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Business SA Submissions in reply *Blood Donor Leave* (AM2016/36)

30 June 2017

Summary

The Shop, Distributive and Allied Employees' Association has applied to significantly vary five modern awards by introducing an additional entitlement to paid leave. This additional entitlement would be accessible where the employee takes leave for the purpose of donating blood. Up to 2 ordinary hours' paid leave, without deduction in pay, usable on a maximum of four occasions per year is being sought.

Business SA recognises and acknowledges the importance of blood donation in Australia. However, Business SA strongly opposes this application. It is Business SA's view that proposed leave entitlement would be inappropriate content for a minimum safety net modern award. This entitlement presently operates successfully in enterprise agreements. This is the appropriate vehicle for such leave to be provided. The modern award and enterprise bargaining systems should not be disturbed by mutating blood donor leave from agreement content to award content.

Business SA opposes this application because it is not permissible within the statutory context, it would not meet the modern awards objective, it would undermine enterprise bargaining and would significantly, and negatively, impact small businesses. The claim does not demonstrate it is necessary to include this additional leave entitlement in any of the nominated modern awards and probative evidence has not been provided to justify this significant variation.

The Fair Work Commission should conclude that the blood donor leave claim does not meet the modern awards objective, should not form part of the fair and relevant minimum safety net provided by modern awards and the National Employment Standards, and should not become award content.

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Introduction

1. These submissions are made in response to directions issued by the Fair Work Commission ('Commission') on 24 April 2017.¹
2. Business SA makes these submissions in reply to the application by the Shop, Distributive and Allied Employees' Association ('SDA')² to insert paid blood donor leave ('BDL') clauses into five modern awards. Business SA has had the benefit of unredacted versions of the SDA's application and accompanying witness statement affidavits. This submission in reply is based on these unredacted documents.
3. The five modern awards the SDA seeks to add BDL to are the:
 - a. *General Retail Industry Award 2010*;
 - b. *Fast Food Industry Award 2010*;
 - c. *Pharmacy Industry Award 2010*;
 - d. *Hair and Beauty Industry Award 2010*; and
 - e. *Mannequins and Models Award 2010*.
4. The proposed clause would provide, inter alia, a permanent employee with up to 2 ordinary hours' paid Blood Donor Leave without deduction of pay.³ This entitlement would be accessible up to a maximum of four occasions per year for the purpose of donating blood. Business SA does not propose to reproduce the SDA's draft clause in full. The SDA puts forward this application on the ground that the proposed BDL clause is a permitted term, as it is about 'leave, leave loadings and arrangements for taking leave' in a modern award.⁴
5. Business SA makes clear that we support and encourage individuals to donate blood. There can be no argument that blood donation is an important community service. Persons who volunteer their personal time to provide these donations are to be commended.
6. However, Business SA must strongly oppose the SDA's proposal.
7. Business SA opposes the SDA's proposal to add paid blood donor leave to the abovementioned awards for the following reasons: the proposed variation is not permissible within the statutory framework; it does not meet the modern awards objective; it would undermine enterprise bargaining in Australia; the variation would disproportionately and severely impact small businesses; and the application has not been supported by probative witness evidence which demonstrates that this variation is necessary to achieve the modern awards objective.
8. Business SA submits the SDA's application does little more than demonstrate what is already known – that voluntary blood donation is a valuable and commendable public service. The SDA has not demonstrated why this additional leave entitlement should be imposed on employers where employees can easily donate

¹ 4 yearly review of modern awards – SDA claim for blood and bone marrow leave (AM2016/36), [24 April 2017](#).

² Shop, Distributive and Allied Employees' Association '[Four yearly review of modern awards – common issues – Blood donor leave](#)', 2 May 2017 ('SDA submission').

³ *Ibid* [10].

⁴ SDA Submission [13] citing FW Act s 139(1)(h).

blood in their personal, non-working time. The application does not demonstrate why the proposed clause is appropriately considered part of the minimum safety net. The application does not demonstrate why employers should face the additional financial, operational and regulatory costs associated with imposing an additional form of paid leave. The SDA's application is severely deficient.

9. Business SA submits that the Commission should conclude that the SDA's paid blood donor leave claim does not meet the modern awards objective and it is not a permissible award term.

Statutory framework

10. We begin our submission in reply by considering the legislative framework within which any change to a modern award or to modern awards occur. We will consider the SDA's application within the bounds established by this statutory framework and will demonstrate that their application is not permissible.
11. The statutory framework for changes to a modern award or awards has recently been detailed by the Full Bench of the Fair Work Commission in the *4 yearly review of modern awards - Penalty Rates* decision (*'Penalty Rates Decision'*).⁵ This decision discussed the statutory framework in considerable detail. For the purposes of this submission in reply Business SA will not go into that same level of detail, we will refer to elements of that decision most relevant for this proceeding.
12. The starting point for interpreting the statutory framework in modern award proceedings is to consider the words of the statute according to the ordinary meaning of the words used.⁶ This interpretation is to consider the context of the words and the purpose of the legislation.⁷
13. Section 3 of the *Fair Work Act 2009* (Cth) ('FW Act') sets out the object of the FW Act. This object guides the reader when interpreting the intent behind provisions contained within the FW Act. Specifically, the FW Act has as its object:

"...to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

(a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and

(b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and

...

(d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and ...

⁵ [2017] FWCFB 1001.

⁶ *Ibid* [96].

⁷ *Ibid*.

(f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simply good faith bargaining obligations and clear rules governing industrial action; and

(g) acknowledging the special circumstances of small and medium-sized businesses.”

14. The Commission is bound to consider the objects of the FW Act when performing its functions and exercising its powers under the FW Act.⁸
15. Part 2-3 of the FW Act deals with modern awards. The Commission must review each modern award in its own right every four years per section 156. The modern awards objective applies to the review.
16. Section 134 contains the modern awards objective. The Commission must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions.⁹ The modern awards objective takes into account the following relevant criteria:
 - a. relative living standards and the needs of the low paid;¹⁰
 - b. the need to encourage collective bargaining;¹¹
 - c. the need to promote social inclusion through increased workforce participation;¹²
 - d. the need to promote flexible modern work practices and the efficient and productive performance of work;¹³
 - e. the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden;¹⁴
 - f. the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern;¹⁵ and
 - g. the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.¹⁶
17. While the above criteria must be considered, and primacy should not be given to one criterion where others are also relevant,¹⁷ the primary question for the Commission in exercising modern award powers is a clear one. When exercising modern award powers the Commission must consider whether the modern award in question, together with the National Employment Standards ('NES'), provides a fair and relevant minimum safety net of terms and conditions. This primary question was expressly stated in the *Penalty Rates Decision*.¹⁸

⁸ Ibid [108].

⁹ Ibid [115].

¹⁰ FW Act s 134(1)(a).

¹¹ Ibid s 134(1)(b).

¹² Ibid s 134(1)(c).

¹³ Ibid s 134(1)(d).

¹⁴ Ibid s 134(1)(f).

¹⁵ Ibid s 134(1)(g).

¹⁶ Ibid s 134(1)(h).

¹⁷ [2017] FWCFB 1001, [115]-[116].

¹⁸ Ibid [116].

18. It is important to consider what is meant by a 'minimum safety net of terms and conditions'. A primary aspect of Business SA's opposition to the SDA's proposed variation is that this proposal would push the modern award(s) out of position as a **minimum safety net** and offer entitlements which are more appropriately addressed in an enterprise agreement. The *Penalty Rates Decision* provides some guidance in the interpretation of 'minimum safety net' and how modern awards operate in relation to enterprise agreements. The Full Bench in that decision stated that under the FW Act, modern awards and the NES "underpin" enterprise agreements. The purpose of a modern award under the current legislation is to set minimum terms and conditions of employment for those covered by that award; with that award inapplicable to the extent an enterprise agreement applies to the specific employment relationship.¹⁹
19. A further application of the modern award objective arises where the Commission is satisfied that a determination to vary a modern award is necessary. It is important to note that the power of the Commission to vary a modern award is discretionary in nature.²⁰ The Commission must be satisfied the variation is necessary to meet the modern award objective. It is important to note that what is necessary is strictly distinct from what is desirable. The Commission must vary an award where it is necessary, it is not compelled to do so merely because the variation would be desirable.²¹ This distinction between what is necessary and what is merely desirable was cited with approval in the *Penalty Rates Decision*.²²
20. The modern awards objective also dictates what terms may be included in a modern award. The content of a modern award is restricted by the FW Act at section 138. A modern award may include terms it is permitted to include, and must include terms it is required to include. Importantly, under the FW Act, a modern award can only include terms "to the extent necessary to achieve the modern awards objective" (emphasis added).²³
21. Finally, Business SA submits an important element of the statutory framework is the scope of the Commission's review powers. The scope of these powers was set out in the *4 yearly review of modern awards: Preliminary Jurisdictional Issues* decision ('*Preliminary Jurisdiction Decision*').²⁴ Important guidelines for the Full Bench in considering an award variation were set out in this decision. Business SA draws particular attention to relevant important elements.
22. The first important element is the presumption that a modern award being reviewed met the modern awards objective at the time that modern award was made. This presumption was clearly laid out in the *Preliminary Jurisdiction Decision* at [24]. Application of this presumption to the present matter means that the awards which the SDA proposes to vary, prima facie, met the modern awards objective when they were made. It is therefore upon the SDA, as the initiating party, to demonstrate that the relevant awards are no longer meeting the modern awards objective.

¹⁹ Ibid [126], [130].

²⁰ *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* (2012) 205 FCR 227 (Tracey J) cited in [2017] FWCFB 1001, [135].

²¹ Ibid.

²² [2017] FWCFB 1001, [136].

²³ FW Act s 138.

²⁴ [2014] FWCFB 1788.

23. The second important element is the level of merit and evidence required to significantly change a modern award. The *Preliminary Jurisdiction Decision* provides guidance which is highly relevant to the present proceedings. The following is an extract of the Full Bench in the *Preliminary Jurisdiction Decision*:

The Commission is obliged to make ensure that modern awards, together with the NES, provide a fair and relevant **minimum safety net** taking into account, among other things, the need to ensure a 'stable' modern award system. The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI's submission that some proposed changes may be self evident and can be determined with little formality. However, **where a significant change is proposed 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 (emphasis added).²⁵

24. These guidelines were recently cited with approval in the *Penalty Rates Decision*.²⁶
25. This second element is highly relevant to the present matter. The SDA is proposing a new form of paid leave be added to five modern awards; certainly a significant change for the purposes of the *Preliminary Jurisdiction Decision*. The guideline set out by the *Preliminary Jurisdiction Decision*, and recently approved by the *Penalty Rates Decision* applies to the SDA's current application. They must, in addition to addressing the relevant legislative provisions, provide **probative evidence** which demonstrates the facts supporting their proposed variation. In this case, that this additional leave is somehow necessary for employees covered by the relevant awards to be able to donate blood; an assertion strongly opposed by Business SA.
26. The statutory framework within which modern awards may be varied is well established and well understood. The *Preliminary Jurisdiction Decision* has stood strongly since it was handed down and the *Penalty Rates Decision* of this year reiterates the longstanding principles applicable to modern award variations. It is within this context the SDA's application must be assessed.
27. Business SA strongly submits the SDA's application, if implemented, does not meet the modern awards objective. The modern awards objective provides a range of considerations, however the primary requirement is that the modern award be a fair and relevant minimum safety net of employment terms and conditions.²⁷ The SDA in its application for paid blood donor leave has not demonstrated that a variation to the relevant modern awards is necessary as part of a fair and relevant minimum safety net. The SDA, in its application, has not provided a compelling argument that the presumption a modern award met the modern awards objective when it was made²⁸ does not apply here.
28. Further, the proposed application is not permissible as it would exceed the modern awards objective. The modern awards objective is to provide a fair and relevant minimum safety net of terms and conditions of

²⁵ Ibid [23].

²⁶ [2017] FWCFB 1001, [111], [269].

²⁷ Ibid [116].

²⁸ *Preliminary Jurisdiction Decision* [24].

employment through the applicable award and the NES.²⁹ The variation sought by the SDA is for additional leave in the relevant modern awards. Neither the SDA's submission nor their evidence demonstrates this additional leave is necessary to meet the modern awards objective. These paid leave terms could not be included in a modern award as such terms would go beyond the extent necessary to meet the modern awards objective.³⁰

29. Finally, Business SA submits the SDA has not established their proposed significant change is necessary, as required by the *Preliminary Jurisdiction Decision*. The submission supporting their application does not demonstrate a merit argument demonstrating that this change is necessary to meet the modern awards objective and is not accompanied by probative evidence which demonstrates facts supporting the variation. As will be later discussed, the witnesses relied on by the SDA are able to attend blood donation centres outside of their working hours. The SDA submit at [74] of their submission that the 'take up rate' of BDL will be considerably low and that it is reasonable to expect that not all full-time and part-time employees will access the benefit.³¹ This undermines their application by demonstrating the requirement of probative evidence for changing the minimum safety net cannot be met.
30. Business SA submits the SDA's proposal to vary the named modern awards is not permissible within the statutory framework.

The modern awards objective

31. This section of Business SA's submissions in reply addresses propositions made by the SDA regarding their application and the modern awards objective. Crucially, the modern awards objective requires the Commission ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions.³² The factors which make up the modern awards objective have been listed previously. Business SA submits the SDA's propositions regarding their application's accordance with the modern awards objective are flawed and should not be considered persuasive.

Need to encourage collective bargaining – s 134(1)(b)

32. The SDA made brief submissions suggesting BDL would not discourage collective bargaining.³³ The need to encourage collective bargaining is one of the modern awards objectives per s 134(1)(b) of the FW Act. Business SA strongly submits the SDA's suggestion is false. This response is discussed in detail later in this submission.

²⁹ Ibid [130].

³⁰ FW Act s 138.

³¹ SDA Submission [74].

³² FW Act s 134(1).

³³ SDA Submission [53].

Need to promote social inclusion – s 134(1)(c)

33. The SDA made submissions claiming BDL would promote social inclusion in a broad understanding.³⁴ The SDA claims that an absence of a blood donor leave entitlement means people cannot take part in blood donation.³⁵ Effectively, the SDA is claiming that a person's employment precludes them from donating blood. Business SA submits this claim is inaccurate.
34. Business SA strongly submits that in the vast majority of situations, a person's employment does not preclude them from volunteering their non-working time to donate blood. Business SA has read the witness statements provided by the SDA which are framed to give the appearance that the deponent cannot donate blood because of their employment, or can only donate blood because they are provided with a BDL entitlement through an enterprise agreement. Business SA submits the majority of these witnesses do in fact have capacity to donate blood at mobile or permanent donation centres close to their place of residence or place of work. In the majority of statements it is clear that how the deponent chooses to spend their non-working time, not the deponent's employment, is what prevents them from donating blood. This is discussed in more detail later in this submission.
35. As peoples' employment does not preclude them from participating in this social activity, donating blood, currently, Business SA submits this element of the modern awards objective does not support the SDA's application.

Need to promote flexible modern work practices – s 134(1)(d)

36. The SDA made submissions claiming BDL would not adversely impact flexible, efficient and productive performance of work in business.³⁶ Business SA strongly disagrees and submits this claim is incorrect.
37. This statement of the SDA appears premised on the experience of large employers who have entered into enterprise agreements which provide paid blood donor leave. As will be discussed later in this paper, these large employers are likely to have more staff and more resources to accommodate a single staff member's absence while that individual donates blood. The same cannot be said for small employers. The total capacity decrease where one employee leaves the workplace will be substantially greater in a small business. This will place extra pressure on remaining staff to ensure services are provided at the same standard.
38. Rather than providing for efficient and productive performance of work, the SDA's claim will place increased pressure on remaining staff and will limit the ability of the employer to balance breaks without incurring the significant additional cost of rostering an additional staff member to cover the paid absence of an employee.

Impact on business, including productivity, employment and regulatory burden – s 134(1)(f)

³⁴ SDA Submission [64].

³⁵ SDA Submission [60].

³⁶ See generally SDA Submission [64]-[68].

39. The SDA has made optimistic submissions that BDL would have ‘no regulatory burden on the business and no negative impact on employment.’³⁷ Business SA does not share this optimism. Business SA submits the SDA’s application will place a significant burden on business, especially small business.
40. The SDA has specifically stated BDL would be accessible in two hour blocks, up to four times a year, as justification that businesses will not be negatively impacted by their proposal.³⁸ Business SA submits the primary cost on business is not only the quantum of paid leave, it is also the productivity and capacity which will be lost when BDL leave is utilised. As has been previously noted, and is discussed in detail below, this will disproportionately impact small businesses. For every employee absent, all other things being equal, there is a significant decrease in the capacity of that business to operate. To maintain the same level of service, extra work will either be placed on the shoulders of remaining employees or the business will have to roster an additional staff member. There is no alternative view. Being forced to increase the workload on remaining staff or to roster an additional staff member is a substantial impact on business. Financially the business is impacted (with additional paid leave not previously offered in the award) and productivity is also impacted as work is required to be done by fewer staff.
41. In defending their application in relation to this modern award objective, the SDA submits the take up rate of blood donor leave will be ‘considerably low’.³⁹ Business SA submits this does not bear on whether the proposal impacts on business. The proposal will impact on business whenever the proposed entitlement is utilised. That the take up rate will be considerably low only goes to demonstrate that this ‘one-size-fits-all’ approach applied by the modern award is an inappropriate mechanism to provide blood donor leave.
42. Business SA submits the likely impact on business, including productivity, employment and regulatory burden of the SDA’s application is significant. This modern award objective should not be offended given the minimal extent to which the SDA’s application accords with other modern award objectives.

Need to ensure a simple, easy to understand and stable and sustainable award system – s 134(1)(g)

43. The SDA has not addressed this modern award objective in any detail. Nebulous claims that the proposed claim ‘provides certainty, is simple, easy to understand and sustainable for an award’⁴⁰ cannot be considered compelling consideration of this modern award objective. Business SA strongly submits that as the initiating party, the SDA has an onus to sufficiently demonstrate how their application accords with this modern awards objective. This onus has not been discharged.

Likely impact of exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy – s 134(1)(h)

44. Business SA also submits the SDA has not addressed this modern award objective in sufficient detail. The SDA relies on its argument and evidence to reiterate that the impact of BDL on business is negligible.⁴¹ In response, Business SA reiterates that the impact on business will be much more than negligible. As will be

³⁷ SDA Submission [73].

³⁸ Ibid [72]-[73].

³⁹ Ibid [74].

⁴⁰ Ibid [78].

⁴¹ Ibid [79].

demonstrated further in this paper, evidence provided by the SDA that major employers are able to incorporate BDL in their enterprise agreements does not, in any way, support the conclusion that small and medium sized enterprises will not be negatively impacted. Business SA submits the SDA's application does not accord with this modern awards objective.

Enterprise bargaining

45. Business SA submits the SDA's push to incorporate entitlements that are greater than minimum standards currently provided under awards and the NES will discourage collective bargaining and undermine the enterprise bargaining system in Australia. Enterprise bargaining is an important aspect of Australia's industrial relations system and its operation is highly influenced by the relevant modern award and the NES.

46. The Australian industrial relations system is formed on the basis of bargaining at an enterprise level. The Hon Julia Gillard MP, Minister for Employment and Workplace Relations in the Second Reading Speech for the Fair Work Bill 2009 stated:

"A system that has at its heart bargaining in good faith at the enterprise level, as this essential to maximise workplace cooperation, improve economic productivity and create rising national prosperity;"

"The Bill aims to achieve productivity and fairness through enterprise-level collective bargaining underpinned by the guaranteed safety net, simple good faith bargaining obligations and clear rules governing industrial action."⁴²

47. The Full Bench of the Commission stated in the *Penalty Rates Decision* that it is apparent from the scheme of the Fair Work Act that modern awards and the NES 'underpin enterprise agreements, through the operation of s.55 and the better off over all test'.⁴³ The Full Bench then further detailed the purpose of modern awards and the NES (and national minimum wage orders) as a system which provides a 'a safety net of fair, relevant and enforceable minimum terms and conditions of employment for national system employees.'⁴⁴ Finally, the Full Bench reiterated its point that these minimum terms and conditions provided by modern awards 'underpin enterprise bargaining.'⁴⁵

48. These recent statements by the Full Bench demonstrate how modern awards and enterprise agreements continue to interact and where the two have necessary differences. It is Business SA's view that if the minimum safety net floor is set too high, this will reduce the willingness of employers to negotiate. This situation would be contrary to the intention of the FW Act as expressed in the Second Reading Speech. More practically, this may lead to reductions in productivity gains, less flexible workplaces and fewer over-award, agreement based, entitlements in future.

49. Business SA acknowledges enterprise bargaining has resulted in a number of agreements containing provisions dealing with blood and bone marrow donor leave and the number of agreements with such terms is increasing. However, this is not compelling evidence that such entitlements are appropriate content for a

⁴² Second Reading Speech, Commonwealth of Australia Parliament, 25 Nov 2008, 2.

⁴³ [2017] FWCFB 1001 [126].

⁴⁴ Ibid [130].

⁴⁵ Ibid [132].

modern award, as opposed to an enterprise agreement. The fact that an increasing number of agreements containing this entitlement are being created demonstrates the system is functioning as intended at present

50. The SDA's submission details a number of organisations that have, by way of negotiation with the SDA, included blood donation leave in enterprise agreements. These Agreements relied upon by the SDA are from, but are not limited to, the following large organisations:
- Woolworths
 - Coles
 - Bunnings
 - Foodland
 - IGA
 - Dan Murphy
 - Country Road Retail Clothing
 - Freedom Retail Enterprise
 - Target Australia
 - Officeworks ⁴⁶
51. The fact that enterprises and unions have negotiated and provided BDL in enterprise agreements demonstrates the effectiveness of the enterprise bargaining system. This system provides tailored results that best suit an organisation at an enterprise level.
52. Business SA submits that the negotiations of these enterprise agreements between the SDA and employers demonstrates the appropriateness of using enterprise bargaining as a mechanism for providing blood donor leave. Negotiation of blood donor leave through the enterprise bargaining system allows parties to determine the approach that best suits the workplace and the capacity of the employer to accommodate such leave. Business SA expects common considerations for organisations looking to offer paid blood donor leave would include matters such as:
- the number of employees employed by the business;
 - the industry and the nature of the businesses;
 - the capacity of employer to cover the absent employees; and
 - the financial resources of the employer.
53. The above considerations will weigh differently for different employers under different awards. Consequently, the impact of the SDA's proposal will also vary between different organisations; but, being an award entitlement, without any ability to negotiate or adapt to suit the specific business.
54. The SDA submission contains evidence from witnesses who currently receive blood donor leave through their applicable enterprise agreement. Business SA supports the use of enterprise agreements to advance such provisions and we submit this demonstrates the appropriate vehicle by which paid blood donor leave should be provided. Enterprise bargaining in general is the appropriate mechanism for providing and regulating access to leave entitlements that exceed entitlements provided by the modern award and NES minimum safety net. This safety net underpins those additional entitlements provided by an enterprise agreement.

⁴⁶ SDA Submission [36].

Lack of evidence considering impact on small employers

55. Business SA submits the SDA has not properly considered the impact of their application on small businesses. The businesses listed by the SDA which offer paid BDL as part of an enterprise agreement comprise entirely of large retailers.⁴⁷ There is a glaring lack of evidence to demonstrate this proposal would not significantly impact on small businesses.
56. Small businesses are a critical class to consider in these proceedings as these businesses make up a substantial proportion of businesses in South Australia, and Australia more generally. These businesses are much more likely to be covered by a modern award than an enterprise agreement. Evidence that large employers have entered into enterprise agreements which provide BDL does not demonstrate that such leave entitlements, if transplanted into modern awards, will not negatively impact small businesses.
57. The following discussion takes place on the basis that a small business employer is one that employs at least 1 employee, but fewer than 20 employees. The following statistics are all sourced from the Australian Bureau of Statistics.⁴⁸
58. Consider food and liquor retail businesses operating in the following ANZSIC industries: supermarket and grocery stores; fresh meat, fish and poultry retailing; fruit and vegetable retailing; liquor retailing; and other specialised food retailing. As at June end 2016, of all South Australian businesses in those industries with at least one employee, 87% had fewer than 20 employees. 87% of that class of businesses were small businesses. Considered nationally, 91% of employers within these ANZSIC industries are small businesses.
59. Consider also hardware and garden supplies retailers operating under ANZSIC code 4231 and 4232. As at June end 2016, of all South Australian businesses in these sectors employing at least one person, 94% of these businesses were small businesses. Considered nationally, 94% of employers operating under these ANZSIC codes are small businesses.
60. A similar proportion is reached in general clothing and accessories retailers. Consider the following ANZSIC industries: clothing retailing; footwear retailing; watch and jewellery retailing; and other personal accessory retailing. At end of June 2016, of South Australian businesses who employ at least one person in these industries, 96% of the businesses employed fewer than 20 people; they were small businesses. Considered nationally, 94% of employers within these ANZSIC industries are small businesses.
61. The gulf between large employers and small employers in the hair and beauty services ANZSIC industry sector is significant. At the same time as above, 99% of South Australian businesses in this industry were small businesses. The actual figures were as follows: 1063 of these businesses employed between 1 and 19 people, only 9 businesses employed 20 people or more. On a national scale the gulf barely decreases, 98% of employers within the hair and beauty services industry are small businesses.
62. Business SA does not intend to continue demonstrating the vast difference between the number of large employers and the number of small employers within all industries affected by the SDA's proposal. As the

⁴⁷ SDA Submission [36]-[37].

⁴⁸ Australian Bureau of Statistics, '8165.0 – Counts of Australian Businesses, including Entries and Exits, Jun 2012 to Jun 2016', published 21 February 2017
<<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/8165.0Jun%202012%20to%20Jun%202016?OpenDocument>>.

initiating party, the SDA must establish, beyond simply saying it will be so, that the impact of their proposed change on small business will be 'negligible.'⁴⁹

63. Business SA submits the change proposed by the SDA will significantly and severely impact small business employers. This additional leave entitlement would require an employer to pay an employee for time where the employee is absent and not able to contribute to the operation of the small business. This absence could significantly decrease the capacity of the business to offer its goods or services. Where the business is larger, has greater financial resources, and is more able to adapt to employee absences, this additional leave may be more easily incorporated. This proposition is strongly supported by the SDA's application as many such businesses have already agreed to paid blood donor leave entitlements in their applicable enterprise agreement. The same cannot be presumed for small businesses with fewer resources.
64. The above scenario can be demonstrated by way of example. This example presumes the SDA's proposed variation has been accepted and incorporated into the nominated modern awards. In this example there are two retailers. Retailer A is a suburban supermarket with 21 staff on site during the day. Retailer B is a toy store in a shopping precinct. This store has three staff on during the day. For the purposes of this example the employment relationship between the employees and their respective employer is covered by the *General Retail Industry Award 2010*; an award subject to the SDA's proposed variation.
65. Where an employee utilises their BDL entitlement there will be a significantly different decrease in total capacity between Retailer A and Retailer B. If one of Retailer A's 21 employees leaves the workplace to donate blood this will leave 20 employees on site. The capacity of Retailer A to serve customers through its employees has only decreased by 4.76% in this situation. If one of Retailer B's three employees leaves the workplace to donate blood this will leave two employees on site. The capacity of Retailer B to serve its customers through its employees has decreased by 33%.
66. As demonstrated above, the SDA's proposed variation will impose a significantly higher cost on small businesses than on larger businesses already providing BDL through an enterprise agreement. A decrease in total capacity by one third will have a substantial impact on the workload of the remaining employees and the ability of consumers to access the goods and services they desire.
67. The SDA has not properly considered the impact of their application on small businesses. The SDA claims in their submission that "The Cost and burden of paid BDL on any size business is negligible."⁵⁰ They claim further that "regardless of the size of the business, paid BDL proposed is an entitlement that is sustainable for any business..."⁵¹ and that paid BDL has a "negligible cost on business."⁵² The above example clearly demonstrates this is untrue.
68. Paid BDL would have a substantial impact on small business. The SDA's claim that paid BDL is common feature of agreements in the retail sector is not evidence that small businesses would not be adversely affected. As previously noted, the agreements cited by the SDA were negotiated with major employers and large companies. These companies have resources far beyond that available to the small corner store or

⁴⁹ SDA Submission [39].

⁵⁰ Ibid [39].

⁵¹ Ibid [41].

⁵² Ibid [82].

local florist. It would be wholly inappropriate to impose 33% capacity reductions on these small businesses because PDL was transplanted from major enterprise awards into the one-size-fits-all modern award.

69. In Business SA's experience employers are generally empathetic, practical and pragmatic when faced with requests for blood donor leave. The imposition of a one-size-fits-all form of leave does not consider the effect enforcing such leave can have on smaller businesses where rostering and staff numbers are considerably less. Not all businesses have the financial capacity to provide their employees with an additional leave entitlement. This is particularly true of small businesses.
70. Business SA submits the best way to incorporate paid blood donor leave into the workplace is through enterprise bargaining, as is currently the case. This will allow businesses, including small businesses, to negotiate terms and entitlements which are properly aligned and applicable within their business. Employees not covered by such an agreement remain able to approach their employer directly and discuss blood donation on a case by case basis. Mandating such entitlements through an award will disproportionately and severely impact small businesses.

Response to witness statements

71. Business SA has concerns regarding the witness statements relied upon by the SDA. The witness statements suggest the deponent is not able to donate blood because of their employment, or is only able to donate blood because of an entitlement to paid blood donor leave in their enterprise agreement.
72. From the outset, Business SA notes considerable gaps in the SDA's witness evidence. Fourteen witness statements have been supplied. All fourteen witnesses work in the retail industry and are covered by the *General Retail Industry Award 2010* ('Retail Award') (or an enterprise agreement). No witness evidence of persons covered by the *Fast Food Industry Award 2010*, the *Pharmacy Award 2010* or the *Hair and Beauty Industry Award 2010* has been provided. Of the 14 witness statements, only 4 are provided by persons employed under the *Retail Award*, the remainder are employed under an enterprise agreement. Business SA submits no probative evidence has been provided to justify a variation to the non-retail awards, and that insufficient evidence has been provided to justify a variation to the *Retail Award*.
73. Business SA submits that the witness statements provided demonstrate two things. Firstly, each witness has a blood donation clinic near their place of residence or place of work which (at time of writing) is accessible outside of the witness' work hours. This demonstrates that the witness' employment does not preclude them from donating blood. Secondly, where a witness' applicable enterprise agreement provides paid blood donor leave this demonstrates the proper mechanism by which this entitlement should be provided in the workplace. Such an entitlement is an appropriate enterprise bargaining item as it can be negotiated to fit within the business' individual characteristics, staff levels and operational requirements. It is wholly inappropriate for a modern award to apply a 'one size fits all' approach. As previously noted such an approach will significantly impact small businesses or those with limited staff and specific operational requirements. Related to this point, Business SA notes that witness' provided with a paid blood donor entitlement would still be able to donate blood outside of work hours even if their applicable agreement did not provide this leave entitlement.
74. There are a number of blood donor centres across Australia, with witnesses residing or working within varying distances of these centres. Blood donation centres are also generally accommodating with their

operating hours. This accommodation can include operation outside or beyond standard business hours and operating for periods over weekends. These varied hours of operation allow a wide range of persons to find time within their personal schedule to donate blood.

75. The witnesses put forward by the SDA work a variety of hours and days. Some work typical Monday to Friday hours and a significant number of the witnesses do not work full time. It is Business SA's strong view that most, indeed if not all, of the witnesses put forward by the SDA are able to donate blood outside of their work hours. Business SA submits that in the great majority of statements, all that appears to prevent these witnesses making time to provide life-saving donations is personal choice not to vary their personal routine a mere four times a year.
76. As previously noted, Business SA has been provided with unredacted copies of the SDA's submission and witness statements. Business SA appreciates the purpose of redacting the personal details of the deponent witnesses. The following discussion does not identify the deponent beyond their state of residence and nearest blood donation centre. Each witness is referred to according to the number of their affidavit.

Witness 10A

77. Business SA submits Witness 10A's employment does not preclude him from donating blood.
78. This witness lives and works in Victoria. He works on a 4 day/6 day roster. As part of his two-weekly roster cycle he begins work at 12pm every second Friday. We further note this witness does not work on Wednesday in either week of his roster cycle.
79. Business SA submits Witness 10A is able to donate blood before work on the second Friday in his roster cycle. The witness does not start work until 12pm. Business SA notes an Australian Red Cross Blood Service centre operates at Level 1, 367 Collins Street Melbourne. This donation centre has generous operating hours, relevantly operating between 07:00 and 18:00 on Fridays.⁵³ This donation centre is a mere 10 minutes' walk from the witness' place of work. Attending the donation centre before work would not require the witness to alter his roster or make special arrangements.
80. In the alternative, Business SA submits Witness 10A is able to donate blood on Wednesdays. Business SA notes an Australian Red Cross Blood Service centre operates approximately 30 to 40 minutes' drive from Witness 10A's place of residence. This centre operates between 07:30 and 15:00 on Wednesdays.⁵⁴ This is an ample window for the witness to donate blood, up to four times a year, on his weekly non-working day.
81. This witness has multiple means by which he can donate blood. Such means would require no more than a simple alteration of routine on up to four occasions per year. Witness 10A's employment does not preclude him from donating blood.

⁵³ <http://www.donateblood.com.au/blood-donor-centre/melbourne-cbd-blood-donor-centre>.

⁵⁴ <http://www.donateblood.com.au/blood-donor-centre/airport-west-donor-centre>.

82. Business SA submits the evidence of Witness 10A, both in isolation and in conjunction with the other witness statements, is not probative and does not support the SDA's proposed variation.

Witness 10B

83. Business SA submits Witness 10B's employment does not preclude him from donating blood.
84. This witness lives and works in Victoria, with shifts Monday through Friday. The witness does not work on weekends. The witness trains for and plays cricket on weekends during the cricket season.
85. Business SA submits Witness 10B is able to donate blood after work on Mondays, Tuesdays and Wednesdays. Business SA notes there is an Australian Red Cross Blood Service centre located less than 10 minutes' walk from Witness 10B's place of work. This centre closes at 19:30 on Mondays, Tuesdays and Wednesdays.⁵⁵ Witness 10B's affidavit demonstrates he finishes work before 18:00 on these days; in one case over two hours before this time.
86. Business SA further notes that Witness 10B resides approximately 10-15 minutes' drive from the nearest donation centre.
87. The witness works less than 10 minutes' walk from a donation centre. At least three times a week the witness finishes work with more than an hour and a half to spare before the nearby donation centre closes. During the cricket 'off-season' he does not train or play on weekends. The witness has the ability to undertake a longer drive to attend donation centres open on weekends, either during the 'off-season' or by foregoing cricket for a few hours.⁵⁶ Business SA submits his employment does not preclude him from donating blood.
88. Business SA submits the evidence of Witness 10B, both in isolation and in conjunction with the other witness statements, is not probative and does not support the SDA's proposed variation.

Witness 10C

89. Business SA submits Witness 10C's employment does not preclude her from donating blood.
90. This witness works and resides in Victoria. This witness works full time, Monday through Friday. We note the witness finishes work at 13:30 on Fridays.
91. Business SA notes at least two donation centres Witness 10C could visit outside of her working hours. The first is a mobile site which operates between 08:30 and 15:30 on Friday 4 August.⁵⁷ This mobile centre is approximately 14 minutes' drive from Witness 10C's place of work. The second is a permanent donation

⁵⁵ <http://www.donateblood.com.au/blood-donor-centre/shepparton-donor-centre>.

⁵⁶ <http://www.donateblood.com.au/blood-donor-centre/echuca-mobile-donor-centre>; <http://www.donateblood.com.au/blood-donor-centre/bendigo-donor-centre>.

⁵⁷ <http://www.donateblood.com.au/blood-donor-centre/narre-warren-north-mobile-donor-centre>.

centre which operates between 08:00 and 15:30 on Saturdays.⁵⁸

92. Business SA submits Witness 10C is able to donate blood after finishing work on Friday. Witness 10C states in her affidavit at [12] that, though she finishes work early on Fridays, she is unable to donate blood because she needs to run errands and do grocery shopping. Business SA submits 'errands and groceries' can equally be carried out on weekends or on other days of the week, either by the witness or her husband (who also works full-time but does not work on weekends per [6] of Witness 10C's affidavit). Witness 10C finishes work at 13:30 on Friday, the mobile donation site is approximately 14 minutes' drive from Witness 10C's place of work.
93. In the alternative, Business SA submits Witness 10C is able to donate blood on Saturdays. The second donation centre is approximately 35-39 minutes' drive from her place of residence. Witness 10C does not work on weekends and neither does her husband. Business SA submits Witness 10C's husband is able to care for the children while Witness 10C donates blood.
94. Business SA submits Witness 10C's employment does not preclude her from donating blood. Her current routine provides time to donate blood outside work hours and even more time could be found with minor, occasional adjustments to Witness 10C's routine.
95. Business SA submits the evidence of Witness 10C, both in isolation and in conjunction with the other witness statements, is not probative and does not support the SDA's proposed variation.

Witness 10E

96. Business SA submits the evidence of Witness 10E does not support the SDA's proposed variation.
97. Witness 10E lives and works in Queensland. Witness 10E works part-time. Witness 10E's employment terms and conditions are covered by an Agreement which provides paid blood donor leave. Business SA notes Witness 10E does not work on Fridays.
98. Business SA strongly submits that the fact that Witness 10E is employed under an Agreement which provides paid blood donor leave demonstrates that the SDA's proposed variation is inappropriate for a minimum safety net award. The appropriate vehicle for such an entitlement is an enterprise agreement.
99. Business SA submits that even if the enterprise agreement applying to Witness 10E did not provide paid blood donor leave, Witness 10E's employment does not preclude her from donating blood.
100. As noted in the SDA's submission the closest donation centres to Witness 10E's place of residence are mobile centres with varying hours and days of operation. For the purpose of this analysis Business SA will consider the operating hours of the three closest to her place of residence at the time of writing.

⁵⁸ <http://www.donateblood.com.au/blood-donor-centre/frankston-donor-centre>.

101. The closest mobile donation sites operate are approximately 5 minutes,⁵⁹ approximately 8 minutes⁶⁰ and approximately 10 minutes' drive from Witness 10E's place of residence.⁶¹ All of these sites operate on Fridays, and two also operate on Saturdays.
102. Business SA submits that Witness 10E is easily able to donate blood on Friday, her non-working day. The three potential sites nominated above are all within approximately 10 minutes' drive from her place of residence.
103. Business SA notes Witness 10E's affidavit states she could not donate blood without her Agreement entitlement because, inter alia, she undertakes household maintenance and likes to participate in fitness classes for her own health. We submit these are not compelling obstacles, particularly given the ease with which she could donate on her non-working day. Business SA submits it is not difficult to conclude that Witness 10E could undertake household maintenance or a fitness class at a different time on up to four occasions per year for the purpose of donating blood.
104. Business SA submits the evidence of Witness 10E, both in isolation and in conjunction with the other witness statements, is not probative and does not support the SDA's proposed variation.

Witness 10F

105. Business SA submits the evidence of Witness 10F does not support the SDA's proposed variation.
106. Witness 10F works and resides in Victoria. She works part-time, working 28 hours per week. Witness 10F's terms and conditions of employment are covered by an enterprise agreement which provides paid blood donor leave. Witness 10F does not work on Tuesdays.
107. Business SA strongly submits that the fact that Witness 10F is employed under an Agreement which provides paid blood donor leave demonstrates that the SDA's proposed variation is inappropriate for a minimum safety net award. The appropriate vehicle for such an entitlement is an enterprise agreement.
108. Business SA submits that even if the enterprise agreement applying to Witness 10F did not provide paid blood donor leave, Witness 10F's employment does not preclude her from donating blood.
109. The closest Australian Red Cross Blood Service mobile donation centre to Witness 10F's place of residence is approximately 34 minutes' drive away. This mobile donation centre operates between 11:30 and 18:00 on Tuesdays.⁶²
110. Business SA submits Witness 10F is able to donate blood on Tuesdays. Witness 10F does not work on Tuesdays. Business SA submits it is difficult to conclude that Witness 10F is not able to fit a blood donation into her weekly non-working day on up to four occasions per year.

⁵⁹ <http://www.donateblood.com.au/blood-donor-centre/alexandra-hills-mobile-donor-centre>.

⁶⁰ <http://www.donateblood.com.au/blood-donor-centre/capalaba-mobile-donor-centre>.

⁶¹ <http://www.donateblood.com.au/blood-donor-centre/cleveland-mobile-donor-centre>.

⁶² <http://www.donateblood.com.au/blood-donor-centre/wonthaggi-mobile-donor-centre>.

111. Business SA submits the evidence of Witness 10F, both in isolation and in conjunction with the other witness statements, is not probative and does not support the SDA's proposed variation.

Witness 10G

112. Business SA submits the evidence of Witness 10G does not support the SDA's proposed variation.

113. Witness 10G lives and resides South Australia. She works full-time. The terms and conditions of Witness 10G's employment are covered by an enterprise agreement which provides paid blood donor leave. Business SA notes Thursday and Saturday are her non-working days.

114. Business SA strongly submits that the fact that Witness 10G is employed under an Agreement which provides paid blood donor leave demonstrates that the SDA's proposed variation is inappropriate for a minimum safety net award. The appropriate vehicle for such an entitlement is an enterprise agreement.

115. Business SA submits that even if the enterprise agreement applying to Witness 10G did not provide paid blood donor leave, Witness 10G's employment does not preclude her from donating blood.

116. The closest Australian Red Cross Blood Service donation centre to Witness 10G's place of residence approximately 7 minutes' drive from Witness 10G's place of residence. This mobile donation centre operates on Thursdays between 11:00 and 18:30.⁶³ Witness 10G's affidavit states this mobile blood donation centre visits regularly.

117. Business SA submits Witness 10G is able to donate blood on Thursday, one of her two non-working days each week. Given the extremely short drive between the mobile blood donation centre and Witness 10G's place of residence it is difficult to see how Witness 10G could not find time, on up to four occasions per year, on one of her two non-working days each week, to donate blood.

118. Business SA submits the evidence of Witness 10G, both in isolation and in conjunction with the other witness statements, is not probative and does not support the SDA's proposed variation.

Witness 10H

119. Business SA submits the evidence of Witness 10H does not support the SDA's proposed variation.

120. Witness 10H lives and resides in Queensland. Witness 10H works full-time, starting work in the afternoon on Tuesday and Wednesday. The terms and conditions of Witness 10H's employment are covered by an enterprise agreement. This enterprise agreement provides paid blood donor leave entitlements. Friday and Saturday are his non-working days.

121. Business SA strongly submits that the fact that Witness 10H is employed under an enterprise agreement which provides paid blood donor leave demonstrates that the SDA's proposed variation is inappropriate for

⁶³ <http://www.donateblood.com.au/blood-donor-centre/mount-barker-mobile-donor-centre>.

a minimum safety net award. The appropriate vehicle for such an entitlement is an enterprise agreement.

122. Business SA submits that even if the enterprise agreement applying to Witness 10H did not provide paid blood donor leave, Witness 10H's employment does not preclude him from donating blood.

123. The closest mobile donation centre to Witness 10H's place of residence is the Australian Red Cross Blood Service mobile donation centre located approximately 12-15 minutes' drive from Witness 10H's place of residence. This mobile donation centre operates on a Friday in August between 08:00 and 14:00.⁶⁴

124. Business SA further notes the closest permanent donation centre to Witness 10H's place of residence is approximately half an hour's drive from Witness 10H's place of residence. This donation centre operates every day of the week excluding Sunday. Relevantly, it operates between 07:00 and 15:00 on Fridays and between 08:00 and 14:30 on Saturdays.⁶⁵

125. Business SA submits Witness 10H is easily able to donate blood, on up to four occasions per year, on one of his two non-working days per week. The mobile donor centre is less than 20 minutes' drive from his place of residence. Witness 10H's affidavit at [16] expresses his opinion that blood donation would 'drop out of [his] priorities' if his employer did not make donations easy. Business SA submits this is not compelling evidence, particularly given the extreme proximity of the mobile donor centre and its hours of operation on one of Witness 10H's non-working days.

126. It is not appropriate to impose additional paid leave entitlements on employers beyond minimum safety net entitlements currently provided by the NES and the award. Employers should not be responsible for how employees choose to prioritise activities in their personal time. Employees, such as Witness 10H, are responsible for how they choose to prioritise their personal time.

127. Business SA submits the evidence of Witness 10I, both in isolation and in conjunction with the other witness statements, is not probative and does not support the SDA's proposed variation.

Witness 10I

128. Business SA submits the evidence of Witness 10I does not support the SDA's proposed variation.

129. Witness 10I works and resides in New South Wales. She is employed part-time. The terms and conditions of Witness 10I's employment are covered by an enterprise agreement. This enterprise agreement contains provisions for paid blood donor leave. Witness 10I does not work on Mondays or Tuesdays.

130. Business SA strongly submits that the fact that Witness 10I is employed under an enterprise agreement which provides paid blood donor leave demonstrates that the SDA's proposed variation is inappropriate for a minimum safety net award. The appropriate vehicle for such an entitlement is an enterprise agreement.

⁶⁴ <http://www.donateblood.com.au/blood-donor-centre/oxenford-mobile-donor-centre>.

⁶⁵ <http://www.donateblood.com.au/blood-donor-centre/southport-donor-centre>.

131. Business SA submits that even if the enterprise agreement applying to Witness 10I did not provide paid blood donor leave, Witness 10I's employment does not preclude her from donating blood.
132. The closest Australian Red Cross Blood Service mobile donation centres are approximately 11 minutes' drive and 14 minutes' drive from Witness 10I's place of residence. The first centre operates between 09:30 and 15:00 on a Monday⁶⁶ and the second operates between 12:30 and 18:00 on a Tuesday.⁶⁷
133. The closest permanent Australian Red Cross Blood Service donation centre is approximately 30 minutes' drive from Witness 10I's place of residence. This centre operates between 12:00 and 20:00 on Mondays and Tuesdays.⁶⁸
134. Business SA submits witness 10I is easily able to donate blood, on up to four occasions per year, on one of her two non-working days per week. The closest permanent donation centre is approximately 30 minutes' drive from Witness 10I's place of residence. This centre operates on both of her non-working days. It is difficult to conclude that Witness 10I could not make time, up to four times a year, to donate blood; an activity she herself, per [15] of her affidavit, considers a worthwhile community service and beneficial to her own health.
135. Business SA notes paragraph [19] of Witness 10I's affidavit where she states it would be difficult to schedule blood donation when she already has so much to do. Business SA submits this is not evidence which demonstrates her employment (absent an entitlement to paid blood donor leave) precludes her from donating blood.
136. Business SA submits the evidence of Witness 10I, both in isolation and in conjunction with the other witness statements, is not probative and does not support the SDA's proposed variation.

Witness 10J

137. Business SA submits the evidence of Witness 10J does not support the SDA's proposed variation.
138. Witness 10J works and resides in Victoria. He is employed full-time. The terms and conditions of Witness 10J's employment are covered by an enterprise agreement. This enterprise agreement contains provisions for paid blood donor leave. Fridays and Saturdays are Witness 10J's weekly non-working days.
139. Business SA strongly submits that the fact that Witness 10J is employed under an enterprise agreement which provides paid blood donor leave demonstrates that the SDA's proposed variation is inappropriate for a minimum safety net award. The appropriate vehicle for such an entitlement is an enterprise agreement.
140. Business SA submits that even if the enterprise agreement applying to Witness 10J did not provide paid blood donor leave, Witness 10J's employment does not preclude him from donating blood.

⁶⁶ <http://www.donateblood.com.au/blood-donor-centre/tuggerah-mobile-donor-centre-zenith-business-centre>.

⁶⁷ <http://www.donateblood.com.au/blood-donor-centre/lake-haven-mobile-donor-centre-shopping-centre>.

⁶⁸ <http://www.donateblood.com.au/blood-donor-centre/gosford-donor-centre>.

141. The closest Australian Red Cross Blood Service mobile donation centre is approximately 9 minutes' drive from Witness 10J's place of residence. This mobile donation centre operates between 08:30 and 15:30 on Fridays;⁶⁹ one of Witness 10J's non-working days.
142. The closest Australian Red Cross Blood Service permanent centre is approximately 20-24 minutes' drive from Witness 10J's place of residence. This centre operates between 07:30 and 15:30 on Fridays and between 08:00 and 15:30 on Saturdays.⁷⁰ Both Friday and Saturday are non-working days for Witness 10J.
143. Business SA submits Witness 10J is easily able to donate blood, on up to four occasions per year, at one of the two donation centres within a half hour drive from his place of residence. Both centres operate for at least one of Witness 10J's two non-working days each week.
144. Business SA welcomes Witness 10J's acknowledgement at [20] that he would make an effort to donate regularly even if his employer did not provide a paid blood donor leave entitlement as part of his employment agreement.
145. Business SA submits the evidence of Witness 10I, both in isolation and in conjunction with the other witness statements, is not probative and does not support the SDA's proposed variation.

Witness 10L

146. Business SA submits the evidence of Witness 10L does not support the SDA's proposed variation.
147. Witness 10L lives and works in Queensland. He is employed full-time. The terms and conditions of his employment are covered by an enterprise agreement. This enterprise agreement provides paid blood donor leave. Business SA notes Witness 10L has multiple non-working days during his two week roster cycle. These days off are as follows:
- Week 1: Witness 10L does not work on Thursdays; and
 - Week 2: Witness 10L does not work on Tuesday, Saturday or Sunday.
148. Business SA strongly submits that the fact that Witness 10L is employed under an enterprise agreement which provides paid blood donor leave demonstrates that the SDA's proposed variation is inappropriate for a minimum safety net award. The appropriate vehicle for such an entitlement is an enterprise agreement.
149. Business SA submits that even if the enterprise agreement applying to Witness 10L did not provide paid blood donor leave, Witness 10L's employment does not preclude him from donating blood.
150. The closest Australian Red Cross Blood Service permanent donation centre is located approximately 8 minutes' drive from Witness 10L's place of residence. This centre operates every day of the week excluding Sunday.

⁶⁹ <http://www.donateblood.com.au/blood-donor-centre/cranbourne-mobile-donor-centre>.

⁷⁰ <http://www.donateblood.com.au/blood-donor-centre/frankston-donor-centre>.

151. Business SA submits Witness 10L is able to donate blood at this nearby blood donation centre on his day(s) off on up to four occasions per year. Witness 10L has at least one Tuesday, Thursday, Saturday and Sunday off work each fortnight. The donation centre operates between 12:00 and 19:30 on Tuesday, between 08:00 and 20:00 on Thursday and between 08:00 and 14:00 on Saturday.⁷¹
152. Business SA notes Witness 10L states at [17] that he has children under 18 who he spends time with. Business SA further notes that the blood donation centre hours of operation listed above include school hours. Business SA submits it is difficult to conclude that Witness 10L's employment, rather than his choice of how to spend personal time, precludes him from donating blood.
153. Business SA submits the evidence of Witness 10L, both in isolation and in conjunction with the other witness statements, is not probative and does not support the SDA's proposed variation.

Witness 10M

154. Witness 10M lives and works in Tasmania. She is employed full-time. The terms and conditions of her employment are covered by an enterprise agreement. This enterprise agreement provides paid blood donor leave. Witness 10M finishes work at 3pm on Thursdays.
155. Business SA strongly submits that the fact that Witness 10M is employed under an enterprise agreement which provides paid blood donor leave demonstrates that the SDA's proposed variation is inappropriate for a minimum safety net award. The appropriate vehicle for such an entitlement is an enterprise agreement.
156. Business SA submits that even if the enterprise agreement applying to Witness 10M did not provide paid blood donor leave, Witness 10M's employment does not preclude her from donating blood.
157. Business SA notes the closest permanent Australian Red Cross Blood Service donation centre is approximately 20 kilometres and 21-23 minutes' drive from Witness 10M's place of residence. This centre operates Monday through Friday. Of note, the centre operates until 18:30 on Thursdays.⁷² Business SA further notes Witness 10M's place of work is approximately 21-23 minutes' drive from this donation centre.
158. Business SA submits Witness 10M is able to donate blood on up to four occasions per year, after work on Thursday. Witness 10M finishes work at 15:00 on Thursdays and the blood donation centre is open until 18:30. Business SA notes Witness 10M states at [10] of her affidavit that it is easier for her to attend a blood donation centre on the way home from work.
159. Business SA submits Witness 10M's employment does not preclude her from donating blood. Witness 10M could easily donate blood should she make a minor adjustment to her non-working hours routine on up to four occasions per year.
160. Business SA submits the evidence of Witness 10M, both in isolation and in conjunction with the other witness statements, is not probative and does not support the SDA's proposed variation.

⁷¹ <http://www.donateblood.com.au/blood-donor-centre/toowoomba-donor-centre>.

⁷² <http://www.donateblood.com.au/blood-donor-centre/burnie-donor-centre>.

Witness 10N

161. Witness 10N lives and works in Queensland. Witness 10N is a part-time whose terms and conditions of employment are covered by an enterprise agreement. This enterprise agreement provides paid blood donor leave. Witness 10N also works a second job when she is not rostered to work at the above workplace. Business SA notes Witness 10N does not work on Saturdays and finishes work in the early-mid afternoon on Tuesday and Thursday.
162. Business SA strongly submits that the fact that Witness 10N is employed under an enterprise agreement which provides paid blood donor leave demonstrates that the SDA's proposed variation is inappropriate for a minimum safety net award. The appropriate vehicle for such an entitlement is an enterprise agreement.
163. Business SA submits that even if the enterprise agreement applying to Witness 10N did not provide paid blood donor leave, Witness 10N's employment does not preclude her from donating blood.
164. The closest Australian Red Cross Blood Service donation centre to Witness 10N's place of residence is approximately 23 minutes' drive away. This centre operates between 11:30 and 19:00 from Tuesday to Thursday, and also operates two Saturdays a month between 07:00 and 13:00.⁷³
165. Business SA submits that, on up to four occasions per year, Witness 10N is able to donate blood at the above centre during the above hours. The centre operates on both her non-working day, and also operates into the evening on the days where she finishes work in the early to mid afternoon.
166. Business SA notes [18] of Witness 10N's affidavit. This paragraph states Witness 10N would find it difficult to donate blood due to family and household responsibilities.
167. Business SA submits this strengthens our assertion that Witness 10N's employment does not preclude her from donating blood. It is for Witness 10N to decide when/how she wants to undertake household responsibilities. She has ample time outside work to donate blood on up to four occasions a year. It is not appropriate for a modern award to impose a requirement on the employer that they accommodate an employee's personal choices regarding how they spend their non-working time (Witness 10N's enterprise agreement blood donor leave entitlement notwithstanding).
168. On this basis Business SA submits the evidence of Witness 10N, both in isolation and in conjunction with the other witness statements, is not probative and does not support the SDA's proposed variation.

Conclusion

169. Business SA strongly submits the SDA has not established a compelling case which warrants a variation to the nominated modern awards. The standard of submissions and witness evidence they are expected to meet is well established and clearly sets out what arguments and evidence must be put forward when calling on the Commission to significantly vary a modern award.

⁷³ <http://www.donateblood.com.au/blood-donor-centre/nambour-donor-centre>.

170. Business SA submits the statutory framework does not support this application. Modern awards, by their legislative design, are to be minimum safety nets. This role as a minimum safety net is explicitly set out in the Act. The SDA's proposal does not accord with the modern awards objective. The paid blood donor leave proposed by the SDA is not an appropriate term to include in a minimum safety net modern award. This proposal goes beyond providing a safety net for the award-covered employee and instead ventures into the realm of enterprise agreements. An enterprise agreement is the appropriate vehicle for employers and employees to negotiate additional or more generous entitlements.
171. Business SA further submits the evidence relied upon by the SDA in support of their application does not meet the standard established by the Full Bench in the *Preliminary Jurisdiction Decision*.⁷⁴ The SDA's witness evidence does not demonstrate that, but for their employment, the witness would be able to donate blood. In fact, the witness evidence relied upon by the SDA demonstrates that where the witness does not donate blood, it is due to their choice of how to spend their non-working time. A number of witnesses live close to blood donation centres which operate outside of their personal working hours or on their non-working days. Business SA submits it is difficult to conclude that in most, if not all, examples the witness' employment precludes them from donating blood. The evidence of these witnesses is not probative and does not demonstrate facts which support the SDA's proposed variation.
172. Business SA further submits the witness evidence relied upon by the SDA demonstrates the appropriate mechanism for blood donor leave to be provided in Australian workplaces. Ten of the witnesses put forward by the SDA have blood donor leave entitlements as part of an enterprise agreement. As part of the bargaining process for these enterprise agreements, paid blood donor leave would have been a factor in negotiations. Business SA is not privy to the specific negotiations for these agreements. However, in each case the negotiation and decision making would have been made with specific reference to that business' individual staff levels and operational requirements. Modern awards are not business specific. Modern awards do not apply differently where one covered business has five employees and another covered business has fifty employees. The one size fits all approach of modern awards is incompatible with paid blood donor leave. As demonstrated by current practice, and reinforced by the witnesses put forward by the SDA themselves, the appropriate mechanism for paid blood donor leave to be provided is through an enterprise agreement.
173. Finally, as demonstrated above, Business SA submits this proposed change will significantly and severely impact small businesses. The evidence of current BDL entitlements provided by the SDA has not considered small businesses. Small businesses, especially in the industries covered by the relevant awards, make up the vast majority of employing businesses. Additional pressures should not be placed on these job providers.
174. In all of the circumstances Business SA submits the SDA's application should not be granted.

⁷⁴ [2014] FWCFB 1788, [23].