

FAIR WORK COMMISSION

Application by the Shop, Distributive and Allied Employees' Association
(**Matter no: AM/2016/36**)

Four yearly review of modern awards – Common issue

Blood donor leave

Submission by Master Grocers Australia Limited

1. Master Grocers Australia Limited (“MGA”) is a national employer industry association representing independent grocery, liquor other retail outlets including hardware, in all states and territories. These businesses range in size from small, to medium and large, and make a significant contribution to the retail industry, accounting for approximately \$15 billion in retail sales each year.
2. There are 2,700 independent grocery stores, trading under brand names such as: Supa IGA, IGA, IGA Xpress, FoodWorks, Foodland, Farmer Jacks, Supabarn, Friendly Grocers, and SPAR, with approximately 1,300 independent supermarkets trading under their own local brand names. In addition, there are numerous independent liquor stores operating throughout Australia and trading under names such as Cellarbrations, The Bottle O, Bottlemart, Duncans, and Local Liquor, which are owned by either single or multi-store owners. Our member’s independently owned hardware stores trade under brand names including; Mitre 10 and True Value Hardware. Our members stores which collectively employ more than 115,000 staff are comparatively much smaller when juxtaposed against the large supermarket chains of Coles and Woolworths, which combined represent approximately 80 per cent of the retail supermarket industry.

The Application by the SDA

3. As part of the 4 yearly review of modern awards, the Shop, Distributive and Allied Employees' Association (“SDA”) lodged an Application to the Fair Work Commission (“the Commission”) pursuant to s.156 of the *Fair Work Act 2009*

("the Act"), to insert new clauses of blood donor leave into the following industry awards ("Awards"):

- General Retail Industry Award 2010;
- Fast Food Industry Award 2010;
- Pharmacy Industry Award;
- Hair and Beauty Industry Award 2010, and
- Mannequins and Models Award.

4. The proposed blood donor leave ("BDL") clause seeks the creation of a new form of leave that is available for the purpose of donating blood. The claim sought is as follows:

- By inserting a blood donor leave provision into the applicable modern awards:

CLAUSE X BLOOD DONOR LEAVE

X.1 A permanent employee shall be entitled to up to 2 ordinary hours' paid Blood Donor Leave, without deduction of pay, on a maximum of four occasions per year for the purposes of donating blood.

X.2 The employee shall notify his or her Employer as soon as possible of the time and date upon which he or she is requesting to be absent for the purpose of donating blood.

X.3 The employee shall arrange for his or her absence to be on a day suitable to the employer and be as close as possible to the beginning or ending of his or her ordinary working hours.

X.4 Proof of the attendance of the employee at a recognised place for the purpose of donating blood and the duration of such attendance shall be produced to the satisfaction of the employer.

MGA'S POSITION

5. MGA is particularly concerned with BDL being inserted into the *General Retail Industry Award 2010* ("GRA").
6. MGA rejects the SDA's claim that BDL is a fair entitlement that ensures a minimum safety net of terms and conditions contained within Awards.¹
7. BDL is not part of the current award safety net and BDL entitlements in limited industries were removed from the award safety net during the award modernisation process in 2009. A national system employee and national system employer rely on the Parliament's power to legislate and "*the Government's key objective is to address public concern about the adequacy of the safety net under the current workplace relations system by providing a safety net which is fair for employers and employees and supports productive workplaces*".²
8. The SDA submitted the historical content of BDL that was contained in previous State awards.³ MGA rejects the SDA's notion that because BDL was contained in previous State Awards that the clause should be reinserted into the proposed Awards. In the course of replacing many thousands of pre-existing awards with 122 modern awards, the Full Bench of the Commission was required to consider the interaction between the National Employment Standards ("NES") and the terms of modern awards. The Full Bench repeatedly avoided supplementation of the NES by rejecting award provisions which provided additional entitlements for leave and other matters dealt with in the NES.⁴ For example, in relation to annual leave, the Full Bench said "*It is not appropriate to supplement the annual leave entitlements provided for in the NES unless it is necessary to maintain the safety net.*"⁵

¹ Blood donor leave submission filed by the SDA on 2 May 2017.

² *Fair Work Bill 2009 Explanatory Memorandum* paragraph 25.

³ Blood donor leave submission filed by the SDA on 2 May 2017.

⁴ Decision [2017] FWCFB 1001 at 117.

⁵ Decision [2010] FWAFB 2026 at 44.

MODERN AWARDS OBJECTIVE

9. In reviewing each award, the Commission must have regard to the modern awards objective in s.134 of the Act. The Modern Awards objective is to “*ensure that modern awards, together with the NES, provide a fair and relevant safety net of terms and conditions, taking into account the particular considerations identified in ss.134(1)(a) to (h) (the s.134 considerations) of the Act*”.⁶
10. While the Commission must take into account the s.134 considerations, the relevant question is whether the modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions. Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.⁷
11. MGA acknowledges that donating blood is an important social issue, however we oppose the grant of the SDA’s claim. It is our view that the proposal of paid BDL entitlement into the modern awards system is not a “necessary” minimum entitlement contemplated by the Act. The Full Bench in the *Four Yearly Review of Modern Awards – Penalty Rates Case* explained what is “necessary” and what is merely desirable is apposite to the consideration of s.138.⁸ The reference to “desirable” minimum entitlements for workers is entirely inappropriate in the current legislative framework.⁹ MGA argues that BDL is merely a desirable form of leave and is not a term that is necessary to achieve the modern awards objective.

Modern Awards Objective Factors

s.134(1)(a): Relative living standards and the needs of the low paid

12. MGA will now assess each of the modern award objectives factors contained in s. 134(1) of the Act. The term “low paid” has a particular meaning, as recognised by the Commission in its Annual Wage Review decisions, “*There is a level of support for the proposition that the low paid are those employees who*

⁶ Decision [2015] FWCFC 3406 at 20.

⁷ Decision [2015] FWCFC 3406.

⁸ Ibid.

⁹ Ibid.

earn less than two-thirds of median full-time wages. This group was the focus of many of the submissions. The Panel has addressed this issue previously in considering the needs of the low paid, and has paid particular regard to those receiving less than two-thirds of median adult ordinary-time earnings and to those paid at or below the C10 rate in the Manufacturing Award. Nothing put in these proceedings has persuaded us to depart from this approach.”¹⁰

13. The SDA submitted evidence to attempt to demonstrate how the absence of BDL for an employee who donates blood can impact adversely on a donor’s level of income. While this may be the case in some limited circumstances the evidence falls short of establishing that low paid workers need BDL. The SDA has not undertaken the analysis required by s.134(1)(a). It would appear that the SDA does not seek to rely on it and accordingly, we consider it sufficient to note for present purposes that the clause it has proposed would apply to all employees, regardless of whether or not they are “low paid”.

s.134(1)(b): The need to encourage collective bargaining

14. MGA submits that varying the modern awards to permit BDL will discourage collective bargaining. To introduce BDL as a uniform entitlement, would be to remove the motivation of employees to bargain for the entitlement. The principal enterprise bargaining related consideration of relevance to whether the claim should be granted must be whether it will encourage parties to engage in enterprise bargaining. BDL appears to represent an opportunity for unions, employees and employers to agree on a common and relevant position in the context of an individual workplace. To impose 2 ordinary hours’ paid blood donor leave on four occasions per year on all permanent employees would be to remove considerable impetus to bargain around the issue and therefore could be seen to discourage collective bargaining.
15. The submissions and the evidence of the SDA prove there are no difficulties faced by the union movement in achieving the inclusion of provisions in enterprise agreements that provide for BDL entitlements. As is the case with

¹⁰ Decision [2013] FWCFB 4000 at 310.

the *Master Grocers Australia and Shop, Distributive Employees' Association Agreement 2014* (MGA agreement 2014). Therefore the inclusion of BDL in Awards will be a factor that may discourage employers from engaging in enterprise bargaining as it will leave less opportunity for the BDL to be bargained over.

s.134(1)(c): The need to promote social inclusion through increased workforce participation

16. MGA submits that the SDA has failed to substantiate this factor. Section 134(1)(c) of the Act requires the Commission to ensure that modern awards, together with the NES, promote social inclusion through increased workforce participation¹¹ which has been interpreted to mean increased employment.¹² The SDA has not provided any probative evidence in this matter that a lack of paid BDL entitlements prevents participation in the workforce and results in any form of social exclusion. The evidence simply supports a proposition that persons in the workforce may need to absent themselves from time to time from being at work for the purpose of donating blood. Apart from some witness statements that the SDA has submitted,¹³ MGA contends that there isn't a sufficient evidentiary basis for the Commission to establish that the inclusion of paid blood donor leave will increase workforce participation. In fact, BDL will most likely see an increased number of employees being absent from work more often.

s.134(1)(d): The need to promote flexible work practices and the efficient and productive performance of work

17. The SDA argues that BDL does not adversely impact on flexible, efficient and productive performance of work in the business.¹⁴ However, the SDA fails to appreciate that an absence from work can disrupt the operation of a business,

¹¹ Decision [2015] FWCFB 4466 at 166.

¹² Ibid.

¹³ Affidavits of Nicole Joy Elmer, Raelene Patricia Robertson, Glen Michael Smith; Michael David McErlane and Drew Gilson.

¹⁴ Blood donor leave submission filed by the SDA on 2 May 2017.

especially smaller to medium businesses that do not have a large pool of employees to call on at any time. In some circumstances, it may be impossible for an employer to engage additional employees to cover the absent employee, especially for a period of 2 hours. In the GRA the minimum daily engagement for employees is three hours. Therefore an employee who is covering the absent employee's shift cannot only replace the 2 hours taken for the purpose of taking BDL, but must work an additional hour to meet the minimum engagement requirement under the GRA.

18. MGA argues that this can adversely effect the productivity in which the work is performed in the employee's absence or whether the work can be performed at all. For example, if the replacement employee does not possess the requisite skills, understanding or experience to undertake the work usually performed by the absent employee, this will weaken the need to promote flexible modern work practices and the efficient and productive performance of work. In reality, taking leave pursuant to a right to do so, when annual leave or unpaid leave is available, could adversely affect efficiency and productivity. MGA submits that the creation of a new form of leave is inconsistent with s.134(1)(d).

s.134(1)(da): The Need to Provide Additional Remuneration for Employees Working in Various Circumstances

19. Section s.134(1)(da) is not relevant in this application.

s.134(1)(e): The Principle of Equal Remuneration for Work of Equal or Comparable Value

20. Section s.134(1)(da) is not relevant in this application.

s.134(1)(f): The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden

21. MGA rejects the SDA's claim that the "take up rate" of blood donor leave proposed will be considerably low so that the cost or disruption to any business is minor when weighed against the significant benefit to a blood donor who

requires to access the entitlement.¹⁵ Section 134(1)(f) of the Act requires that consideration be given to the impact on individual businesses. In a large business, an occasional absence from work may not have a significant impact on the business. However in a small business, especially a small retail business, unplanned absences can have a greater impact on employers. For example, the payment made for a Level 1 employee under the GRA who is absent from work for the purpose of donating blood would be as follows:

2 hours leave X 4 occasions per year = \$160.64, plus superannuation. Employers must engage a replacement employee for a minimum of three hours under the GRA and administration costs are self-evident for organising the replacement employee as well as the time taken to process the BDL. This will burden small businesses and increase their employment costs significantly.

22. Furthermore, the SDA's material presented does not enable the Commission to properly assess the potential impact of the claim. The SDA states that it is estimated in 2016, the Australian Red Cross program has saved nearly 1 million lives.¹⁶ The SDA's evidence does not suggest that presently there is a problem in Australian society for employees to donate blood, especially those working in the retail industry. Therefore the current practices of employers in dealing with employees taking leave for the purpose of donating blood appear to be more than adequate under the current modern award system.

s.134(1)(g): The need to ensure a simple, easy to understand, stable and sustainable modern award system

23. The insertion of BDL would result in a significant expansion of the safety net. It cannot be assumed that the impact that this will have on business can necessarily be accommodated or absorbed. The Commission has firmly rejected attempts to supplement the NES with modified forms of leave. Inserting BDL to the selected Awards is contrary to the Commission's approach, as BDL will be an additional type of leave only applicable to certain Awards.

¹⁵ Blood donor leave submission filed by the SDA on 2 May 2017 at 74.

¹⁶ Blood donor leave submission filed by the SDA on 2 May 2017 at 67.

24. The creation of an entitlement that would only be triggered in particular Awards and for particular employees is likely to reduce the simplicity of the modern award system. Introducing a new type of leave does not support a simplistic award system and only encourages the likelihood of instability and confusion for those trying to understand and interpret the Awards. If the SDA's claim is granted, BDL may be seen as a precedent for similar claims that are consequently made by union bodies. As a result, respondent parties and the Commission may be hindered in the future to differentiate social issues taking into consideration their grounds and implications.

25.

s.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

26. This limb of section 134 of the Act requires the Commission to consider the likely impact of exercising its power in the context of the broader economy. The SDA submitted that paid blood donor leave has no detrimental effect on inflation, employment growth and the sustainability, performance and competitiveness of the national economy.¹⁷ However, the SDA has not provided satisfactory evidence to satisfy this point. It is unknown to the SDA whether the cumulative growth of the safety net is actually sustainable. MGA argues that BDL would continue to increase costs faced by employers without regard for the extent to which this can in fact be borne by employers, including small businesses. Significant costs faced by businesses can then be transferred to the economy and further passed onto consumers. This will in turn create a negative impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

27. Furthermore, in addition to the modern awards objective the Commission is required to take into account the object of the Act contained in s.3. Subsection 3(g) of the Act requires acknowledging the special circumstances of small and medium-sized businesses.

¹⁷ Blood donor leave submission filed by the SDA on 2 May 2017 at paragraph 79.

28. The Commission should give particular consideration on the impact of granting the SDA's claim on small businesses. A much higher proportion of the employees of small businesses are award reliant than the employees of larger businesses. Table 1 below is removed from ABS Australian Industry cat. no. 6306 – *Employee Earnings and Hours, Australia, May 2014*, released in January 2015. The table illustrates that a much higher proportion of the employees of employers with under 20 employees are award reliant compared to the employees in each of the larger employer size.

29.

Table 1: Employees reliant on award only, by employer size¹⁸

Employer size	Number of employees
Under 20 employees	705,900
20 - 49 employees	366,600
50 - 99 employees	171,500
100 - 999 employees	353,500
1000 and over employees	263,300
Total	1,860,700

30. Table 2 below is also extracted from ABS cat. no. 6306. The table illustrates the employees of businesses with less than 20 employees are the least likely to be covered by an enterprise agreement.

Table 2: Employees covered by enterprise agreements, by employer size¹⁹

Employer size	Number of employees
Under 20 employees	126,700
20 - 49 employees	203,800
50 - 99 employees	201,800
100 - 999 employees	1,289,000

¹⁸ ABS Cat. No. 6306 – Employee Earnings and Hours, Australia, May 2014.

¹⁹ ABS Cat. No. 6306 – Employees covered by enterprise agreements, Australia, May 2014.

1000 and over employees	2,248.80
Total	4,070,100

31. As a result, small businesses will be particularly impacted by the SDA’s claim as they are more award reliant in contrast to enterprise agreements. In comparison to businesses who operate under an enterprise agreement, if the Awards are varied to accommodate for BDL, small businesses must implement the leave from the date of the Award variations.

32. **CONCLUSION**

In our view, the SDA’s evidence does not currently justify the inclusion of BDL in the Awards, and particularly not in the GRA. The likely impact on employment, business, productivity, and the economy of introducing BDL for Australian workers is substantially to the detriment of small and medium business owners who will be forced to pass on this cost to consumers. Increasing the excessive regulatory burden that is already placed on industries, and in particular, the retail industry, without proper economic and other analysis is a flawed approach undertaken by the SDA. The notion of ‘fairness’ as contained in s.134(1) of the Act suggests the need to finely balance competing interests and considerations in order to establish a safety net that is reasonable, just and equitable.

33. Consideration as to whether the safety net is ‘fair’ is not limited to the rights and interests of employees, it must be also assessed from the perspective of employers.²⁰ For the reasons set out in this submission, the SDA has failed to establish that the BDL claim is consistent with the modern awards objective and is “necessary” in order for the modern awards objective to be achieved. Accordingly, the SDA’s claim should be dismissed by the Commission.

²⁰ [2015] FWCFB 3177 at 109.