



Fair Work Commission: 4 Yearly Review of Modern awards

SUBMISSIONS

**COMMON ISSUES
BLOOD DONOR LEAVE**

(AM2016/36)

30 JUNE 2017

**AUSTRALIAN BUSINESS INDUSTRIAL
- and -
THE NSW BUSINESS CHAMBER LTD**

1. BACKGROUND

1.1 These submissions are filed on behalf of Australian Business Industrial (**ABI**) and the NSW Business Chamber Ltd (**NSWBC**) and relate to the Shop, Distributive and Allied Employees' Association application for the inclusion of Blood Donor Leave (**BDL**) into five modern awards:

- (a) *General Retail Industry Award 2010* (**Retail Award**);
- (b) *Fast Food Industry Award 2010* (**Fast Food Award**);
- (c) *Pharmacy Industry Award 2010* (**Pharmacy Award**);
- (d) *Hair and Beauty Industry Award 2010* (**Hair and Beauty Award**);
and
- (e) *Mannequins and Models Award 2010* (**Models Award**).

(collectively, the **Awards**).

1.2 ABI is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth) and has approximately 4,200 members.

1.3 NSWBC is a recognised State registered association pursuant to Schedule 2 of the *Fair Work (Registered Organisation) Act 2009* (Cth) and has over 18,000 members.

1.4 ABI and NSWBC each has a material interest in the 4 Yearly Review of Modern awards given that both entities represent numerous employers who are covered by the Awards.

2. NEW FORM OF LEAVE

- 2.1 As a matter of general policy, ABI and the NSW Business Chamber supports the charitable act of donating blood and recognises its importance in society.
- 2.2 However, there is a distinction between the benevolent or charitable actions of people who choose to donate blood, and the creation of an entirely new form of leave for employees as part of a fair and relevant minimum safety net of terms and conditions.
- 2.3 The creation of a new form of leave in five modern awards would be a wholly undesirable outcome.
- 2.4 Although ABI and NSWBC submit that BDL is not necessary in the statutory sense for inclusion in these five awards, it is not without relevance the ACTU did not see BDL as *necessary* for inclusion in modern awards at large and has not made an application.
- 2.5 There is nothing special in the five industries' covered by these Awards and whilst not supported as a general proposition, as a matter of logic, the subject of a new form of leave, including any BDL, is more aptly achieved by legislative reform and amendment to the *Fair Work Act 2009 (FW Act)* and the National Employment Standards (**NES**) contained within it.
- 2.6 Employers already provide a substantial amount of leave benefits to employees:

Type	Relevant Legislation	Entitlement	Paid/Unpaid
Annual Leave	FW Act	20 days per year	Paid
Personal/Carer's Leave	FW Act	10- days per year	Paid
Compassionate Leave	FW Act	2 days per occasion	Permanent (Paid) Casual (Unpaid)
Long Service Leave	See Table A Below		Paid
Unpaid Personal/Carer's Leave	FW Act	2 days per occasion	Unpaid
Community Service Leave	FW Act	Unlimited	Unpaid except for jury duty
Public Holidays	FW Act, State based legislation and Modern awards	8 under the FW Act plus additional State specific public holidays	Paid

- 2.7 The addition of another head of leave into five awards is undesirable when set against the operation of the overall scheme.
- 2.8 There are a great number of possible charitable causes for which new forms of leave could be proposed, including fundraising, campaigning, organ donation, or other broad volunteering actions.
- 2.9 There does not appear to be any determinative basis for the Commission to elevate one form of charitable action over another, and it would not

be difficult to identify a floodgates situation in the event BDL is granted in five awards.

3. AWARD MODERNISATION AND BLOOD DONOR LEAVE

- 3.1 The SDA submissions contend the Commission should be satisfied that the history of a limited number of State and federal instruments which contained BDL provides a legitimate basis for the Commission to conclude that BDL should now be included in the Awards.
- 3.2 Such a position is misconceived as the history of pre-modern awards is no longer a relevant consideration in the 4 Yearly Review of Modern Awards.
- 3.3 Of course, during the Award Modernisation process, the Awards that are the subject of this claim were each given close consideration by industrial parties and the Full Bench of the Australian Industrial Relations Commission.
- 3.4 It was at this time that the SDA and any other industrial party had ample opportunity to agitate for the inclusion of BDL on the basis of the history of pre-modern industrial awards.
- 3.5 It is evident from a review of the material filed, transcripts and decisions issued during the Award Modernisation proceedings that very little attention was given to BDL by the SDA, or other parties.
- 3.6 The Full Bench did not consider the inclusion of BDL as *necessary* in any of the Awards. BDL does not appear in any transcript relating to the Awards during the Award Modernisation process, nor is it referred to in any of the Full Bench decisions or statements in respect of the Awards.
- 3.7 The only reference to BDL in the course of the Award Modernisation proceedings in respect of the Awards was its inclusion as a specific clause in the SDA draft "Retail Industry Award" filed on 11 August 2008.

- 3.8 Ultimately BDL did not make it into the General Retail Industry Award 2010 and the SDA, or other industrial parties did not appear to cavil or make any submissions on the subject. Although not a matter the Commission is to take into account, this casts doubt on the industrial necessity for such leave.
- 3.9 Of the antecedent awards referable to this application, only the *Quick Service Food Outlets (QSFO'S) Award - State 2004* contained any reference to BDL:

“7.7 BLOOD DONOR LEAVE

7.7.1 A full-time or part-time employee who is absent during ordinary working hours for the purpose of donating blood, will not suffer any deduction of pay, including any allowances and penalty payments the employee would have received had they been at work, up to a maximum of 2 hours on each occasion and subject to a maximum of 4 separate absences each calendar year.

7.7.2 An employee must attempt to donate blood outside working time. If that is not possible, the employee must arrange for such leave to be taken on a day suitable to the Manager and be as close as possible to the beginning or end of the ordinary working hours.

7.7.3 The employee must first provide proof of attendance, and of the duration, to the satisfaction of the Manager.

7.7.4 The employee must notify their Manager as soon as possible, of the date and time upon which they are requesting to take such leave.”

- 3.10 This clause was inserted by industrial agreement and contains similar provisions to the proposed clause advanced by the SDA. Clause 7.7.2 above is of vital importance to the operation of the provision and essentially provides that before any taking of BDL an employee was required to first attempt to do so outside working time. No such qualification is provided by the SDA in the present application.

- 3.11 Nevertheless, the inclusion of BDL in one pre-reform instrument was not replicated in the supervening modern award and does not bear any relevance to whether the proposal in this application meets the modern awards objective.
- 3.12 The predecessor instruments referenced by the SDA included a form of BDL only by agreement between industrial parties. There is no suggestion that the industrial agreements would have satisfied the modern awards objective.

4. PRELIMINARY ISSUES DECISION

- 4.1 The Preliminary Issues Decision dealt with the legislative framework applicable to the 4 Yearly Review.
- 4.2 The Preliminary Issues Decision concluded that the Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions.
- 4.3 When considering any variation, the Commission must be focused to ensure that any new version of the safety net is consistent with the modern awards objective.
- 4.4 If the variation is a “significant change”, such as in the case of the present application for the insertion of an entirely new head of leave for BDL, the Full Bench held:
- “...it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.”¹*
- 4.5 If an application in the 4 Yearly Review involves and affects multiple modern awards, each variation sought stands alone and each must be evaluated on its merits including whether the variations sought meet the modern awards objective.²

¹ Preliminary Issues Decision [2014] FWCFB 1788 at [23].

² Preliminary Issues Decision [2014] 1788 at [60]

5. SDA EVIDENCE

5.1 There is limited evidence of probative value advanced in the application by the SDA to warrant amendment of the Awards on the basis that the Awards in their current form do not meet the Modern awards objective unless BDL forms part of the minimum safety net.

5.2 By way of summary, the SDA evidence provides evidence of a limited number of propositions:

- (a) blood donation is a community benefit;
- (b) a number of pre-modern instruments provided for BDL where agreement had been reached between industrial parties (this is no basis for concluding BDL is necessary to meet the modern awards objective);
- (c) a small number of enterprise agreements concerning the operation of large, well known and generally nationwide Australian businesses, many of which are publically listed or are owned by a listed parent company, contain a BDL provision of one form or another;
- (d) a small number of employees employed pursuant to these large company's enterprise agreements are pleased they are able to donate blood;
- (e) a small number of employees who are employed in workplaces covered by the Awards may be unable to donate blood because of particular circumstances, including:
 - (i) the unavailability of weekend donation in some areas outside metropolitan areas;

- (ii) particular caring responsibilities for members of the family or household with illnesses;
- (iii) caring responsibilities for children; and
- (iv) an employee who would like to play amateur cricket with his local team.

5.3 The SDA evidence is not wide-ranging or quantitative and cannot be good or sufficient evidence to suggest that the small numbers of employees who have provided affidavits are a representative sample of employees employed in the industries covered by the Awards who are blood donors.

5.4 The evidence is not sufficient to demonstrate the need for “*significant change*” in the sense contemplated by the Full Bench in the Preliminary Issues Decision.

6. MODERN AWARDS OBJECTIVE

- 6.1 The point at which to start for the proper consideration of this matter is the modern awards objective.
- 6.2 It is implicit in each of the Awards that are the subject to this claim that they *prima facie* met the modern awards objective at the time they were made.³
- 6.3 Therefore in order to be successful, the SDA is required to displace the status quo, and to demonstrate that the inclusion of BDL in the Awards is *necessary* to achieve the balance described at section 134(1) of the FW Act.
- 6.4 Section 134(1) of the FW Act sets out the modern awards objective. The objective requires that modern awards together with the National Employment Standards provide a “fair and relevant minimum safety net” of terms and conditions.
- 6.5 What is “fair and relevant” is a contextual consideration and will vary from Award to Award and industry to industry and is conditioned by the requirement to take into account the matters set out in section 134(1)(a) - (h) of the FW Act.
- 6.6 There is no specific definition of a “safety net” in the FW Act, however the Macquarie Dictionary defines the words⁴ separately to provide employees with a foundation that provides “...*the least quantity or amount possible...allowable*”⁵ to ensure employees are “*secure from liability to harm, injury, danger or risk*”.

³ Preliminary Issues Decision [2014] FWCFB 1788 at [24].

⁴ Macquarie Dictionary, Third Edition, *safety, safe* - p.1025, *net* p. 769.

⁵ Macquarie Dictionary, Third Edition, *minimum* - p. 727.

- 6.7 The addition of the term “minimum” serves to emphasise that the employees are protected with a foundation that provides a floor of employment conditions.
- 6.8 Section 138 of the FW Act provides an overarching principle that in setting out to achieve the modern awards objective:
- “...a modern award may include terms it permitted to include, and must include terms that it is required to include, only to the extent necessary...”*
- 6.9 Section 138 effectively limits the content of a modern award “only to the extent necessary” to achieve the modern awards objective and the minimum wages objective. That is, the Commission can only include terms in a modern award to the extent necessary to create a fair and relevant minimum set of terms and conditions that secure employees from harm, danger or risk.
- 6.10 Once this minimum foundation or floor is created, section 138 effectively restrains the Commission when exercising Modern award powers from going any further irrespective of what historically would be called the general industrial merits of the case.
- 6.11 In addition the Commission cannot vary a modern award if to do so would take the award below the minimum safety net.
- 6.12 This construction of section 138 (and related sections) is consistent with the Objects of the Act and also the overall scheme of the Act which sets a minimum safety net which is overlaid by a comprehensive enterprise bargaining regime.

6.13 There is a distinction between what is necessary to achieve the modern awards objective and what is merely desirable for reasons that have nothing to do with the modern awards objective.

6.14 The Federal Court in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)*⁶ 22 Tracey J held in respect to s.157(1) of the FW Act:

“...in reaching my conclusion on this ground I have not overlooked the SDA’s subsidiary contention that a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action..”

6.15 The Full Bench in the Preliminary Issues Decision referred with approval to *SDA v NRA (No. 2)* confirming that the distinction is relevant in the consideration of section 138.⁷

6.16 At its highest the submissions and evidence advanced by SDA demonstrates that the inclusion of BDL is merely *desirable* or something that would be “nice to have” for charitable ends. In our clients’ submission there is certainly not enough evidence in this matter filed by the moving party to warrant the insertion of BDL into the Awards for the reason that it meets the modern awards objective.

6.17 Crucially, the SDA have not demonstrated that the act of donating blood is anything more than a charitable action and that it would be useful if more did so.

⁶ (2012) 205 FCR 227

⁷ FWCFB 1788 at [37] to [39].

6.18 A failure to include BDL in the Awards (the status quo) would not result in a failure to protect employees from danger or harm, or a failure to provide a fair and relevant safety net. The Awards, in the form they are at the moment, meet the modern awards objective.

Section 134 Considerations

6.19 In arriving at this fair and relevant minimum safety net, the Commission is to *“take into account”* those matters set out in section 134(1)(a)-(h) of the FW Act.

6.20 The phrase *“take into account”* has a relationship with similar phrases such as *“consider”* and *“have regard to”*.

6.21 The significance of the stated matters in section 134(1)(a)-(h) inclusive will depend upon their context and the Commission is required to conduct a weighing exercise with regard to the considerations.

6.22 The particular weight to be given in relation to the matter is for the decision-maker to determine, provided that the consideration of the matter is genuine.

6.23 The fact that a decision-maker is directed to take into account certain matters does not preclude consideration of other factors thought to be relevant.

6.24 The various provisions of section 134(1) of the FW Act provide a set of quite different requirements. Some of the limbs are written in terms of the ‘need’ to do something, while others are not. The degree to which

the Commission is moved in relation to these 'needs' is qualified using different phrases:

- (a) *“encourage”*;
- (b) *“promote”*;
- (c) *“provide”*; and
- (d) *“ensure”*.

6.25 In addition, some of the provisions are focused on the impact of a possible exercise of power.

6.26 Turning to the specific requirements of section 134(1) considerations in the context of the proposal to include BDL in the Awards:

Section 134(1)(a) Relative living standards and needs of low paid

6.27 Section 134(1)(a) is set out somewhat differently from other limbs (except perhaps 134(1)(e)). It requires consideration of 'relative living standards' and the 'needs of the low paid' generally.

6.28 'Relative living standards' and the 'needs of the low paid' are related but not identical considerations.

6.29 The Commission has made a number of observations about the phrase 'relative living standards' including that central to the examination of relative living standards is the extent to which low paid workers are able

to purchase the essentials for a decent standard of living and to engage in community life.⁸

6.30 Employees' relative living standards are also affected by the level of wages an employee earns, hours they work, household circumstances and tax transfer payments.

6.31 In order to be successful in this application, it is not enough for the moving party to simply demonstrate the employees the subject of the claim are low paid.

6.32 The SDA submit that those who are covered by the Awards:

(a) are low paid;

(b) in the General Retail Industry are likely to:

(i) work on a casual or part time basis less than 35 hours per week;

(ii) work set rosters with eight hour shifts;

(c) in the Fast Food Industry are overwhelmingly likely to:

(i) work between 1 to 24 hours per week;

(ii) be aged between 14 to 24 years of age; and

(iii) work on a casual or part time basis.

(d) in the Pharmacy Industry in retail are likely to:

⁸ Annual Wage Review 4 June 2013 FWCFB 3500 at [302].

- (i) be female;
- (ii) work on a casual or part time basis less than 35 hours per week;
- (iii) be 25 to 65 years old.

6.33 The SDA does not provide specific evidence of employees who work in the Hair and Beauty Industry or in the Mannequins and Models Industry.

6.34 The SDA broadly state that an absence of BDL impacts upon a small number of donor employee's who live in regional areas, with particular caring responsibilities or in one case the apparent wish to play cricket.

6.35 On the SDA's own submissions, in the majority of cases the employees whose work is covered by the Awards are likely to work fewer than full time hours on a casual or part time basis. It is difficult to see why such employees would require employer paid leave donate blood, and could not do so in their spare time.

6.36 There is nothing before the Commission which demonstrates that the deponents in the SDA evidence are a representative sample of the majority of people working under the Awards.

6.37 Whilst there is no lack of sympathy for such persons, it cannot be said that the insertion of BDL is necessary to meet the modern awards objective, especially if it is not the case for the large majority of people. On any characterisation, BDL cannot be considered to be a need of the low paid.

Section 134(1)(b) - The need to encourage collective bargaining

- 6.38 The phrase “*encourage*” means to inspire with courage, spirit or confidence;... to stimulate by assistance, approval...”⁹. This particular limb does not simply require the Commission to find that a provision does not encourage enterprise bargaining, nor does it require it to make it easy to obtain a bargained outcome.
- 6.39 Placing a one size fits all clause in the Awards simply changes the scheme of the BOOT against which enterprise agreement bargaining occurs rather than serving to encourage or promote enterprise bargaining itself.
- 6.40 The SDA argue that “*the inclusion of BDL in an award will not be a disincentive to collective bargaining*”. When properly considered within the scheme of the FW Act, Modern awards and enterprise bargaining, if one were to include BDL in an award, it would remove an outcome which has historically and currently only ever been achieved as the result of bargaining efforts.

Section 134(1)(c) - The need to promote social inclusion through workforce participation

- 6.41 The word promote, like encourage, is a positive act. “Promote” has a stronger positive meaning than “encourage” and means “...to advance in rank, dignity, position etc to further the growth development progress of; to help to found, originate, organise or launch...”¹⁰
- 6.42 “Social inclusion” is a term that has been considered by the Commission previously and essentially goes to the diversity of demographic

⁹ Macquarie Dictionary, Third Edition p. 365.

¹⁰ Macquarie Dictionary, Third Edition p. 923.

composition within the workforce and the broader issue of having employment and reasonably engaging in community life.

6.43 Clauses that ordinarily promote social inclusion through workforce participation are those that encourage the optimum level of participation irrespective of the employee's circumstance; flexibility clauses, broad flexibility in the types of employment and their flexibility to meet different social circumstances etc are examples of provisions which promote social inclusion.

6.44 The SDA evidence in this matter does not assist in relation to the question whether the the Awards in their current form (without paid BDL) prevent participation in the workforce and result in a form of social exclusion.

6.45 The SDA argue that a lack of BDL:

“can be a detriment to the living standards in a broad sense for the regular blood donor who cannot participate in a social activity.”

6.46 This characterisation of section 134(1)(c) by the SDA misunderstands the nature of this head of considerations and is not an accurate way to describe the actions of regular blood donation.

6.47 BDL in and of itself does not promote social inclusion through workforce participation. At its highest there is social utility in blood donation and it would be generally seen as better if more people donated blood, but the act of giving blood does not promote social inclusion through workforce participation.

6.48 In any event, the SDA evidence in this matter does not demonstrate this, and section 134(1)(c) cannot be made out.

Section 134(1)(d) - The need to promote modern flexible working practices and the efficient productive performance of work

6.49 As with bargaining and social inclusion this limb is expressed as a “need” but is qualified by the word “promote”.

6.50 This limb of the modern awards objective is aimed squarely at promoting:

- (a) flexible modern work practices; and
- (b) the efficient and productive performance of work.

6.51 The language in this limb of section 134 is directed at the nature of the work practices and then to the performance of work as regulated by the modern award to achieve a particular goal.

6.52 Elements of this would seem uncontroversial:

- (a) ensuring that there are no artificial barriers to the performance of work; and
- (b) ensuring appropriate fluidity of the use of labour without unnecessary or arbitrary restrictions.

6.53 The notion of the efficient and productive performance of work extends to the broader cost structures against which labour is engaged and this would include the extent of leave an employee can access.

- 6.54 BDL will have a significant impact of the productive and efficient performance of work and it cannot be said to promote flexible work.
- 6.55 It would create rostering difficulty for employers in industries which are covered by the Awards involving work that cannot be performed anywhere other than at the place of business.
- 6.56 At least some employers will be forced to pay overtime to employees to cover those donating blood accessing BDL.
- 6.57 The SDA submissions state that there would be no disruption to “the business” because the taking of BDL would be predictable. The level of disruption will depend on the business. For example many clients of hairdressers deal with one individual only. A fast food employer will have rostering arrangements which ensure there a certain number of employees employed at any one time which are necessary to properly carry out the service of food.
- 6.58 The suggestion that “it would be relatively easy to find replacement staff with the necessary skills...” is without foundation or qualification. The SDA evidence, as the moving party, does not provide evidence for these assertions as would be required to satisfy this component of the modern awards objective.

Section 134(1)(da) - The need to provide additional remuneration

- 6.59 This limb has no work to do in the current case.

Section 134(1)(e) - The principle of equal remuneration for work of equal or comparable value

6.60 This limb has no work to do in the current case.

Section 134(f) - Likely impact on business, including productivity, employment and regulatory burden

6.61 This limb of section 134(1) requires the Commission to consider the likely impact of exercising its power on business.

6.62 This consideration should be contextual; in each industry or occupation the subject of a modern award not in aggregate.

6.63 This consideration at its simplest is the impact on business, especially small and medium sized businesses, of BDL leave being inserted in the Awards, which would result in two hours being lost up to four times per year per employee. This approximately equates to 8 hours or marginally more than 1 day per year per employee.

6.64 Such an amount of time is significant, especially when considered in the overall scheme of leave which is provided to employees in Australia outlined above.

6.65 In the estimation of the SDA, *“BDL imposes no regulatory burden on the business and no negative impact on employment”*. Such a statement lacks credit, as of course there will be the regulatory, administrative and employment burden on employment of:

- (a) keeping records pertaining to BDL including leave balances and evidence of attendance;

- (b) there is no indication as to whether the SDA intends BDL to be cumulative and accrue from year to year but this would have a clear effect on business;
- (c) the requirement to pay overtime to employees to cover others accessing BDL will have a quite obvious negative effect on employment and business generally; and
- (d) the minimum engagement clauses in the Awards do not permit an employee to be engaged for a period of fewer than 3 hours resulting in employers being required to remunerate replacement employees brought in for short engagements or pay overtime to cover those absent on BDL.

6.66 The impact on productivity is detrimental as the unitary cost of engaging individuals to cover those on leave on overtime effectively doubles the cost of the labour on a per hour basis during the absence.

6.67 All of this has a cost impact on a business which affects productivity and employment.

6.68 The SDA submits that the numbers of people accessing BDL would be low in support of the position that its effect on business will not be great. In support of this the SDA conducts a basic division exercise involving the number of blood donors in 2015/16 by the number of people who are said to be in employment. In percentage terms this is said to be 3.9%. The SDA label 3.9% as the “potential take up rate” of BDL in any business.

- 6.69 Of course such a calculation involves a leap of faith, especially in the circumstances of a small business with fewer than 15 employees. It is not trite to explain the circumstances of a business with up to 5 employees for whom the loss of a single employee would result in minimum 20% loss of total available labour.
- 6.70 At the same time as submitting that the take up rate of BDL will be negligible, the SDA submits that the ultimate objective is to encourage and enable more employees to donate blood.
- 6.71 These positions are contradictory and both cannot be sustained.
- 6.72 The SDA additionally states that the average donation times are 40 minutes according to the Red Cross. However the Red Cross calculation of course does not include travel time to and from the donation location.
- 6.73 Furthermore there is no consideration of waiting times which on the SDAs own submission is said to be 28.9 minutes to 41.2 minutes from registration to collection.¹¹
- 6.74 It is not difficult to envisage a set of circumstances in which the provision of two hours per occasion donating blood will not be sufficient.

¹¹ Submission filed by the SDA 2 May 2017, Annexure 11.

Section 134(1)(g) - Need to ensure simple easy to understand stable and sustainable system of modern awards

- 6.75 Like many limbs of the modern awards objective, this limb is expressed in imperative terms as a need but it is also qualified with the word “ensure”.
- 6.76 This suggests that an object that must be achieved by modern awards is a simple, easy to understand stable and sustainable modern award system.
- 6.77 The word “simple” means “... *easy to understand, deal with, use ... not elaborate or artificial ...*”¹². The words “*easy to understand*” are expressly stated and there is clearly some overlap between the notion of “simple” and “easy to understand”.
- 6.78 The notions of “stable” and “sustainable” are more complex. These could be said to introduce notions going to the inter-relationship of modern awards and their relevance and therefore longevity.
- 6.79 Introducing a new and complex form of paid leave has a detrimental affect to the simplicity of modern awards and increases the likelihood of instability and complexity. The SDA provides no evidence and does not address this limb of the modern awards objective. The BDL proposal if inserted would result in unnecessary overlap of conditions in five modern awards with the way in which award covered employees in every other industry or occupation in the country operate.

¹² Macquarie Dictionary, Third Edition, p. 1081.

6.80 The claim does not support simple and sustainable modern awards. As earlier submitted the claim has the potential to encourage new claims for paid time to engage in public spirit activities.

6.81 Though probably a typographical error, the SDA also state that if the limb of section 134(1)(g) is satisfied, this has the effect of achieving the modern awards objective. That is clearly incorrect.

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 -

6.82 This limb of section 134 requires the Commission to consider the likely impact of exercising its power in the context of the broader economy.

6.83 We have not sought to adduce expert evidence in these proceedings of the net effect of BDL on the national economy and the effect on Australia's international competitiveness.

6.84 If the net effect of BDL is 1 day of absence per year per employee, on top of an already generous scheme of leave available to employees as described above and at Table A, the SDA's submission that there will be "no detrimental effect" on inflation, employment growth and the sustainability, performance and competitiveness in the Australia economy cannot be sustained. This submission made in absolute terms is claimed to be supported by the evidence of a number of employees who work pursuant to the Awards.

6.85 At its highest, it could be said the SDA seeks to show that there is negligible effect, not that there is not detrimental effect.

6.86 The SDA evidence can be said to demonstrate that a statistically inconclusive sample of employees employed would like to donate blood during working hours and be paid during their absence.

Conclusion in respect of the modern awards objective

6.87 In our respectful submission, there is insufficient evidence before the Commission to enable members of the Bench to displace the status quo and to warrant an amendment of the Awards.

6.88 When weighed on balance, and on the basis of the limited evidentiary case which has been advanced by the SDA, the Commission should conclude that the insertion of BDL is not necessary to meet the modern awards objective. We further submit that the Awards set a fair and relevant minimum safety net (with the NES) in their current form.

6.89 There is no modern award that provides for any provision of BDL or any other form of leave, save for the *Aboriginal and Community Controlled Health Services Award 2010* which contains dispute resolution training leave.

7. EXISTING ABILITY OF EMPLOYEES TO DONATE BLOOD OUTSIDE OF WORK

- 7.1 There are a number of ways for employees to donate blood outside their work hours.
- 7.2 Employees who live in metropolitan areas generally have the possibility of donating their blood between Monday to Saturday at donation centres, and in blood donor vans in operation either in the morning or afternoon and sometimes in operation for the duration of the day.¹³
- 7.3 For those in regional centres availability varies between Monday to Friday or Monday to Saturday donation either in the morning or afternoon and sometimes both.
- 7.4 On the fringe of large capital cities, or in regional centres, donation centres and vans vary in availability from approximately 30 to 80km+ away and services may either be available from Monday to Friday in the most cases, or Monday to Saturday in other cases.
- 7.5 Given the size of the Australian continent, the Red Cross blood donation service is of excellent coverage and quality.
- 7.6 Blood donation services are able to be accessed by individuals during business hours and appointments are recommended.
- 7.7 When taken together, individuals and the community at large have a wide array of possible options for blood donation available to them.
- 7.8 It certainly cannot be concluded the average person does not have the possibility to donate blood except during working hours. The evidence of the SDA demonstrates the particular requirements of employees who

¹³ Australian Red Cross website, <http://www.donateblood.com.au/blood-donor-centre>, accessed 15 June 2017.

are employed in businesses covered by the Awards who have additional caring or parental responsibilities.

7.9 The ABS data deployed by the SDA also demonstrates that those who depose in affidavits in this case is not representative of the number of hours typically worked by those in the industry.

7.10 It is not difficult to envisage that employees the majority of whom work fewer hours than a full time 38 hour week would have ample time and opportunity to occasionally donate blood.

8. THE PROPOSED CLAUSE

8.1 The insertion of BDL into the Awards needs to be evaluated on an Award by Award basis by the Commission however no substantive consideration has been provided by the SDA.

8.2 Nonetheless the clause proposed by the SDA is unsatisfactory for a number of reasons.

8.3 The SDA's clause is proposed for all of the Awards:

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 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.

8.4 Clause X.1 provides an *entitlement* to “permanent employees” that is likely to be full-time and part-time. On the SDA's own evidence a large number of employees employed pursuant to the Awards are engaged fewer than full time hours. Non-full time employees have ample

- opportunity to donate blood at a time suitable to them outside their work hours.
- 8.5 The provision of “up to two hours paid Blood Donor Leave” will in many cases, for reasons outlined above, be insufficient time in which to donate blood, even if a donation centre is available nearby.
- 8.6 Clause X.1 does not require an employee to attend the closest available location. The SDAs proposed clause would render it appropriate for an employee to exercise discretion to attend a blood donation centre which is not nearby and for which a period of time greater than 2 hours would be required.
- 8.7 The method accrual of BDL according the proposed clause is a matter which is entirely unclear. For instance, it is unclear whether BDL accrues from year to year, or whether the ability to take up to two hours leave crystallises for an employee on day one of their employment.
- 8.8 Whilst the SDA states in its submissions at paragraph 11.4 that its proposed BDL clause does not allow for the accrual of BDL from year to year, there is nothing present in the clause that gives effect to this statement. If this was the intent, one would expect the express exclusion of accrual. Such an omission causes uncertainty and inevitably leads to the uneven application of the proposed BDL provision.
- 8.9 Clause X.1 refers to an entitlement while clause X.2 refers to notification and request. Such language is confusing when considered against the overall scheme of words used in industrial instruments.
- 8.10 It would not be difficult to foresee circumstances which flow from the proposed clause in which an employee might place reliance on particular words to argue that he or she provided **notification** to his or her

employer to access an **entitlement** to paid BDL and that the absence from work is therefore an absolute right. Such a position would leave an employer in the invidious position of arguing that there is also an entitlement to refuse the **request** where it cannot operationally **arrange** for the absence as is the apparent requirement in X.3.

- 8.11 The manner of the taking of BDL in the proposed clause is confusing and bound to be contentious and create disharmony.
- 8.12 Additionally, there does not appear to be any capacity for an employer to refuse a request for BDL. Such an imposition is without justification and is manifestly unfair to employers. There does not appear to be any consideration given to how “suitable to the employer would operate”.
- 8.13 Instead, clause X.3 assumes that there will be a “*day suitable to the employer*”.
- 8.14 The proposed clause does not deal with the inevitable circumstances that BDL would lead to absences of over 2 hours in duration in a variety of circumstances including that the donation centre is too busy, there is blood donation equipment malfunction or breakdown, or other form of delay including involving the employees travel time to the donation centre.

8.15 In any case, the inclusion of BDL is not supported by our clients and the application made by the SDA should be dismissed.

A handwritten signature in blue ink, appearing to read 'Michal', is centered on the page.

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On behalf of Australian Business Industrial and the NSW Business Chamber Ltd

TABLE A - LONG SERVICE LEAVE ENTITLEMENTS IN AUSTRALIAN STATES AND TERRITORIES

State or Territory	Name of Enactment	Amount of basic leave entitlement	Casual Entitlement	Comments
Northern Territory	Long Service Leave Act	On completion of 10 years continuous service with the employer the employee's entitlement is 1.3 weeks for each completed year of service	Definition of employee in s7(1) includes casual employees. But s12(1) requires continuous service which is likely to exclude some casuals.	S 6(2)(b) excludes a person who is entitled to long service leave under an award
Queensland	Industrial Relations Act, 1999	On completion of 10 years continuous service with the employer the employees entitlement is 8.6667 weeks per s43(2)(a)	The casual entitlement is in s47(1). The employment is continuous unless broken by a period of 3 months or more from the start of one employment contract to the next per s47(2).	See section 49 for the casual minimum amount using a formula Actual service/52x(13/15)x hourly rate
Tasmania	Long Service Leave Act, 1976	On completion of 10 years continuous service 8 2/3 weeks per s8(2)(a)(i)	The casual entitlement is in s5(3). Casual and part-time employees are considered to be continuously employed if they have been regularly working for 32 hours or more in each consecutive period of four works.	Mining employees entitlements differs

State or Territory	Name of Enactment	Amount of basic leave entitlement	Casual Entitlement	Comments
New South Wales	Long Service Leave Act, 1955	2 months leave for 10 years continuous service per s 4	Casuals mentioned in s4(11) but may be excluded if service is not “continuous”	S4(2)(a3) defines month to mean 4 and 1/3rd weeks
ACT	Long Service Leave Act 1976	S3 and s4 provide 1.4 months leave for 7 years continuous service accrued at the rate of 1/5th of a month’s leave for each year of service	S7(2) provides for the calculation of LSL payment for casual or part time employees as the ordinary number of hours worked in the 12 months prior to taking LSL multiplied by the ordinary remuneration of the employee on the day they qualified for LSL. Note that an employee is defined to include a casual employee. A casual employee is defined as engaged in regular and systematic employment with the employer in circumstances where employment of the same type would or might be offered but where the duration of employment is uncertain.	S7(3) contains a formula to calculate LSL where the employee converts from full time to part-time or casual

State or Territory	Name of Enactment	Amount of basic leave entitlement	Casual Entitlement	Comments
South Australia	Long Service Leave Act, 1987	13 weeks after 10 years continuous service per s5	S3(2)(b)(iii) contains an averaging provision where the employee was engaged on a casual or part time basis within three years of the date of entitlement to LSL.	Casuals must satisfy the continuous service criterion.
Victoria	Long Service Leave Act 1992	13 weeks after 15 years of continuous service per s 56	S59(b) includes a casual or seasonal employee in the definition of employee. S62A provides that casual and seasonal workers are entitled to LSL where their employment has not been broken for a period greater than 3 months.	S62a(1)(b) also permits the period of broken engagements to be greater than 3 months for casual and seasonal workers where the length of the absence is due to the terms of engagement of the employee by the employer.

State or Territory	Name of Enactment	Amount of basic leave entitlement	Casual Entitlement	Comments
Western Australia	Long Service Leave Act 1958	After 10 years continuous service 8 and 2/3rd weeks per s8(2)(a)	Casual employees mentioned in s4(2)(c) re calculation of ordinary pay.	Employees, including casuals, entitled to their ordinary pay for a period of LSL. Casual or part time employees receive their ordinary rate of pay calculated on the average number of hours worked over their period of employment.