²²

[5] Operation of the BDL Provision:

[5.1] The BDL provision filed on 27 April 2017 is set out at paragraph [10] of the SDA submission filed on 2 May 2017 ('SDA submission').

[5.2] The employer associations claim that the SDA witness evidence falls short of being substantial due to:

- small number of witnesses²³;
- the industrial instrument which covers the witnesses who have BDL is not an award;
- not all SDA witnesses are representative of all the awards the SDA²⁴ seeks to vary; or
- the workplace is not representative of the size of businesses in the industries covered by the awards to be varied²⁵.

The SDA submits that what is material is the substance of the Affidavits relied upon by the SDA. The SDA Witness evidence prove the intended operation of the BDL where the benefit is provided. The SDA witness evidence also demonstrate the necessity of blood donation from the point of view of the donor either by view of their personal circumstances or otherwise. The SDA has provided cogent evidence for variation of the awards listed in this application.

[5.3] The SDA witness evidence demonstrate the intended operation of the BDL, as outlined in paragraphs [11.1] to [11.9] in the SDA submission filed 2 May 2017.

[5.4] Much of AIG's assertions in the AIG submission at paragraphs [31] to [161] are misconceived and led without any evidence. The SDA submits that the assertions made can be refuted by SDA witness evidence.

²⁰ Affidavits of [REDACTED]; [REDACTED]; and [REDACTED]

²¹ For example, Affidavits of [REDACTED]; [REDACTED]; [REDACTED] and [REDACTED]; [REDACTED], and [REDACTED].

²² Affidavit of [REDACTED] at paragraphs [14] and [15]; Affidavit of [REDACTED] at paragraph 13.

²³ AIG submission at paragraph [100], [204], [205] and [206]

²⁴ For example, AIG submission at paragraph [203], ABI&NSWBC at paragraph [6.33]

²⁵ For example, PGA submission at paragraphs [16] to [18] and AIG submission at paragraph [206], and Business SA submission at paragraph [55]

[5.4.1] Absence of any prescription as to the location of the place attended by the employee²⁶

- The following witnesses demonstrate a donor will try to find a donation clinic closest to their place of work during their shift (**sections 134(1)(d) and section 134(1)(f)**):

SDA witness evidence of [REDACTED] (10 minute walk from his workplace)²⁷; [REDACTED] (where blood donation process takes 1 hour)²⁸; [REDACTED] (mobile donation clinic visits carpark near her workplace)²⁹; [REDACTED] (at a hospital near his workplace where absence is 1 to 2 hours including travel and recovery time)³⁰; [REDACTED] (travelling donation bus visits carpark near his work when he donates)³¹; [REDACTED]³².

[5.4.2] The proposed leave on up to four occasions per year³³

- SDA witness evidence show that not every donor will necessary donate blood 4 times a year and regardless whether whole blood is donated or double red cells, the number of occasions is always capped at 4 occasions providing certainty for the employer. (**section 134(1)(f)**)
- The entitlement of BDL of up to 2 hours on 4 occasions per year is not difficult to apply. For example, SDA Witness [REDACTED] only donates twice a year. The cap of 4 occasions per year with sufficient notice in advance and on a day suitable to the employer provides certainty for the employer. Therefore the cost would be negligible. (**section 134(1)(f)**).
- BDL is taken on a maximum of four occasions per calendar year. For the purposes of clarity, the SDA would agree to expressly state 'calendar year'. This amendment provides certainty for the employer. (**sections 134(1)(d), 134(1)(f) and 134(1)(g)**)

²⁶ AIG submission at paragraphs [52] to [55]

²⁷ At paragraph [10]

²⁸ At paragraph [7]

²⁹ At paragraph [14]

³⁰ At paragraph [11]

³¹ At paragraph [13]

³² At paragraph [10]

³³ AIG submission at paragraphs [73] to [77]

[5.4.3] The proposed requirement to notify the employer as soon as possible³⁴

- BDL and accordingly the short absence is planned in advance. SDA witness evidence show that where BDL exists, the clause operates appropriately. Donors will give their employer sufficient notice of their intent to donate blood which on many occasions is determined by availability of the donation clinic and appointment process which is very much in advance³⁵. SDA witness evidence of [REDACTED]³⁶, [REDACTED]³⁷, [REDACTED]³⁸, [REDACTED]³⁹, and [REDACTED]⁴⁰ show that a donor will undoubtedly provide sufficient notice to their employer and the employer will be able to accommodate the leave. BDL without any doubt accommodates the needs of the business. **(sections 134(1)(d) and 134(1)(f)).**

From the SDA witness evidence, X.2 of the BDL provision appropriately addresses the concerns raised by the employer associations. The SDA submission adequately deals with this aspect of the provision.

[5.4.4] The absence of any express employer discretion and the proposed requirement to arrange an absence on a day suitable to the employer⁴¹

- The SDA submits that taking all the clauses together, the employee needs to comply with the entire provision to access the entitlement. Most importantly, the employee has an obligation to arrange an appointment on a day that suits the employer. Taking X.2, X.3 and X.4 together, the practical operation of the entitlement is that the employer has a considerable degree of discretion and certainty. The operation of the provision is robust enough to refute the assertions made by the AIG. The SDA witness evidence from [REDACTED]⁴², [REDACTED]⁴³, [REDACTED]⁴⁴, [REDACTED]⁴⁵ shows the effectiveness of the provision. Therefore, BDL proposed can overcome the difficulties asserted by the AIG summarised at paragraph [126]. **(section 134(1)(f))**
- The SDA submits that the BDL provides enough discretion is given to the employer to mitigate any operational impact on the business. Regardless of any assumption made by the employee of 'what is suitable' to the employer, there is no obstacle in the provision that prevents the operational needs of the business being considered when leave is requested.

³⁴ AIG submission at paragraph [108] to [111]

³⁵ Affidavit of [REDACTED] at paragraph 13

³⁶ Affidavit of [REDACTED] at paragraph [17]

³⁷ Affidavit of [REDACTED] at paragraph [14]

³⁸ Affidavit of [REDACTED] at paragraph [8]

³⁹ Affidavit of [REDACTED] at paragraph [12]

⁴⁰ Affidavit of [REDACTED] at paragraph [17]

⁴¹ AIG submission at paragraphs [112] to [134], [247]

⁴² Affidavit of [REDACTED] at paragraphs [17] and [18],

⁴³ Affidavit of [REDACTED] at paragraphs [17] and [19]

⁴⁴ Affidavit of [REDACTED] at paragraph [14]

⁴⁵ Affidavit of [REDACTED] at paragraph [15]

- The SDA witness evidence show AIG's concerns at paragraphs [137] and [138] about the interpretation of the phrase of 'ordinary working hours' are superfluous. The examples given about the Fast Food and Hair and Beauty employees⁴⁶ are speculative at best and failure to grasp the nature of the application of the entire provision. There is enough discretion given to the employer to facilitate BDL This evidenced by the SDA witnesses who have the benefit in their workplace.
- There should be no doubt that X.3 imposes an obligation on the employee to arrange his or her absence on a day suitable to the employer. It goes without saying that 'shall' is interchangeable with 'must'.

[5.4.5] The proposed requirement to arrange an absence as close as possible to the beginning or ending of ordinary working hours

- The assertions made by the AIG submission under this heading are all hypothetical and have no basis regarding to the operation of the BDL.
- X.3 has two elements, namely,
 - (a) 'the absence be on a day suitable to the employer', and
 - (b) 'as close as possible to the beginning or ending of his or her shift'.

Furthermore, X.3 does not operate in isolation from X.2, i.e. 'notification of the absence' in advance is required. All these elements would enable the employee and employer to deal with determining the appropriate timing of the absence. The reference to the beginning or ending of a shift is useful in the sense that:

- it can be used to minimise the absence from work during a shift if recovery time is needed⁴⁷. Refer to SDA witness evidence of [REDACTED]⁴⁸ and [REDACTED]⁴⁹; and
- the availability of staff to cover the donor's absence from work. Refer to SDA witness [REDACTED]⁵⁰ is evidence where there is no requirement to hire extra staff with appropriate notice given. **(section 134(1)(f))**

The second element to X.3 is seen as a facilitative provision which is designed to assist the business, and always subject to the first element of X.3, i.e. the absence be on a day suitable to the employer. The SDA witness evidence of [REDACTED]⁵¹ and [REDACTED]⁵² shows the facilitative nature of the provision. Evidence from SDA witness [REDACTED]⁵³ is further proof how X.3 is applied with a degree of discretion. This degree of discretion provided by the clause negates any disruption or cost to the business. **(sections 134(1)(d) and 134(1)(f))**

⁴⁶ AIG submission at paragraphs [149] and [153]

⁴⁷ Affidavit of [REDACTED]

⁴⁸ Affidavit of [REDACTED] at paragraph [14]

⁴⁹ Affidavit of [REDACTED] at paragraph [14]

⁵⁰ Affidavit of [REDACTED] at paragraph [11]

⁵¹ Affidavit of [REDACTED] at paragraph [8]

⁵² Affidavit of [REDACTED] at paragraph [16]

⁵³ Affidavit of [REDACTED] at paragraph [13]

[5.4.6] the absence of any consequences of not providing proof to the satisfaction of the employer

- The SDA rejects the assertion made by the AIG at paragraphs [157] to [161]. It is clear from the reading of X.4 of the provision that if the employee does not provide proof of attendance and duration of the attendance, the employer is not required to pay for the absence. This ensures that the provision is used for its intended purpose. **(sections 134(1)(f))**

However, for the purposes of clarity, SDA would consider adding the following words in X.4 or add a separate provision to the effect of *'If upon request, the employee does not provide such proof to the satisfaction of the employer, the employee shall not receive paid Blood Donor Leave.'* This inclusion would be satisfactory for the purposes of a fair minimum safety net. **(section 134(1)(g))**

[5.4.7] the proposed provision for a paid leave entitlement, 'without deduction of pay', the manner in which leave would accrue, leave for the purposes of donating blood⁵⁴

- The SDA submits that part time employees and full-time employees should receive the same quantum of BDL regardless of the number of ordinary hours worked. The SDA relies on the SDA submission filed 2 May 2017 outlining the composition of the workforce in the industries where the awards apply⁵⁵. The AIG's submission on the exclusion of part time to the provision or accrue BDL according to hours of work should be rejected by the FWC.
- SDA witness evidence make clear that unpaid BDL leave is unaffordable and it is problematic for employees to change their hours of work for the purpose of a short absence from work due to BDL. This would be the same for full time as well as part time employees. All employees are considered low paid and are exposed to the same costs associated with caring and family commitments as a result of a change in their roster. The availability of donation clinics can just as well be problematic for part time employees. Refer to SDA witness evidence of [REDACTED]⁵⁶, [REDACTED]⁵⁷, [REDACTED]⁵⁸, [REDACTED]⁵⁹, [REDACTED]⁶⁰, [REDACTED]⁶¹, [REDACTED]⁶². **(section 134(1)(a))**
- SDA witness [REDACTED] is a therapeutic donor who works part time. She uses blood donation as a consequence of her personal health and personal circumstances. For [REDACTED], blood donation for one of necessity. BDL would provide her with a fair and relevant minimum safety net of terms and conditions. **(section 134(1)(a))**

⁵⁴ AIG submission at paragraphs [56] to [107]

⁵⁵ SDA submission at paragraphs [50.1] to [53]

⁵⁶ Affidavit of [REDACTED] at paragraph [12]

⁵⁷ Affidavit of [REDACTED] at paragraph [12]

⁵⁸ Affidavit of [REDACTED] at paragraph [11]

⁵⁹ Affidavit at paragraphs [9] and [10]

⁶⁰ Affidavit at paragraph [15]

⁶¹ Affidavit at paragraph [19]

⁶² Affidavit at paragraph [17]

- Roster change for such a short absence for the employee would be just as onerous on the employer. Short absences from work due to BDL as shown by the evidence will not necessarily require hiring extra staff or add extra burden which may be necessary for other leave that require extended absences from work. **(section 134(1)(d) and 134(1)(f))**
- BDL applies the same way as compassionate leave. The same entitlement applies to full time and part time employees and for a specific purpose. Furthermore, like compassionate leave, BDL does not accrue from year to year if untaken. Accruing BDL on a pro-rate basis (like personal/carer's leave under the NES) or for such a short absence would render it contrary to a fair and relevant minimum safety net. The removal of part time employees from accessing BDL would not result in a fair and relevant minimum safety net. **(sections 134(1)(a), 134(1)(d) and 134(1)(f))**
- The fact that the BDL is taken on a day suitable to the employer in accordance with X.3, removes the concerns raised by the employer associations regarding the payment of Blood Donor leave. The SDA's proposed reference to 'without deduction of pay' in X.1 should be given its ordinary meaning. The employer shall pay the amount the employee would have received if the employee would have been working during the absence. For example, over award payments are not necessarily paid on the basis of time worked, but rather on other factors such as performance over an extended period of time and in recognition of an employee's position. Such payments are not necessarily paid on an hourly basis and considering the short absence from work for the purpose of donating blood, the deduction would be miniscule and unascertainable. Clause X.1 is simple and easy to understand and apply by the employer **(section 134(1)(g))**.
- The SDA rejects any departure from the proposed provision in X.1, for reasons provided above.

[6] Use of other leave or entitlements

[6.1] An employee who is unfit for work because of either a physical or psychological injury can take personal leave. The SDA relies on its submission filed on 2 May 2017 that personal leave would not be the appropriate form of leave to donate blood. The ARC does not provide medical certificates to blood donors⁶³.

⁶³ SDA submission filed 2 May 2017 at paragraph [11.7] and Annexure [11]

[6.2] In reply to the employer associations relating to the use of annual leave⁶⁴, the SDA submits that the request for annual leave to donate blood can be problematic for both the employee and the employer. Usually annual leave is taken over a number of days and weeks and the timing of such an extended absence may not necessarily suit the employer. An employer cannot unreasonably refuse a request of annual leave. However, a dispute may arise where the employer may refuse to grant annual leave due to the operational requirements of the business when the employee wants to take leave. Furthermore, Blood donation may not necessarily be considered a pressing issue for the employer to automatically grant annual leave. Timing for donating blood by the donor is also dependent upon the personal circumstances of the donor or simply due to the availability of the nearest clinic, especially in remote regional areas where mobile clinics are only provided during certain times of the year. Vice versa, the timing of annual leave suitable to the employer may not be at an ideal time for donating blood due to the personal circumstances of the donor and accessibility of the closest donation clinic.

SDA witness evidence of [REDACTED], [REDACTED] and [REDACTED] demonstrate how difficult it is to change a roster for the purpose of donating blood, regardless whether it is due to family circumstances or justifying a roster change with the employer. Considering each of the witnesses' family circumstances and other caring responsibilities, BDL would provide a fair and relevant minimum safety net by allowing the donor to access the entitlement for which it is intended and which they view as necessary. The provision is also fair for the employer due to the limited scope and certainty the provision provides. **(section 134(1) – fair and minimum safety net – 134(1)(a), 134(1)(d) and 134(1)(f))**

[7] Scope of the provision

In terms of the overall operation of the BDL provision, the SDA's evidence demonstrates that the scope of BDL provides certainty for employers and a fair and relevant minimum safety net for a modern award system. The provision leaves no room for any broader application, i.e. paid leave only for the purpose of donating blood. The provision applied holistically provides a fair and relevant minimum safety net for both employees and employers. **(section 134(1) – 'fair and relevant minimum safety net', sections 134(1)(a), 134(1)(d), 134(f) and 134(1)(g))**

[8] Fair and Relevant Minimum Safety Net and Blood Donation

[8.1] The Full Bench in the *4 Yearly Review of Modern Awards – Fire Fighting Industry Award 2010*⁶⁵ stated that the word 'relevant in section 134(10) of the FW Act 'is intended to convey that a modern award should be suited to contemporary circumstances'.

⁶⁴ AIG submission at paragraph [211] and [244]; NRA submission at paragraph [84]

⁶⁵ [2016] FWCFB 8025 at paragraph [29]

[8.2] The establishment of the National Blood Authority⁶⁶, and the considerable funding provided to the Australian Red Cross Blood Service ('ARC')⁶⁷ to ensure the safe supply of high quality blood and blood products to the community, demonstrates the importance of the contribution BDL can make to the adequate blood supply needed in the community.

[8.3] In terms of the overall operation of the BDL provision, the SDA's evidence demonstrates that the proposed BDL entitlement achieves the object of the FW Act, and can exist in terms of a balanced framework for a productive workplace for all enterprises regardless of size⁶⁸.

[8.4] The AIG outlines data from Australian Red Cross Blood Service ('ARC') on the over-supply of blood during 2015 to 2016, concluding that there is no impending crisis to warrant an extension of encouraging blood donation to the modern award system.⁶⁹ This assessment in reply to the SDA's submission is an over-simplification. Donation centres rely on government funding and financial donations to be able to provide facilities for the donation of blood and efficient storage of blood products. However, the adequate supply of blood products is dependent on the number of donors who attend donation clinics. The supply of blood and blood products is dependent on the number of donors.

[8.5] The SDA relies on the information relating to the ARC campaigns provided in the submission filed 2 May 2017⁷⁰ including data relating to the RED25 group Donation program which encourages blood donation in the workplace. The fact that a number of businesses in retail, pharmacy and hair and beauty have registered in the Red25 Group Donation Program to encourage their work force to donate blood is evidence that BDL is suited in 'contemporary circumstances'⁷¹.

Therefore, BDL has a place in the modern award system without imposing financial or operational difficulties to the extent advanced by the employer associations in their respective submissions. **(sections 134(1)(d) and 134(1)(f))**

[8.6] Further material on the importance of blood donation and critical need of donors throughout various times in the year is provided at **Attachment 1** of this submission. For example, the Media Release by the ARC on Tuesday, 23 May 2017 urging the people with the 'O – negative' and 'O – positive' to donate blood before the winter months. SDA witness, [REDACTED] would appreciate the importance of this campaign as she carries the same blood type⁷². From the perspective of a donor with the same blood type, BDL is a necessary and fair and relevant safety net. **(sections 134(1) – 'fair and relevant minimum safety net')**

⁶⁶ <https://www.blood.gov.au/about-nba> - A statutory authority which manages and coordinates arrangements for the supply of blood products and services on behalf of the Australian Federal Government and State and Territory Governments.

⁶⁷ Acknowledged in the AIG submission at paragraph [228] with reference provided <http://www.donateblood.com.au/about-us>

⁶⁸ Reply to AIG submission at paragraph [216]; MGA Submission at paragraph [27] referring to section 3(g) of the FW Act.

⁶⁹ AIG submission at paragraphs [222] to [224]

⁷⁰ SDA submission at paragraphs [67], [68], Annexure [11] – paragraph [2(c)] and Annexure [12]

⁷¹ In reply to AIG submission at paragraph [254] referring to the view of the Full Bench in the recent Penalty rates Decision [2017] FWCFB 1001 at [120]

⁷² At paragraph [20]

[8.7] Furthermore, in reply to the AIG submission on 'necessity' to donate blood⁷³. Blood donation may arise out of 'necessity' from the individual's personal circumstance, i.e. for therapeutic purposes, which is balanced with the needs and interests of the business. **(section 134(1) – 'fair and relevant minimum safety net')**

- SDA witness [REDACTED] is evidence that blood donation is a function by virtue of the donor's personal circumstance, i.e. necessitated by her circumstance. At paragraph [13] she states *'This is someone who needs to donate to control the high iron levels in their blood'*.

[9] Modern Awards Objective ('MAO') and SDA Witness Evidence

[9.1] The SDA submits that it has provided cogent evidence for the Commission to determine that BDL, with the NES, provide a fair and relevant minimum safety net of terms and conditions.

[9.2] Section 134(1)(a) – relative living standards and the needs of the low paid

[9.2.1] The SDA relies on the SDA submission filed on 2 May 2017 at paragraphs [50.1] to [54] and the following further reply:

[9.2.2] The relevant group of the award-reliant employees outlined in this submission will utilise BDL are low paid.

[9.2.3] The 'needs of the low paid' also requires an examination of the extent to which an employee can engage in 'community life'⁷⁴. BDL assists the employee in donating blood more often than would otherwise be. BDL assists with blood donation which is an activity of high social utility and benefit to the community in saving lives. Also encouraged by family and friends and group drives in workplaces. For example, the SDA refers in particular to the following witness evidence:

- SDA Witness [REDACTED]⁷⁵ on her efforts to donating blood during Easter coinciding with the media campaign and by the ARC over Easter on the importance of blood donation.
- SDA Witness [REDACTED] associates blood donation with her own personal health.⁷⁶
- SDA Witness [REDACTED] who identifies with having a blood type that can be transfused in almost any patient.⁷⁷ and appreciates the entitlement to BDL which allows her to donate as regularly as she can.
- SDA [REDACTED] notes her personal circumstances and her level of satisfaction in receiving a text message from the ARC that her blood saved a life in another State⁷⁸.

⁷³ AIG submission at paragraphs [81] and [89]

⁷⁴ Annual Wage Review 2015-16 [2016] FWCFB 3500 at paragraph [352]

⁷⁵ At paragraph [9]

⁷⁶ At paragraphs [13] and [15]

⁷⁷ At paragraph [20] and [21]

⁷⁸ At paragraph [12]

[9.2.4] The SDA submission outlines the nature of the workforce in the awards listed in this submission. Employees covered by these awards are likely to have fewer financial resources. A loss in pay arising from taking unpaid BDL, or change in roster for the purposes of donating blood have a greater impact, especially the expense of getting to a clinic and the location and operating times of a clinic in regional areas. For example, the SDA refers to the following witness evidence:

- SDA Witness [REDACTED], 64 years of age, the nearest blood donor centre for her is near her work which is 37km away from her home in Port Macquarie.
- SDA witness [REDACTED], where clinic is not located in the area where he lives, and attends a donation twice a year at a clinic walking distance from work (at no extra travel cost).
- SDA witness [REDACTED] donates blood at a clinic 50km away from her home and therefore attends a clinic on her way home from work at less travel cost.
- SDA Witness [REDACTED]⁷⁹ and [REDACTED]⁸⁰, has limited window of opportunity due to the availability of the mobile clinics.

[9.3] Section 134(1)(b) – the need to encourage collective bargaining

[9.3.1] The SDA reiterates its submission filed on 2 May 2017 on this objective, i.e. BDL is not a disincentive to collective bargaining around the issue.

[9.3.2] The evidence is that the enterprise agreements listed in the SDA submission filed on 2 May 2017, replaced agreements which also had BDL while BDL was in awards in NSW and SA and QLD.

[9.4] Section 134(1)(c) - Need to promote social inclusion through increased workforce participation

[9.4.1] The SDA relies on SDA submission filed on 2 May 2017 at paragraphs [57] to [62] and the SDA witness evidence provided.

[9.4.2] The SDA acknowledges the incorrect reference at paragraph [58] of the SDA submission filed on 2 May 2017. However, the SDA submits that wages together with other conditions of employment are all important. All employment conditions impact on the employee's capacity to engage in community life and the extent of their social participation. The SDA also acknowledges this aspect of the submission supports the objective in **section 134(1)(a)** outlined above.

[9.4.3] The SDA relies on the witness evidence [REDACTED]⁸¹, that the benefit of BDL available in one job allows her to work in another job uninterrupted when she can donate blood.

⁷⁹ SDA submission at paragraph [43.3.7]

⁸⁰ SDA submission at paragraph [43.8.6]

⁸¹ Affidavit at paragraph [12]

[9.5] Section 134(1)(d) – the need to promote flexible modern work practices and the efficient and productive performance of work

[9.5.1] The SDA relies on the SDA submission filed on 2 May 2017 at paragraphs [64] to [68] and submissions made earlier (section highlighted) as to the operation of the BDL clause proposed⁸².

[9.5.2] Many of the assertions advanced by the employer associations regarding this objective have been dealt with under the objective of **section 134(1)(f)**⁸³. SDA witness evidence, in addition to witness evidence provided at paragraph [5.4.1], demonstrates that the use of the BDL clause proposed in and of itself does not impose any obstruction to the productivity in the work place⁸⁴. Such examples are provided where the donation clinic is very close to the place of work:

- SDA witness [REDACTED] (mobile clinic visits a location not far from her workplace so that the process takes between 1 to 2 hours)⁸⁵;
- SDA witness [REDACTED]⁸⁶ (attends mobile donation centre located 4km away from her workplace, such that she is only away from work from 45 minutes to an hour and her absence is accommodated)

[9.5.3] The nature of the operation of BDL proposed does not prevent a 'give and take'⁸⁷ approach between the employer and employee, but encourages it. This is demonstrated by SDA witness evidence. X.2 and X.3 of the proposed BDL clause operates on the basis that flexibility and certainty is provided to both the employee and the employer.

[9.5.4] The assertion made by the ABI&NSWBC at paragraph [6.57] as to the level of disruption to the business, is misconceived⁸⁸. The ABI&NSWBC uses the examples of hairdressers and fast food employers to demonstrate its point. It is clear from the evidence provided by the SDA that the BDL clause ensures that the benefit to the employee is provided subject to the operational needs of the business, not vice versa.

[9.5.5] The SDA submits that BDL will not impact on the manner in which work is performed and therefore is not inconsistent with this objective.

[9.6] Section 134(1)(da) – the need to provide additional remuneration for:
(i) employees working overtime; or
(ii) employees working unsocial, irregular or unpredictable hours; or
(iii) employees working on weekends or public holidays; or
(iv) employees working shifts

[9.6.1] this is not relevant to this application.

[9.7] Section 134(1)(e) – equal remuneration for work of equal or comparable value

[9.7.1] this is not relevant to this application.

⁸² At paragraphs [5.4.2], [5.4.3], [5.4.7]

⁸³ At paragraphs [9.8.4] and [9.8.5]

⁸⁴ In reply to MGA submission at paragraph [18]

⁸⁵ At paragraph [12]

⁸⁶ At paragraphs [13] and [17]

⁸⁷ NRA submission at paragraphs [124] and [125]

⁸⁸ The AIG uses the same examples.

[9.8] Section 134(1)(f) – likely impact on business, including on productivity, employment costs and regulatory burden

[9.8.1] The SDA relies on the SDA submission filed 2 May 2017 at paragraphs [71] to [77] including further submissions made above⁸⁹. SDA witness evidence is also referred below.

[9.8.2] As explained elsewhere in this submission, the SDA has provided cogent evidence that the proposed BDL provision provides certainty for any size business. As explained elsewhere in this submission, regardless of the size of the business, the application of the proposed BDL clause is both fair to an employee and employer. The provision provides certainty for the employer and therefore a fair and relevant minimum safety net.

[9.8.3] The MGA represent members who would be considered small businesses and many of which are included in a multi-business collective agreement such as the MGA Agreement 2014⁹⁰ that have the entitlement to BDL. There is no evidence provided by the MGA to prove the assertions regarding the level of disruption arising from an employee accessing BDL.

[9.8.4] The MGA submission⁹¹ refers to unplanned absences having greater impact on small business. Although this may be true, however, MGA's analysis is based on a mischaracterisation of the BDL provision. The BDL clause proposed is planned in advance with sufficient notice given by the employee and on a day that must be suitable to the employer (X.2 and X.3 of the proposed clause).

[9.8.5] The employer associations make assertions to rostering difficulties, engaging additional staff and other associated costs (such as overtime, penalties and loadings, etc), and for small business a reduction in capacity to service customers⁹². These assertions ignore the holistic application of the BDL proposed. Most importantly, crucial element to the BDL for the employer is X.3, i.e. BDL must be taken on a day suitable to the employer. SDA witness evidence demonstrate that capacity for rostering is not as problematic as advanced by the employer groups. For example, the SDA refers to the evidence of:

- SDA Witness evidence of ██████████⁹³ who believes there is sufficient staff to cover the registers for the short absence prior to the end of her shift.
- SDA ██████████⁹⁴ can donate anytime during his shift because he makes an appointment in advance.
- SDA Witness ██████████⁹⁵ minimises her short absence by incorporating her rest break when donating blood at a clinic near work.

[9.8.6] The SDA submits that the proposed clause provides enough certainty to an employer that any associated costs would be mitigated to the point that they would become negligible to the business.

⁸⁹ At paragraphs [5.4.2], [5.4.4], [5.4.7], [6.3] and [8.5], the SDA notes the typographical error at page 30 when referring to section 134(1)(f)

⁹⁰ Noted in the SDA submission at paragraph [38] and [39]

⁹¹ MGA submission at paragraph 21

⁹² ABI&NSWBC at paragraph [6.65] and [6.66]; PGA at paragraph [28] and [29]; AIG at paragraph [318] to [321], Business SA at paragraphs [40]

⁹³ At paragraph [11]

⁹⁴ At paragraph [13]

⁹⁵ At paragraph [15]

[9.9] Section 134(1)(g) – the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards

[9.9.1] The SDA has provided cogent evidence that BDL is not new and complex and does not lack clarity as asserted by the employer associations.⁹⁶

[9.9.2] The ABI&NSWBC⁹⁷, MGA⁹⁸, PGA⁹⁹ in their respective submissions have submitted that the introduction of BDL will leading to other leave applications which will undermine the simplicity and sustainability of the modern award system. The Commission should reject this submission as each application to vary a modern award is determined on individual merit with cogent evidence. The majority of the Full Bench in the DFVL determined these types of submissions if accepted by the Commission, will see the modern award system stagnate over time¹⁰⁰.

[9.9.3] Much of the basis of the submission made by the NRA¹⁰¹ regarding this objective, especially claims of ambiguity as to the rights and obligations of employers and employees, are misconceived. As submitted above¹⁰², the BDL proposed does not require the employer to determine whether the employee is eligible to donate.

[9.9.4] The SDA submits that the variation of the awards by the inclusion of BDL will not lead to the awards being anything other than clear, easy to understand, stable and sustainable.

[9.10] Section 134(1)(h) – the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy

[9.10.1] The SDA submits this factor is not relevant.

[9.10.2] If anything, BDL in a modern award system will have a positive effect on the performance and competitiveness of the national economy elsewhere, such as medical research¹⁰³.

[10] Conclusion

[10.1] The BDL clause proposed in this application balances the needs of both the employee and the employer covered by the awards in the SDA's application.

[10.2] BDL provision does not obstruct the balanced framework of a productive workplace under a modern award system.

[10.3] The terms of the award, as varied, will achieve the modern award objects, such that paid Blood Donor Leave, together with the NES, ensures a fair and relevant minimum safety net. This is demonstrated by the evidence provided by the SDA submissions.

⁹⁶ In reply to ABI&NSWBC submission at paragraph [6.79]; AIG submission at paragraphs [324] to [327], [325]

⁹⁷ At paragraph [6.8];

⁹⁸ At paragraph [24]

⁹⁹ At paragraphs [32] and [33]

¹⁰⁰ [2017] FWCFB 3494 at paragraph [103]

¹⁰¹ At paragraph [157]

¹⁰² At paragraph [4.1.3] in this submission.

¹⁰³ Briefly addressed in SDA submission filed on 2 May 2017 at paragraph [81], Annexures [12] and [13].

ATTACHMENT 1

Australian Red Cross Blood Service

Media Releases – Tuesday, 23 May, 2017

Wednesday, 14 June 2017



MEDIA RELEASE

EMBARGOED until 12am, Tuesday, 23 May, 2017

CRITICAL NEED FOR O TYPE BLOOD DONORS

The Blood Service is urging people with the O-Negative and O-Positive blood types to roll up their sleeves and give blood in the next fortnight as the nation's reserve slips to just two days' supply.

Historically, cold and flu symptoms wipe out up to 1,000 donors a day over the winter months, placing a strain on existing donors.

Australian Red Cross Blood Service spokesman Shaun Inguanzo called on 8,000 donors to come forward and donate between Monday 22nd May and Friday 2 June to help prevent a blood shortage.

"These two blood types are essential: O-Negative is the universal type given to patients in emergency situations," he said.

"And O Positive is the type that 39 percent of Australians have – and therefore the most type needed – should they require a blood transfusion.

"With one in three of us needing donated blood in our lifetime the life you save could be that of friend or family member."

Mr Inguanzo said maintaining blood supplies during winter was a seasonal challenge for the Blood Service.

"The number of people suffering cold and flu symptoms increases, limiting the number of regular donors who are able to give," he said.

"We need others – in this case people with O Negative and O Positive blood – to take the place of those who will be unable to answer our call."

Donors who are affected by cold and flu symptoms are able to give blood at least seven days after making a full recovery.

To make an appointment call 13 14 95 or visit donateblood.com.au

For images or further information please contact:

VIC, TAS: Erin Lagoudakis, 0439 396 397

NSW, QLD: Shaun Inguanzo, 0404 769 054

SA, NT: Rebecca DiGirolamo, 0448 102 277

WA: Jessica Willet, 0467 710 464

About the Australian Red Cross Blood Service

Australian governments fully fund Red Cross for the provision of blood products and services to the Australian community. This is possible through the support of more than half a million voluntary blood donors. For more information or to make an appointment to give blood call 13 14 95 or visit www.donateblood.com.au



MEDIA RELEASE

Wednesday, 14 June, 2017

NATIONAL BLOOD DONOR WEEK

'Double up on donation': Once-a-year donors could solve Australia's blood needs

New statistics reveal that once-a-year donors could create a near-endless blood supply for Australian patients if they just make a second donation each year.

About 40 per cent of Australia's 455,000 blood donors who gave blood in the past year have only made one donation. Wholeblood can be given four times a year, and plasma every fortnight.

The Blood Service confirmed that if once-a-year donors gave blood twice a year – just one extra hour of their time - Australia's blood supply would be assured, no longer requiring urgent appeals at times when Australia is traditionally short on donors, such as Winter and long-weekends

The Blood Service's executive director of donor services, Janine Wilson, encouraged Australia's once-a-year donors to 'double-up' and make a second donation this year.

"We really appreciate the effort that goes into making one donation and hope that this group of donors sees how just another hour of their time could make such a significant difference to the availability of blood and blood products for Australian patients," Ms Wilson said.

"A second donation from each donor would give us an extra 180,000 blood donations annually.

"The fact is that we as a nation are just a collective hour away from making this happen. It really is a remarkable ideal that we could quickly turn into a reality if our once-a-year donors just made one more donation."

Ms Wilson added that the Blood Service was always on the lookout for new donors to join its ranks.

"This week is National Blood Donor Week, a time when the nation says thank you to the 455,000 'bloody legends' who gave blood in the past 12 months," she said.

"It's also a great opportunity for anyone aged between 16 and 70, who is feeling fit and healthy and who may be eligible to give blood to get in touch to see if they can start their donation career with us."

National Blood Donor Week is an Australian event that starts on 11 June and ends 17 June, and occurs in tandem with World Blood Donor Day on June 14.

To give a (second) blood donation, please call 13 14 95 or visit donateblood.com.au

For images or further information please contact: Shaun Inguanzo; 0404 769 054

About the Australian Red Cross Blood Service

Australian governments fully fund Red Cross for the provision of blood products and services to the Australian community. This is possible through the support of more than half a million voluntary blood donors. For more information or to make an appointment to give blood call 13 14 95 or visit www.donateblood.com.au