Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Reply Submission

Blood Donor Leave
(AM2016/36)

30 June 2017

4 YEARLY REVIEW OF MODERN AWARDS

AM2016/36 BLOOD DONOR LEAVE

1. INTRODUCTION

1. In the context of the 4 yearly review of modern awards (**Review**), the Shop, Distributive and Allied Employees' Association (**SDA**) is seeking the introduction of a new paid leave entitlement in five modern awards for the purposes of donating blood; those being:

    - The *General Retail Industry Award 2010* (**Retail Award**);
    - The *Fast Food Industry Award 2010* (**Fast Food Award**);
    - The *Hair and Beauty Industry Award 2010* (**Hair and Beauty Award**);
    - The *Pharmacy Industry Award 2010*; and
    - The *Mannequins and Models Award 2010*.

2. This reply submission is filed in accordance with the amended directions issued by the Fair Work Commission (**Commission**) on 24 April 2017.

3. The Australian Industry Group (**Ai Group**) has an interest in the Fast Food Award, the Hair and Beauty Award and the Retail Award (together, **the Awards**) and we strongly oppose the union's claim in relation to each.

4. Ai Group also appears for the Hair and Beauty Australia Industry Association (**HABA**) in these proceedings. We are instructed that HABA supports and adopts these submissions in relation to the Hair and Beauty Award.

2. THE STATUTORY FRAMEWORK

5. The SDA's claim is being pursued in the context of the Review, which is conducted by the Commission pursuant to s.156 of the *Fair Work Act 2009* (**FW Act** or **Act**).

6. In determining whether to exercise its power to vary a modern award, the Commission must be satisfied that the relevant award includes terms only to the extent necessary to achieve the modern awards objective (s.138).

7. The modern awards objective is set out at s.134(1) of the FW Act. It requires the Commission to ensure that modern awards, together with the National Employment Standards (**NES**), provide a fair and relevant minimum safety net of terms and conditions. In doing so, the Commission is to take into account a range of factors, listed at s.134(1)(a) – (h).

8. The modern awards objective applies to any exercise of the Commission's powers under Part 2-3 of the FW Act, which includes s.156.

9. We later address each element of the modern awards objective with reference to the SDA's claim for the purposes of establishing that, having regard to s.138 of the FW Act, the claim should not be granted.

3. THE COMMISSION'S GENERAL APPROACH TO THE REVIEW

3.1 The Preliminary Jurisdictional Issues Decision

10. At the commencement of the Review, a Full Bench dealt with various preliminary issues. The Commission's Preliminary Jurisdictional Issues Decision[1] provides the framework within which the Review is to proceed.

11. The Full Bench emphasised the need for a party to mount a merit based case in support of its claim, accompanied by probative evidence (emphasis added):

> **[23]** The Commission is obliged to 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 (s.134(1)(g)). 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.[2]

12. The Commission indicated that the Review will proceed on the basis that the relevant modern award achieved the modern awards objective at the time that it was made (emphasis added):

> **[24]** In conducting the Review the Commission will also have regard to the historical context applicable to each modern award. Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Part 10A of the Workplace Relations Act 1996 (Cth) were deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Act). Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective. The considerations specified in the legislative test applied by the AIRC in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective in s.134 of the FW Act. In the

[1] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788.

[2] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [23].

Review the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.[3]

13. The decision confirms that the Commission should generally follow previous Full Bench decisions that are relevant to a contested issue unless there are cogent reasons for not doing so: (emphasis added)

> **[25]** Although the Commission is not bound by principles of stare decisis it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in Nguyen v Nguyen:
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> > "When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see Queensland v The Commonwealth (1977) 139 CLR 585 per Aickin J at 620 et seq."
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> **[26]** While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the Commission. As a Full Bench of the Australian Industrial Relations Commission observed in Cetin v Ripon Pty Ltd (T/as Parkview Hotel) (Cetin):
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> > "Although the Commission is not, as a non-judicial body, bound by principles of stare decisis, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so."
>
> **[27]** These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.[4]

14. In addressing the modern awards objective, the Commission recognised that each of the matters identified at s.134(1)(a) – (h) are to be treated "as a matter of significance"[5] and that "no particular primacy is attached to any of the s.134 considerations"[6]. The Commission identified its task as needing to "balance

[3] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24].

[4] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24] – [27].

[5] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [31].

[6] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [32].

the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net"[7]: (emphasis added)

> **[36]** … Relevantly, s.138 provides that such terms only be included in a modern award 'to the extent necessary to achieve the modern awards objective'. To comply with s.138 the formulation of terms which must be included in modern award or terms which are permitted to be included in modern awards must be in terms 'necessary to achieve the modern awards objective'. What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations. In the Review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective.[8]

15. The frequently cited passage from Justice Tracey's decision in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* was adopted by the Full Bench. It was thus accepted 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.[9]

16. Accordingly, the Preliminary Jurisdictional Issues Decision establishes the following key threshold principles:

- A proposal to significantly vary a modern award must be accompanied by submissions addressing the relevant statutory requirements and probative evidence demonstrating any factual propositions advanced in support of the claim;
- The Commission will proceed on the basis that a modern award achieved the modern awards objective at the time that it was made;
- An award must only include terms to the extent necessary to achieve the modern awards objective. A variation sought must not be one that is merely desirable; and

[7] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [33].

[8] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [36].

[9] *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 at [46].

- Each of the matters identified under s.134(1) are to be treated as a matter of significance and no particular primacy is attached to any of the considerations arising from it.

17. In a subsequent decision considering multiple claims made to vary the *Security Services Industry Award 2010*, the Commission made the following comments, which we respectfully commend to the Full Bench (emphasis added):

> **[8]** While this may be the first opportunity to seek significant changes to the terms of modern awards, a substantive case for change is nevertheless required. The more significant the change, in terms of impact or a lengthy history of particular award provisions, the more detailed the case must be. Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes. Such evidence should be combined with sound and balanced reasoning supporting a change. Ultimately the Commission must assess the evidence and submissions against the statutory tests set out above, principally whether the award provides a fair and relevant minimum safety net of terms and conditions and whether the proposed variations are necessary to achieve the modern awards objective. These tests encompass many traditional merit considerations regarding proposed award variations.[10]

18. The SDA's claim conflicts with the principles in the Preliminary Jurisdictional Issues Decision. Further, it has not discharged the evidentiary burden described in the above decision. Accordingly, its claim should be rejected.

3.2 Considerations Associated with Procedural Fairness

19. We are of course mindful of the nature of the Review and the Commission's repeated observation that it is not bound by the terms of a proponent's claim. It is relevant to note, however, that a respondent party at this stage of the proceedings can deal only with that which has been put before us. That is, these submissions only relate to the variations sought and the material filed by the SDA in support of them. It is not incumbent upon us to provide a response (or a hypothetical response) to any potential derivative of the clause

[10] *Re Security Services Industry Award 2010* [2015] FWCFB 620 at [8].

sought. Such an approach would render the task here before us virtually impossible to undertake, particularly within the timeframes imposed upon us by the Commission and the resource constraints we face due to the conduct of the Review generally.

20. Should the SDA or the Commission, during these proceedings, propose that the Awards be varied in terms that differ to those which have been proposed as at the time of drafting these submissions, notions of fairness dictate that respondent parties such as Ai Group be afforded an opportunity to address the Full Bench in relation to whether such a course of action should be permitted or taken in the context of these proceedings. If such a course is to be adopted, there should also be a further opportunity to make submissions and/or call evidence in response to any such new proposal. Absent such a process, it may be argued that procedural fairness has not been afforded to those who oppose the claim because, for instance, such parties have not been granted a chance to be properly heard in relation to the variations ultimately sought to be made, which may well have implications that have not otherwise been put before the Full Bench.

4. THE SDA'S CASE

21. The gravamen of the SDA's case can be summarised as follows:

- The claim addresses "matters of social importance and promotes an essential benefit to the community".[11]

- Blood donor leave was "a common feature in old State Awards across Victoria, South Australia, New South Wales and to a limited extent in Queensland which were predecessors" to the Awards.[12]

- The entitlement sought is a "fair work place (sic) entitlement that can be accommodated by any size business. The cost and burden of paid [blood donor leave] on any size business is negligible."[13] This is in part because the SDA anticipates a "considerably low" "take up" rate.[14]

- Employees covered by the Retail Award and Fast Food Award are low paid.[15] The absence of the entitlement sought can adversely impact upon their level of income. In such cases, "the donor will most likely not donate if not for the provision of [blood donor leave]."[16]

- The proposed entitlement will improve social inclusion and workforce participation.[17]

- The variations sought are necessary to achieve the modern awards objective.[18]

22. In the submissions that follow, we address each of the above propositions.

[11] SDA submission dated 2 May 2017 at paragraph 23.
[12] SDA submission dated 2 May 2017 at paragraph 24.
[13] SDA submission dated 2 May 2017 at paragraph 39.
[14] SDA submission dated 2 May 2017 at paragraph 74.
[15] SDA submission dated 2 May 2017 at paragraph 46.
[16] SDA submission dated 2 May 2017 at paragraph 53.
[17] SDA submission dated 2 May 2017 at paragraphs 57 – 63.
[18] SDA submission dated 2 May 2017 at paragraph 86.

5. Ai GROUP'S CASE

23. Ai Group's case is developed in the several chapters of this submission that follow. It can be summarised as follows.

24. **Firstly,** the entitlement sought is for a purpose that is not 'necessary', in the true sense of the word. It is for the purposes of enabling an employee to engage in activity that an employee is not compelled or required to participate in; nor is it one that must or can only be undertaken during working hours.

25. **Secondly,** the modern awards objectively is not concerned with advancing social causes or enhancing the entitlements of employees engaged in such causes. We also note that in this case, the Australian Red Cross Blood Service (**Red Cross**), which is responsible for operating a number of donor centres across Australia and running campaigns to encourage members of society to donate, has recently reported that during 2015 – 2016:

- It received an oversupply of donated blood[19]; and
- It achieved a significant operational surplus[20], suggesting it has adequate resources to direct towards operating additional donor centres, extending the opening hours of donor centres and/or increasing the scope of its campaigns.

26. **Thirdly,** the grant of the claim would result in increased (direct and indirect) costs for employers and operational difficulties.

27. **Fourthly,** the SDA has not identified any cogent reason for which the Full Bench should depart from the approach generally taken by the Commission and its predecessors, which is to refrain from supplementing the NES by including new forms of leave in modern awards.

[19] Australian Red Cross Blood Service 2015-16 Annual Report at page 17.

[20] Australian Red Cross Blood Service 2015-16 Annual Report at page 73.

28. **Fifthly,** the SDA's claim is not supported by any relevant historical considerations. This includes prior arbitral support for the inclusion of a blood donor leave entitlement in the minimum safety net or even the inclusion of such a clause in a pre-dominant number of the relevant pre-modern instruments.

29. **Sixthly,** it is appropriate that matters such as additional forms of leave be left to enterprise bargaining.

30. **Seventhly,** the evidentiary case mounted by the union falls well short of establishing the various factual propositions that would be necessary in order to enable the Commission to conclude that the proposed clause is necessary in the sense contemplated by s.138 of the Act.

31. **Eighthly,** for all of these reasons and those stated in the submissions that follow, the proposed clause is not *necessary* to ensure that the Awards provide a fair and relevant minimum safety net.

6. THE VARIATIONS SOUGHT BY THE SDA

32. The SDA is seeking the insertion of the following new clause in each of the Awards:

> **X. Blood donor leave**
>
> **X.1** A permanent employee shall be entitled to up to 2 ordinary hours paid Blood Donor Leave, without deduction of pay, on a maximum of four occasions per year for the purposes of donating blood.
>
> **X.2** The employee shall notify his or her Employer as soon as possible of the time and date upon which he or she is requesting to be absent for the purpose of donating blood.
>
> **X.3** The employee shall arrange for his or her absence to be on a day suitable to the employer and be as close as possible to the beginning or ending of his or her ordinary working hours.
>
> **X.4** Proof of 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.

33. Before turning to deal with the merits (or rather, the lack thereof) of the SDA's case generally, we here propose to deal with specific elements of the provision proposed by the union. These submissions should not be read as limiting the scope of our opposition to the union's claim to any one or more element of it. Their purpose is instead to highlight various aspects of the clause sought that are particularly problematic which, together with the submissions that follow, should lead the Commission to conclude that the SDA's claim in its totality must be dismissed.

Clause X.1 – the proposed provision of the entitlement to part-time employees

34. Clause X.1 is expressed to apply to "permanent employees", which we understand to include full-time and part-time employees.

35. Whilst Ai Group opposes the grant of the claim in respect of any award-covered employee, the grant of the proposed entitlement to part-time employees is in our view particularly unjustifiable.

36. Each of the Awards define a part-time employee as one who works less than 38 hours per week.[21] A part-time employee necessarily works fewer ordinary hours per week than a full-time employee. The ability of a part-time employee to accommodate blood donation outside of working hours is therefore even greater than what may be the case for a full-time employee.

37. The recent Commission decision regarding various claims to reduce penalty rates (**Penalty Rates Decision**) in the retail and hospitality industries cites data from the 2011 ABS Census, which is here apposite. It provides an impression of the extent to which employees covered by the Fast Food Award work part-time (defined by the ABS as working less than 35 hours a week on a permanent or casual basis) and the number of hours in fact worked by all employees in the 'takeaway food services' industry:[22]

Labour force characteristics of the Takeaway food services industry class, ABS Census 9 August 2011

	Number	Percentage
Full-time / part-time status		
Full-time	33 484	20.3
Part-time	131 539	79.7
Total	165 023	100
Hours worked		
1 – 15 hours	81 900	49.6
16 – 24 hours	30 005	18.2
25 – 34 hours	19 636	11.9
35 – 39 hours	14 017	8.5
40 hours	9514	5.8
41 – 48 hours	4671	2.8
49 hours and over	5283	3.2
Total	165 026	100

38. As can be seen from the shaded cells, only one-fifth of employees work 35 or more hours per week. The very vast majority of employees work less than 35 hours, of which the biggest proportion work 15 hours or less. The data

[21] Clause 12.1(a) of the Fast Food Award, clause 12.1(a) of the Hair and Beauty Award and clause 12.1(a) of the Retail Award.

[22] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [1161].

concerning employees engaged in the 'general retail industry' follows a similar pattern.[23]

39. The introduction to the safety net of a paid leave entitlement for the purposes of undertaking an activity that does not necessitate absence from work (a matter that we later come to) and which the very vast majority of employees would not be precluded from partaking in by virtue of their working hours alone, cannot properly be justified.

40. No cogent reason has been presented by the SDA in support of the provision of the entitlement to part-time employees. No logical reason is provided for extending the safety net in this way to an employee who, for instance, works only 2 – 3 days a week. There can be no justification for imposing additional employment costs on employers in such circumstances.

41. Furthermore, the treatment of part-time employment under the Awards is such that the relevant employees will necessarily be on notice as to when they will be required to work ordinary hours. This is because each of the Awards require that agreement be reached upon engagement between an employer and part-time employee as to the number of hours to be worked each day, the days of the week upon which they will work, the actual starting and finishing times on each day, the times at which any meal breaks will be taken and the duration of such meal breaks.[24] To the extent that the Hair and Beauty Award[25] and the Retail Award[26] afford employers with an ability to change a part-time employee's roster (but not the agreed number of hours of work), this is subject to a requirement to give seven days' notice in writing or, in the case of an emergency, 48 hours' notice. As a result, a part-time employee is readily able to make an appointment to donate blood if they so choose.

[23] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [1495].

[24] Clause 12.2 of the Fast Food Award, clause 12.2 of the Hair and Beauty Award and clause 12.2 of the Retail Award.

[25] Clause 12.8 of the Hair and Beauty Award.

[26] Clause 12.8 of the Retail Award.

42. The SDA's case fails to establish that the provision of the entitlement to part-time employees is necessary to achieve the modern awards objective.

Clause X.1 – up to two ordinary hours' paid leave

43. The proposed clause X.1 grants an employee a maximum of two ordinary hours of paid leave. We raise the following issues in this regard.

44. **Firstly**, as we understand it, the principle purpose driving the SDA's claim is to encourage employees to donate blood. However it is important to note that there may be many employees for whom a period of two hours would fall well short of being a sufficient period of time to donate blood. This is because the nearest donor centre is located at such a distance, that an employee would require a significant period of time to reach it and to return.

45. Take for instance an employee working in Broken Hill. As at 5 June 2017, according to the Red Cross' website, the nearest permanent donor centre is in Mildura[27] (256.27 km) and the nearest mobile donor unit is in Renmark[28] (256.4 km). A return trip to Mildura by car would take over six hours and to Renmark would take over eight hours.[29] The same can be said for numerous other locations in rural parts of Australia such as Mount Isa (QLD), Katherine (NT), Esperance (NT), Geraldton (WA), Coober Pedy (SA), and Bourke (NSW), to name but a few.

46. We do not consider that the proposed clause will serve its intended purpose in relation to employees covered by the Awards who work in such locations. The utility of the clause is undermined in any location where a Red Cross donor centre is not so close as to enable an employee to donate blood within a period of two hours. It would appear extremely unlikely to us that employees will be induced to donate blood in such circumstances. This logically

[27] http://www.donateblood.com.au/blood-donor-centre/mildura-donor-centre

[28] http://www.donateblood.com.au/blood-donor-centre/renmark-mobile-donor-centre

[29] Estimates based on those provided by Google Maps.

undermines any alleged *necessity* of the clause, in the sense contemplated by s.138 of the Act.

47. **Secondly,** in the information provided by the Red Cross to the SDA, it states as follows regarding average donation times:

> The average donation time will vary by donation type:
>
> **Whole blood donations:** 1 hour is recommended (30 minutes for registrations and interview + up to 30 minutes for collection and recovery)
>
> **Plasma Donations:** 1.5 hours (30 Minutes for registration and interview + up to 1 hour for collection and recovery)
>
> **Platelet Donation:** 2 hours (30 Minutes for registration and interview + up to 1.5 hour for collection and recovery) [30]

48. As can be seen, the average time required to donate blood ranges from 1 – 2 hours. This includes registration, an interview, collection and recovery. It does *not*, however, appear to include time spent waiting at the donor centre.

49. Average waiting times are also set out in the material provided by the Red Cross to the SDA[31]. It states that during 2016, donors waited an average of 28.9 minutes – 41.2 minutes from registration to collection. Assuming a waiting time of 30 minutes for present purposes, this takes average donation times to 1.5 – 2.5 hours.

50. An additional factor that is not considered in the above estimates is travelling time from an employee's place of work to the donor centre and back. This is of course contingent upon the distance between the two and the mode of transport utilised.

51. Having regard to the above, it would appear to us that there may be many circumstances in which an employee cannot donate blood within a period of two hours. Additionally, in circumstances where an employee will be attending work after donating blood (including circumstances in which an employee is

[30] SDA submission dated 2 May 2017 at Annexure 11.

[31] SDA submission dated 2 May 2017 at Annexure 11.

returning to work), any delays (whether anticipated or otherwise) would cause further disruption to the business. For instance, if the employee experiences delays at the donor centre and therefore is required to wait for some time, or if the employee requires a longer period of time to recover after donating blood, the employee may be absent from work for a period that exceeds two hours. Whilst the proposed clause would afford not more than two hours of paid leave, that does not remedy the operational consequences that would flow to the business as a result of an employee being absent for a period longer than that which was expected.

Clause X.1 – the absence of any prescription as to the location of the place attended by the employee

52. Clause X.1 grants an employee up to two ordinary hours of paid leave for the purposes of donating blood, however the clause does not contain any prescription as to the location of the place that the employee might attend to donate blood. It appears that this is a matter that is left to the discretion of the employee.

53. The proposed clause would permit an employee to deliberately select a venue for blood donation that is not the closest such available venue and as a result, take a period of leave that is longer than that which would otherwise have been necessary.

54. For example, an employee working in Parramatta (NSW) would have access to various donor centres, including one in Rose Hill (which, according to the Red Cross' website is 1.77km away from Parramatta) and another in North Rocks (which is 4.57km away, according to the same source). Assuming that the time taken to travel to the latter would be longer than the time taken to travel to the centre in Rose Hill, and controlling any other relevant variables, the clause would not preclude an employee from opting to donate blood in Rose Hill and consequently accessing a longer period of leave. The provision does not require, expressly or by implication, that an employee accessing the leave entitlement must only donate blood at the blood donor centre that is

closest to their place of work or that would result in the most time efficient outcome.

55. This element of the provision is quite clearly unfair to employers. It permits an employee to choose to donate blood in a location that ensures them access to two hours of leave, even if this is not necessary in the circumstances. This is particularly likely in metropolitan areas where an employee will likely have access to multiple donor centres within close proximity to their workplace.

Clause X.1 – the proposed provision for a *paid* leave entitlement

56. Fundamentally, the SDA has not established that a *paid* leave entitlement for the purposes of donating blood is necessary to ensure that the Awards achieve the modern awards objective. Our submissions in this regard should not be read as an acceptance that an unpaid leave entitlement should be introduced. Rather, they simply serve to highlight yet another deficiency in the material filed by the union in support of its proposal.

57. The SDA asserts that its proposal would ensure that employees donating blood are not further financially disadvantaged or that employees who would otherwise donate blood are not deterred from doing so due to costs that they would incur such as transportation or child care.[32] It appears that the SDA's proposed clause essentially seeks to shift the financial implications flowing from an individual's decision to donate blood to their employer.

58. When considering what constitutes a fair and relevant safety net of minimum terms and conditions, as contemplated by the modern awards objective, there is a need to balance the interests of both employers and employees. It cannot possibly be fair to require an employer to not only provide leave from work to persons seeking to donate blood, but to also require the payment of compensation to such persons.

[32] SDA submission dated 2 May 2017 at paragraph 53.

59. The union's claim effectively seeks to enable employees to decide to elect to participate voluntarily in an activity that is not essential or necessitated by the employee's own personal circumstances (an issue that we turn to shortly), and proceeds on the basis that this should be permitted such that the employee is not required to spend time outside of work in order to participate in the activity or incur expenses that might otherwise fall due and instead, this burden should be shifted to the employer. It is of course important to remember that the burden would be so shifted to *all* employers covered by the Awards, regardless of their ability to in fact accommodate that which is being sought.

60. We trust that the blatant unfairness of this ludicrous proposition is self-evident and does not warrant further explanation. Clearly, the SDA's case falls well short of establishing that a paid leave entitlement is 'necessary' in the relevant sense.

Clause X.1 – the proposed provision for a leave entitlement *without deduction of pay*

61. The proposed clause X.1 entitles an employee to blood donor leave "without deduction of pay". We understand this to mean that where an employee takes such leave, the employee must be paid for the duration of the leave at the same rate at which they would have been paid if they were performing work; including any loadings (e.g. casual loading and shift loading), allowances and penalty rates.

62. Noting our opposition to the introduction of an entitlement to paid leave irrespective of the rate at which that payment is due, we make the following submissions about the SDA's proposal.

63. **Firstly**, the SDA has not presented any justification for the proposed adoption of an approach that is out of step with other paid leave entitlements that form part of the minimum safety net.

64. For instance, annual leave, personal/carer's leave and compassionate leave are all to be paid at the base rate of pay (defined by s.16 of the Act) pursuant

to the NES. In the context of an employee to whom one of the Awards apply, such leave is to be paid at the minimum rate prescribed by the relevant award, to the exclusion of any loading, allowance, penalty rates or other separately identifiable amounts. [33]

65. The material filed does not establish that the more generous approach here sought by the union is *necessary* in order to ensure that the Awards achieve the modern awards objective. The case advanced does not so much as attempt to make good that proposition.

66. **Secondly** and furthermore, the approach envisaged by the SDA would require employers to pay employees amounts that are payable under the Awards if a particular disutility is suffered even though the employee would be absent from work and therefore, would not experience the relevant disutility. No reasonable argument for such an inherently unfair and unjustifiable obligation has been advanced. By way of example, there is no apparent justification for why an employee accessing the proposed form of leave should receive a weekend penalty rate or a shift loading in circumstances where they are not performing work. An employee covered by the Awards accessing personal/carer's leave would have no equivalent entitlement to receive such amounts under the NES.

67. **Thirdly,** the SDA's position as to over-award payments is unclear. We note that the phrase "without deduction of pay" (or derivatives of it, such as "without loss of pay") presently appear in other award clauses[34] and is understood by Ai Group to relate only to amounts prescribed by the relevant award. We consider that this proposition is supported by the decision of a Full Bench

[33] Whilst some modern awards require the payment of an amount higher than the base rate of pay during a period of annual leave, that is not so in relation to the Awards, subject to the payment of annual leave loading.

[34] For example, clause 40.10(a) of the *Manufacturing and Associated Industries and Occupations Award 2010*, clause 27.3(b) of the *Road Transport and Distribution Award 2010* and the model 'job search entitlement' clause that appears in most if not all modern awards.

issued earlier in this Review, which made the following observations: (emphasis added)

> **[95]** The AMWU and TCFUA, supported by a number of other unions submitted that replacing terms such as 'time and a half' and 'double time' with '150% of the minimum hourly rate' or '200% of the minimum hourly rate' (or '200% of the ordinary hourly rate' in awards where there is an all purpose payment) reduces an employee's entitlements under the award. They argue that where an employee is receiving an overaward payment, it is the higher rate that should be multiplied to calculate the amount payable.
>
> **[96]** Modern awards provide a safety net of minimum entitlements. The modern award prescribes the minimum rate an employer must pay an employee in given circumstances. Overaward payments, while permissible, are not mandatory. Further, if an employer chooses to pay an employee more than the minimum amount payable for ordinary hours worked, the employer is not required to use that higher rate when calculating penalties or loadings. We are not persuaded by the submissions advanced by union parties and do not propose to replace the terms 150% and 200% with time and a half or double time, etc.[35]

68. Accordingly, we proceed on the basis that the proposal put by the SDA is not intended to mandate the payment of over award amounts. If this is not so, we make the obvious observation that the SDA has not advanced any arguments in support of such a generous approach, nor has it explained why the Commission ought to depart from the decision cited above.

Clause X.1 – the manner in which the leave would accrue

69. The proposed clause does not express any connection between an employee's service and the accrual of the entitlement to leave. That is to say, it appears that any permanent employee is entitled to take up to four instances of leave in a year regardless of their period of service or the hours that they work.

70. In our view, it is inherently unfair that there is no mechanism within the proposed clause that would limit or reduce the quantum of leave for employees who work less than full-time hours as a result of which, for instance a part-time employee who works only one day per week would be entitled, from the very start of the "year" (we later return to the proper interpretation of that term) to two ordinary hours of leave on up to four occasions in the same way that a full-time employee would have such an entitlement. Unlike most

[35] *4 yearly review of modern awards* [2015] FWCFB 4658 at [95] – [96].

paid leave entitlements under the NES, the leave does not accrue by reference to an employee's ordinary hours and therefore, it is available in its entirety at the commencement of the year and the quantum available to an employee is the same, regardless of their number of hours of work. The SDA has not provided any justification for such a generous approach, which is clearly out-of-step with comparable paid leave entitlements found in the statute.

Clause X.1 – whether the leave would accumulate

71. The SDA's submissions state that blood donor leave would not accumulate from year to year.[36] We note that this is not, however, clear on the face of the proposed clause.

72. To this extent, the proposed clause is not "simple and easy to understand" (s.134(1)(g)).

Clause X.1 – the proposed provision for leave on up to four occasions per year

73. The proposed clause would enable an employee to access the leave entitlement sought on up to four occasions each year. We make the following submissions in relation to this aspect of the SDA's proposal.

74. **Firstly**, it is important to appreciate that by virtue of the proposed clause X.1, an employee has an entitlement of up to eight ordinary hours of leave each year for the purposes of donating blood. In the case of a full-time employee who works a standard day of 7.6 ordinary hours, this equates to over a day of leave. In the context of a part-time employee who works, for instance, four ordinary hours per week, the SDA's proposal would equate to up to two weeks of leave for such an employee. The quantum of the leave proposed by the union is not insignificant.

[36] SDA submission dated 2 May 2017 at paragraph 11.4.

75. **Secondly**, the SDA's claim seeks to provide a leave entitlement that would cover every instance in which a person can feasibly donate 'whole blood' or 'double red cells'. Citing the website of the Red Cross it submits as follows:

> The Australian Red Cross Service stipulates that whole blood donors 18 years and older can donate whole blood every 12 weeks; 16 weeks between double red cell donations, and platelet apheresis donors every 7 days. …[37]

76. It appears that persons who donate 'whole blood' would not be permitted by the Red Cross to do so more than four times a year. The proposed clause would facilitate this, by allowing such an employee to take paid leave of up to two ordinary hours each time. An employee donating 'double red cells' would be permitted to donate only three times in a year and so that too would be covered by the proposed clause.

77. The union clearly takes the view that an employer should be required to provide an employee with paid leave in each instance that they seek to donate blood (save for plasma and platelet donors, who can donate "as often as every 2 – 3 weeks"[38]). In this way the claim seeks the adoption of a very generous approach, unsupported by any convincing submissions or probative evidence that establish that it is *necessary* to ensure that the Awards achieve the modern awards objective.

Clause X.1 – the meaning of the term 'year'

78. The proposed clause X.1 states that leave may be taken "on a maximum of four occasions *per year*". The clause does not state expressly or by implication whether a 'year' is to be measured by reference an employee's anniversary date or whether it is a reference to the calendar year. Further, the union's submissions do not shed any light as to its intention.

[37] SDA submission dated 2 May 2017 at paragraph 11.5.

[38] Australian Red Cross Blood Service website, accessed 2 June 2017: http://www.donateblood.com.au/when-can-i/plasma

79. The provision is ambiguous in this regard and therefore may give rise to disputation. It is contrary to the need to ensure that modern awards are "simple and easy to understand" (s.134(1)(g)).

Clause X.1 – leave for the purpose of donating blood

80. The issue we here raise is perhaps one of the most fundamental deficiencies to arise from the SDA's case.

81. The SDA is seeking the introduction of a paid leave entitlement for circumstances that do not *necessitate* an employee's absence from work. The proposed clause would provide an entitlement to leave for a purpose that does not create an imperative for an employee to be absent from work. The union is pursuing the inclusion of a leave entitlement for the purposes of partaking in an activity that an employee may *elect* to undertake but is not necessary, in the sense that:

- it is not *essential* for a person to donate blood by virtue of their personal circumstances or otherwise; and
- in any event, an employee's absence from work in order to donate blood is not *essential*, in the sense that it is not a matter that must necessarily be attended to during the employee's working hours.

82. We return to these concepts below.

83. Whilst we acknowledge that the donation of blood is an important cause that members of our community should be encouraged to participate in, it is not an activity, a cause or a purpose that necessarily requires an employee to be absent from work.

84. A clear distinction can be drawn between the SDA's proposal and, for instance, the entitlement to personal/carer's leave or compassionate leave under the NES. By virtue of the manner in which the Act casts the provisions associated with taking such leave, the ability to do so arises only in

circumstances where it is necessary. That is, s.97 allows an employee to take personal/carer's leave if it is taken:

- because the employee is not fit for work; or
- to provide care or support to a member of the employee's immediate family or household who requires care or support because of a personal illness/injury or an unexpected emergency affecting the member.

85. In describing the circumstances in which an employee can take personal/carer's leave by reference to specific situations that arise at a particular point in time and which, by their very nature, render absence from work necessary, the legislation effectively creates a limitation on the purposes for which the leave can be taken. Section 104 of the Act prescribes the circumstances in which an employee has an entitlement to compassionate leave in a similar vein:

> An employee is entitled to 2 days of compassionate leave for each occasion (a ***permissible occasion***) when a member of the employee's immediate family, or a member of the employee's household:
>
> (a) contracts or develops a personal illness that poses a serious threat to his or her life; or
>
> (b) sustains a personal injury that poses a serious threat to his or her life; or
>
> (c) dies.

86. Compassionate leave can only be taken:

- to spend time with a member of an employee's immediate family or household who has contracted or developed a personal illness, or sustained a personal injury, referred to in s.104[39]; or
- after the death of the member of an employee's immediate family or household referred to in s.104[40].

[39] Section 105(1)(a) of the Act.

[40] Section 105(1)(b) of the Act.

87. The SDA's proposed clause is clearly out of step with the approach otherwise adopted in the minimum safety net. The exception to this proposition is the provision of annual leave under the NES, which we later come to.

88. As we earlier stated, it is unfair and entirely unjustifiable to expand the minimum safety net applying to employees covered by the Awards by introducing a new form of paid leave that can be accessed for a purpose that does not necessitate the employee's absence from work. We detail the reasons for our position hereunder.

89. **Firstly** and fundamentally, we are not aware of any circumstances in which it is essential for a person to donate blood. Rather, it is an activity that one can elect to participate in if they so choose. However benevolent this may be, it is not one that *must* be undertaken by a person due to, for instance, their health or other personal circumstances. This is in clear contrast to an employee seeking to be absent from work because of an illness or injury as a result of which they are unfit for work.[41]

90. **Secondly** and in any event**,** where an employee elects to donate blood, it is not essential or inevitable that, as a general proposition, this be undertaken during working hours or that it result in an absence from work. The nature of the activity is not such that it cannot be undertaken at another time.

91. Save for a 'link' to the Red Cross' website[42], very little information has been put before the Commission by the SDA regarding the opening hours of the Red Cross' donor centres. Perhaps this is strategically so, because a review of the relevant information on its website reveals that many donor centres are open during ordinary working hours, outside of ordinary working hours and on the weekend.

[41] Section 97(a) of the Act.

[42] SDA submission dated 2 May 2017 at Annexure 11.

92. The following are examples of donor centres in and around Sydney that are open outside of ordinary working hours and/or on the weekend:

	Centre	Opening Hours
1	Baulkham Hills (mobile unit)[43]	Tuesday 13 June until 1800 Monday 17 July until 1800 Monday 14 August until 1800 Monday 11 September until 1800
2	Blacktown (mobile unit)[44]	Thursday 22 June until 1800 Thursday 20 July until 1800 Thursday 3 August until 1800 Thursday 21 September until 1800
3	Bondi Beach (mobile unit)[45]	Wednesday 14 June until 1800 Thursday 15 June until 1800 **Saturday 17 June 0915 – 1500**
4	Camden (mobile unit)[46]	Tuesday 9 May until 1800 Wednesday 10 May until 1800 Tuesday 1 August until 1800 Wednesday 2 August until 1800
5	Campbelltown (mobile unit)[47]	Monday 22 May until 1800 Thursday 25 May until 1800 Monday 26 June until 1800 Thursday 29 June until 1800 Monday 24 July until 1800 Thursday 27 July until 1800 Monday 21 August until 1800 Thursday 24 August until 1800 Monday 25 September until 1800 Thursday 28 September until 1800
6	Dural (mobile unit)[48]	**Saturday 10 June 0830 – 1400** Monday 3 July until 1800 Thursday 6 July until 1800

[43] http://www.donateblood.com.au/blood-donor-centre/baulkham-hills-mobile-donor-centre-norwest-marketown

[44] http://www.donateblood.com.au/blood-donor-centre/blacktown-mobile-donor-centre-kmart

[45] http://www.donateblood.com.au/blood-donor-centre/bondi-beach-mobile-donor-centre

[46] http://www.donateblood.com.au/blood-donor-centre/camden-mobile-donor-centre-woolworths-car-park

[47] http://www.donateblood.com.au/blood-donor-centre/campbelltown-mobile-donor-centre-bunnings

[48] http://www.donateblood.com.au/blood-donor-centre/dural-mobile-donor-centre-bunnings

7	Epping (mobile unit)[49]	Monday 5 June until 1830 Monday 4 September until 1830
8	Katoomba (mobile unit)[50]	Wednesday 12 July until 1800 Thursday 13 July until 1800
9	Lithgow[51]	Monday 5 June until 1900 Tuesday 6 June at 0800 Wednesday 7 June until 1900 Thursday 8 June at 0800 Monday 7 August until 1915 Tuesday 8 August at 0800 Monday 4 September until 1900 Tuesday 5 September at 0800 Wednesday 6 September until 1900 Thursday 7 September at 0800
10	Liverpool[52]	Monday until 1830 Tuesday until 1830 Wednesday 0700 – 1830 Thursday 0700 – 1830 Friday at 0700 **Saturday 0700 – 1530**
11	Nepean[53]	Monday until 2000 Tuesday at 0800 Wednesday until 2000 Thursday until 2000 Friday at 0800 **Saturday 0730 – 1530**
12	Parramatta[54]	Monday until 1830 Tuesday 0700 – 1830 Wednesday 0700 – 1830 Thursday 0700 – 1830 Friday at 0700 **Saturday 0700 – 1530**

[49] http://www.donateblood.com.au/blood-donor-centre/epping-mobile-donor-centre-baptist-church-hall

[50] http://www.donateblood.com.au/blood-donor-centre/katoomba-mobile-donor-centre

[51] http://www.donateblood.com.au/blood-donor-centre/lithgow-bowling-club

[52] http://www.donateblood.com.au/blood-donor-centre/liverpool-donor-centre

[53] http://www.donateblood.com.au/blood-donor-centre/nepean-donor-centre

[54] http://www.donateblood.com.au/blood-donor-centre/parramatta-donor-centre

13	Picton[55]	Wednesday 19 July at 1830 Thursday 20 July at 1830
14	Plumpton (mobile unit)[56]	Thursday 15 June until 1800 Thursday 14 September until 1800
15	Springwood (mobile unit)[57]	Wednesday 7 June until 1800 Thursday 8 June until 1800 Wednesday 9 August until 1800 Thursday 10 August until 1800 Wednesday 6 September until 1800 Thursday 7 September until 1800
16	Sutherland Shire[58]	Monday until 1815 Tuesday 0800 – 1815 Wednesday until 1815 Thursday 0800 – 1815 Friday 0800 – 1815 **Saturday 0800 – 1615**
17	Sydney CBD, Elizabeth St[59]	Monday until 1900 Tuesday at 0700 Wednesday at 0700 Thursday until 1930 **2nd and 4th Saturday of each month 0730 – 1415**
18	Sydney CBD, Town Hall[60]	Monday until 1900 Tuesday 0730 – 1900 Wednesday 0730 – 1900 Thursday 0730 – 1900 Friday at 0730 **Saturday 0730 - 1630**

[55] http://www.donateblood.com.au/blood-donor-centre/picton-mobile-donor-centre-picton-shire-hall-car-park

[56] http://www.donateblood.com.au/blood-donor-centre/plumpton-mobile-donor-centre-marketplace

[57] http://www.donateblood.com.au/blood-donor-centre/springwood-mobile-donor-centre-iga-carpark

[58] http://www.donateblood.com.au/blood-donor-centre/shire-donor-centre-sutherland-shire

[59] http://www.donateblood.com.au/blood-donor-centre/elizabeth-street-donor-centre-sydney-0

[60] http://www.donateblood.com.au/blood-donor-centre/town-hall-donor-centre-sydney

93. Similar examples can be found in regional NSW:

	Centre	Opening Hours
1	Armidale[61]	Monday until 1900 Tuesday until 1900 Wednesday until 1900 Thursday at 0800 Friday at 0800
2	Bathurst (mobile unit)[62]	Monday 14 August until 1900 Monday 25 September until 1900
3	Belmont (mobile unit)[63]	Wednesday 26 April until 1830 Thursday 27 April until 1830 Wednesday 26 July until 1830 Thursday 27 July until 1830 **Saturday 29 July 0830 - 1500**
4	Bowral (mobile unit)[64]	Tuesday 6 June until 1800 Wednesday 7 June until 1800 Tuesday 11 July until 1800 Wednesday 12 July until 1800 Tuesday 29 August until 1800 Wednesday 30 August until 1800
5	Byron Bay (mobile unit)[65]	Monday 19 July until 1830 Monday 24 July until 1830 Monday 21 August until 1830 Tuesday 22 August until 1830
6	Coffs Harbour[66]	Monday until 1830 Tuesday until 1830 Wednesday at 0730 Thursday until 1830 Friday at 0730 **Saturday 0730 – 1500**
7	Dubbo[67]	Monday until 1930

[61] http://www.donateblood.com.au/blood-donor-centre/armidale-donor-centre

[62] http://www.donateblood.com.au/blood-donor-centre/bathurst-mobile-donor-centre-mcdonalds

[63] http://www.donateblood.com.au/blood-donor-centre/belmont-mobile-donor-centre-belmont-citi-centre

[64] http://www.donateblood.com.au/blood-donor-centre/bowral-mobile-donor-centre-bowral-swimming-centre

[65] http://www.donateblood.com.au/blood-donor-centre/byron-bay-mobile-donor-centre

[66] http://www.donateblood.com.au/blood-donor-centre/coffs-harbour-donor-centre

[67] http://www.donateblood.com.au/blood-donor-centre/dubbo-donor-centre

		Tuesday until 1930 Wednesday at 0800 Thursday at 0800 Friday at 0800 **1st Saturday of the month 0800 – 1300**
8	Gloucester (mobile unit)[68]	Tuesday 27 July until 1830 Tuesday 26 September until 1830
9	Goulburn[69]	Tuesday at 0745 Wednesday until 1900 Thursday until 1900
10	Lismore[70]	Monday until 1930 Tuesday at 0700 Wednesday until 1930 Thursday until 1930 Friday at 0700 **Saturday 0900 - 1300**
11	Maitland[71]	Monday until 1900 Tuesday until 1900 Wednesday at 0730 Thursday until 2000 Friday at 0730 **Saturday 0800 - 1500**
12	Medowie (mobile unit)[72]	Monday 19 June until 1830 Tuesday 20 June until 1830 Monday 18 September until 1830 Tuesday 19 September until 1830
13	Morisset (mobile unit)[73]	Tuesday 18 July until 1800 Wednesday 19 July until 1800 Thursday 20 July until 1800
14	Mudgee (mobile unit)[74]	Monday 3 July until 1900 Tuesday 4 July at 0800 Wednesday 5 July until 1900

[68] http://www.donateblood.com.au/blood-donor-centre/gloucester-mobile-donor-centre

[69] http://www.donateblood.com.au/blood-donor-centre/goulburn-donor-centre

[70] http://www.donateblood.com.au/blood-donor-centre/lismore-donor-centre

[71] http://www.donateblood.com.au/blood-donor-centre/maitland-donor-centre

[72] http://www.donateblood.com.au/blood-donor-centre/medowie-mobile-donor-centre-community-centre

[73] http://www.donateblood.com.au/blood-donor-centre/morisset-mobile-donor-centre-morisset-multipurpose-centre

[74] http://www.donateblood.com.au/blood-donor-centre/mudgee-mobile-donor-centre

		Thursday 6 July at 0800 Monday 10 July until 1900 Tuesday 11 July at 0800
15	Muswellbrook (mobile unit)[75]	Tuesday 4 July until 1900 Wednesday 5 July until 1900 Thursday 6 July until 1900
16	Newcastle[76]	Monday until 2000 Tuesday at 0700 Wednesday until 2000 Thursday until 2000 Friday at 0700 **Saturday 0700 – 1500**
17	Nowra (mobile unit)[77]	Tuesday 27 June until 1800 Wednesday 28 June until 1800 Tuesday 4 July until 1800 Tuesday 22 August until 1800 Wednesday 23 August until 1800 Tuesday 19 September until 1800 Wednesday 20 September until 1800 Tuesday 26 September until 1800
18	Orange[78]	Monday until 1830 Tuesday at 0730 Wednesday until 1830 Thursday until 1830 Friday at 0730 **2nd and 4th Saturday of the month 0730 – 1230**
19	Port Macquarie[79]	Monday until 1830 Tuesday until 1830 Wednesday at 0730 Thursday until 1830 Friday at 0730 **Saturday 0730 – 1500**

[75] http://www.donateblood.com.au/blood-donor-centre/muswellbrook-mobile-donor-centre-pcyc

[76] http://www.donateblood.com.au/blood-donor-centre/newcastle-donor-centre

[77] http://www.donateblood.com.au/blood-donor-centre/nowra-mobile-donor-centre-school-arts-car-park

[78] http://www.donateblood.com.au/blood-donor-centre/orange-donor-centre

[79] http://www.donateblood.com.au/blood-donor-centre/port-macquarie-donor-centre

20	Scone (mobile unit)[80]	Wednesday 21 June until 1830 Thursday 22 June until 1830 Wednesday 20 September until 1830 Thursday 21 September until 1830
21	Singleton (mobile unit)[81]	Tuesday 18 July until 1830 Wednesday 19 July until 1830 Thursday 20 July until 1830 Tuesday 29 August until 1830 Wednesday 30 August until 1830 Thursday 31 August until 1830
22	Tamworth[82]	Monday until 1900 Tuesday until 1900 Wednesday at 0800 Thursday until 1900 Friday at 0800 **Saturday 0900 - 1300**
23	Taree[83]	Monday until 1800 Tuesday until 1900 Wednesday at 0800 Thursday until 1900 Friday until 0800 **2nd Saturday of the month 0800 - 1200**
24	Wagga Wagga[84]	Monday at 0700 Tuesday until 1930 Wednesday until 1930 Thursday until 1930 Friday at 0700 **2nd Saturday of the month 0800 – 1300**

[80] http://www.donateblood.com.au/blood-donor-centre/scone-mobile-donor-centre

[81] http://www.donateblood.com.au/blood-donor-centre/singleton-mobile-donor-centre-singleton-square-car-park

[82] http://www.donateblood.com.au/blood-donor-centre/tamworth-donor-centre

[83] http://www.donateblood.com.au/blood-donor-centre/taree-donor-centre

[84] http://www.donateblood.com.au/blood-donor-centre/wagga-wagga-donor-centre

94. The same can be seen in other states. For example, in Queensland, the following centres are some of those which are open outside of ordinary working hours and on weekends, including those in Brisbane and in regional areas:

	Centre	Opening Hours
1	Beerwah (mobile unit)[85]	Wednesday 28 June until 1800 Thursday 29 June until 1800 Friday 30 June at 0800
2	Bokarina (mobile unit)[86]	Monday 24 July at 0800 Tuesday 25 July until 1800 Wednesday 26 July until 1800 Thursday 27 July until 1800 Friday 28 July at 0800
3	Brisbane[87]	Monday 0700 – 1900 Tuesday 0700 – 1900 Wednesday 0700 – 1900 Thursday 0700 – 1900 Friday 0700 – 1900 Saturday 0730 – 1500
4	Bundaberg[88]	Monday until 1900 Tuesday until 190 Wednesday at 0730 Thursday until 1900 Friday at 0730 **2nd and 4th Saturday of the month 0800 – 1200**
5	Cairns[89]	Tuesday until 1830 Wednesday until 1830 Thursday until 1830 Friday at 0700 **Saturday 0700 - 1330**
6	Caloundra (mobile unit)[90]	**Saturday 0800 – 1300** Monday 19 June at 0800

[85] http://www.donateblood.com.au/blood-donor-centre/beerwah-mobile-donor-centre
[86] http://www.donateblood.com.au/blood-donor-centre/bokarina-mobile-donor-centre
[87] http://www.donateblood.com.au/blood-donor-centre/brisbane-donor-centre
[88] http://www.donateblood.com.au/blood-donor-centre/bundaberg-donor-centre
[89] http://www.donateblood.com.au/blood-donor-centre/cairns-donor-centre
[90] http://www.donateblood.com.au/blood-donor-centre/caloundra-mobile-donor-centre

		Tuesday 20 June until 1800 Wednesday 21 June until 1800 Thursday 22 June until 1800 Friday 23 June at 0800 Monday 17 July at 0800 Tuesday 18 July until 1800 Wednesday 19 July until 1800 Thursday 20 July until 1800 Monday 31 July at 0800 Friday 11 August at 0800 Monday 14 August at 0800 Tuesday 15 August until 1800 Wednesday 16 August until 1800 Friday 18 August at 0800 **Saturday 19 August 0800 – 1300**
7	Gladstone[91]	Monday until 1900 Tuesday until 1900 Wednesday at 0730 Thursday until 1900 Friday at 0730 **2nd and 4th Saturday of the month 0800 – 1200**
8	Gympie (mobile unit)[92]	Tuesday 11 July until 1800 Wednesday 12 July until 1800 Tuesday 8 August until 1800 Wednesday 9 August until 1800 Monday 21 August at 0800 Tuesday 22 August at 0800 Wednesday 23 August until 1800 Thursday 24 August until 1800
9	Helensvale (mobile unit)[93]	Tuesday 6 June at 0800 Thursday 8 June until 1800
10	Hervey Bay[94]	Monday until 1900 Tuesday until 1900 Wednesday at 0700 Thursday until 1900 Friday at 0700 **Saturday 0700 – 1300**

[91] http://www.donateblood.com.au/blood-donor-centre/gladstone-donor-centre

[92] http://www.donateblood.com.au/blood-donor-centre/gympie-mobile-donor-centre

[93] http://www.donateblood.com.au/blood-donor-centre/helensvale-mobile-donor-centre

[94] http://www.donateblood.com.au/blood-donor-centre/hervey-bay-donor-centre

11	Heston (mobile unit)[95]	Monday 12 June at 0800 Thursday 15 June until 1800 Friday 16 June at 0800
12	Mackay[96]	Monday until 1930 Tuesday until 1930 Wednesday at 0700 Thursday until 1930 Friday at 0700
13	Maroochydore[97]	Monday at 0700 Tuesday until 1800 Wednesday at 0700 Thursday until 1800 Friday at 0700 **Saturday 0730 – 1400**
14	Milton (mobile unit)[98]	Wednesday 5 July at 0800 Friday 7 July at 0800 Monday 14 August at 0800
15	Morayfield (mobile unit)[99]	Wednesday 21 June at 0800 Monday 26 June at 0800 Thursday 28 June until 1900 Monday 17 July at 0800 Monday 21 August at 0800 Thursday 24 August until 1900 Friday 25 August 0800
16	Nambour[100]	Monday at 0700 Tuesday until 1900 Wednesday until 1900 Thursday until 1900 Friday at 0700 **1st and 3th Saturday of the month 0700 – 1300**
17	Newstead (mobile unit)[101]	Wednesday 2 August at 0800 Thursday 3 August at 0800

[95] http://www.donateblood.com.au/blood-donor-centre/herston-mobile-donor-centre

[96] http://www.donateblood.com.au/blood-donor-centre/mackay-blood-donor-centre

[97] http://www.donateblood.com.au/blood-donor-centre/maroochydore-donor-centre

[98] http://www.donateblood.com.au/blood-donor-centre/milton-mobile-donor-centre-0

[99] http://www.donateblood.com.au/blood-donor-centre/morayfield-mobile-donor-centre

[100] http://www.donateblood.com.au/blood-donor-centre/nambour-donor-centre

[101] http://www.donateblood.com.au/blood-donor-centre/newstead-mobile-donor-centre

		Friday 4 August at 0800 Monday 7 August at 0800
18	Robina[102]	Monday at 0730 Tuesday until 1930 Wednesday until 1930 Thursday until 1930 Friday at 0730 **Saturday 0730 - 1530**
19	Rockhampton[103]	Monday until 1800 Tuesday until 1800 Wednesday 0700 Thursday until 1800 Friday at 0700 **2nd and 4th Saturday of the month 0800 – 1300**
20	Southport[104]	Tuesday at 0700 Wednesday until 2000 Thursday until 2000 Friday at 0700 **Saturday 0800 - 1430**
21	St Lucia (mobile unit)[105]	Monday 5 June at 0800 Friday 9 June at 0800 Monday 21 August at 0800 Friday 25 August at 0800 Monday 28 August at 0800
22	Tewantin (mobile unit)[106]	Monday 5 June at 0800 Tuesday 6 June until 1800 Wednesday 7 June until 1800 Thursday 8 June until 1800 **Saturday 1 July 1130 – 1800** Monday 3 July at 0800 Tuesday 4 July until 1800 Wednesday 5 July until 1800 Thursday 6 July until 1800 Friday 7 July at 0800 Tuesday 1 August until 1800

[102] http://www.donateblood.com.au/blood-donor-centre/robina-donor-centre

[103] http://www.donateblood.com.au/blood-donor-centre/rockhampton-donor-centre-new-location

[104] http://www.donateblood.com.au/blood-donor-centre/southport-donor-centre

[105] http://www.donateblood.com.au/blood-donor-centre/st-lucia-mobile-blood-donor-centre

[106] http://www.donateblood.com.au/blood-donor-centre/tewantin-mobile-donor-centre

		Wednesday 2 August until 1800 Thursday 3 August until 1800 Friday 4 August at 0800 **Saturday 5 August 0800 - 1300**
23	Townsville[107]	Monday at 0700 Tuesday until 1900 Wednesday until 1900 Thursday 0700 – 1900 Friday at 0700 **Saturday 0700 – 1300**

***NOTE**: the information contained in the tables above has been derived from the Red Cross' website, as at 5 June 2017. In no case is it intended to be an exhaustive list of all donor centres (permanent or mobile). The information included regarding opening hours is an extract of that which is found on the webpage for the relevant donor centre (see footnotes), to the extent that the donor centre is open on Monday – Friday before 8.30am, after 5.30pm and/or on a weekend.*

95. According to the Red Cross 2015 – 2016 Annual Report (**Annual Report**), it operates some 97 permanent and mobile blood donor units across Australia.[108] The sample above provides details of 65 of those donor units.

96. Having regard to the information above and additional information which is publicly available on the Red Cross' website, it appears that:

    i. All donor units' opening hours include ordinary working hours;

    ii. A large number of donor units' opening hours extend beyond ordinary working hours on weekdays;

    iii. Some donor units are also open on weekends.

[107] http://www.donateblood.com.au/blood-donor-centre/townsville-donor-centre-moving-14th-june

[108] Australian Red Cross Blood Service 2015 – 16 Annual Report at page 9.

97. The first point is relevant because the proposed provision would apply to all permanent employees including:

- Full-time employees who do not work hours that might generally be thought of as ordinary working hours (i.e. weekdays only, between the hours of 8.30am – 5.30pm).

- Part-time employees who, by their very definition, work less than 38 ordinary hours a week.

98. Such employees in all likelihood would not be required to work at certain times that coincide with the opening hours of the Red Cross' donor centres.

99. The second and third points are relevant because they enable employees who might otherwise be unable to donate blood to attend donor centres outside of ordinary working hours. It appears that this option is available at a significant proportion of all donor centres.

100. Further, blood donation is not a matter associated with any time sensitivity. That is to say, an employee who decides to donate blood must not necessarily do so within any specified period of time. It is certainly not a matter that must be attended to urgently. Accordingly, if for instance, an employee cannot make an appointment at a time that enables the employee to donate blood outside of working hours in a particular week (whether that be due to the unavailability of an appropriate appointment time and/or due to the employee's personal circumstances or commitments), there is no apparent reason why the employee cannot instead seek to make an appointment at an alternate later time.

101. The SDA's evidentiary case consists of a small number of employees who assert that they are unable to donate blood outside their working hours due to their personal commitments and family responsibilities. We address this element of the SDA's material in greater detail below but for present purposes it is sufficient to note that such evidence does not provide a compelling basis for creating a new modern award obligation to provide paid leave to

employees for the purposes of donating blood. The manner in which employees decide to allocate their time outside of working hours and their personal priorities is, put simply, a matter for them and not for the modern awards system or for their employers. Further, not all employees face personal circumstances that preclude them from donating blood outside of working hours. The proposed clause would nonetheless facilitate their absence from work.

102. **Thirdly**, there are any number of important causes in which members of our community can and do participate, of which blood donation is but one. This includes volunteering for various charitable organisations, campaigning in relation to numerous social issues, attending and/or organising fundraising events, organ donation and so on.

103. The grant of the SDA's claim would have the effect of creating a new paid leave entitlement for employees who seek to participate in a particular social cause in the context of many other important and challenging issues that an employee could also seek to be involved in. Our concern in this respect is twofold.

104. In the first instance, with respect, we do not consider that it is the Commission's role to identify and prioritise specific social causes for the purposes of creating new minimum safety net standards.

105. It is not appropriate for the Commission, in considering what constitutes a 'fair and relevant minimum safety net', to prioritise particular social causes over others. The modern awards objective would not be furthered by treating those employees participating in certain activities more generously than those participating in other such activities. The legislature has already struck an appropriate balance in determining the circumstances in which employees should be entitled to paid leave. It has elected not to establish specific leave entitlements for employees who wish to partake in such activities. The Commission should not supplant the intent of the legislature by developing a

new form of leave that would be applicable to all employees covered by the Awards.

106. Further, it is our concern that if the claim were successful, it may result in further calls from the union movement for additional forms of leave in respect of various other activities such as those listed above, resulting in continual claims to expand the minimum safety net in a manner that would be contrary to the need to ensure a stable and sustainable modern awards system (s.134(1)(g)).

107. The 'floodgates' argument, as this proposition is often called, is not one that should be dismissed as mere rhetoric. A clear example of the unions seeking the introduction of another new leave entitlement can be found in this very Review; that being the ACTU's case in relation to family and domestic violence leave (AM2015/1). The concern we here raise is a very real one.

Clause X.2 – the proposed requirement to notify the employer as soon as possible

108. Clause X.2 requires an employee to "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".

109. The proposed clause does not impose a minimum notice period. That is, the proposal does not require that an employee must notify his or her employer within a stipulated timeframe. All that it prescribes is that an employee must do so "as soon as possible".

110. The absence of greater specificity in this regard would likely result in disruption to an employer's business and/or would create added difficulties for an employer attempting to accommodate employee absences by virtue of the proposed clause. For instance, an employee may decide on a particular day that they want to donate blood the following day or even that very same day. In such circumstances, even if the employee notifies the employer as soon as

he or she has made a decision to donate blood, this would leave the employer with very little time to, for instance, obtain relief staff or amend their roster.

111. This element of clause X.2 would have the effect of exacerbating the adverse effects of the proposed clause on business (s.134(1)(f)) and the "efficient and productive performance of work" (s.134(1)(d)).

Clause X.2 – the absence of any express employer discretion

112. The proposed clause X.1 provides for the entitlement to leave for the purposes of donating blood, but does not deal with the *taking* of such leave. This is left to clauses X.2 and X.3.

113. Clause X.2 is in the following terms:

> **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.

114. The clause requires an employee to "notify" an employer of the date and time upon which the employee is "requesting" to be absent. That is, it requires an employee to advise their employer as to when the employee is "requesting" to be absent". The proposed clause X.3 deals further with the timing of any leave taken by the employee.

115. Clause X.2 does not expressly require an employee to make a *request* to take leave pursuant to the proposed clause. It instead requires an employee to *notify* their employer. Whilst the provision goes on to use the word "requesting", this does not appear to have any material implication for the operation of the clause. Further, the proposed clause does not expressly grant an employer the discretion to disallow an employee from taking the leave. The exercise of such discretion is not expressly contemplated by the proposed clause in relation to the taking of leave or the *time* at which the leave is taken.

116. Having regard to other leave entitlements afforded by the NES, personal/carer's leave under the NES is also non-discretionary, in the sense that an employee who meets the circumstances described at s.97 of the Act

and the notice and evidentiary requirements at s.107 may take personal/carer's leave. So long as the relevant statutory criteria are met, the legislation does not grant an employer the discretion to refuse access to the leave entitlement. Compassionate leave operates similarly.[109]

117. The distinction, however, between personal/carer's leave or compassionate leave, and the blood donor leave entitlement proposed is that by virtue of the manner in which the Act casts the provisions associated with taking the leave, the ability to do so arises only in circumstances where it is necessary. By describing the circumstances in which an employee can take personal/carer's leave by reference to specific situations that arise at a particular point in time and which, by their very nature, render absence from work necessary, the legislation effectively creates a limitation on the purposes for which the leave can be taken and when that leave is taken. Section 105 prescribes the circumstances in which compassionate leave may be taken in a similar vein.

118. By contrast, as we have earlier set out, blood donor leave does not apply in circumstances in which an employee's absence from work is necessary in the same sense. We have previously set out the basis for this proposition in some detail.

119. The proposed clause appears to permit an employee to take blood donor leave as and when an employee so desires. Neither the nature of the entitlement, the purpose for which it may be accessed nor the terms in which it is cast limits access to it, nor does it expressly grant an employer the discretion to not grant leave. This renders the clause inherently problematic and unfair to employers.

120. The absolute right to take blood donor leave absent any employer discretion in the SDA's proposal displays a complete disregard for the operational realities facing employers and the disruption that it would likely cause. The clause appears to essentially allow an employee to absent himself or herself

[109] Sections 104 and 105 of the FW Act.

from work at a time of their own choosing (subject to the requirements at clause X.3 which, for the reasons we shortly turn to, do not address the concerns we here raise), without any reciprocal right for an employer to not grant the leave, notwithstanding their operational requirements.

121. Take for instance a small fast food operator that rosters only a few employees concurrently. If one of those employees sought to donate blood on a day that the employee perceives is "suitable to the employer" at the beginning of his "ordinary working hours" such that it coincides with a peak period for the business associated with breakfast time, the employer must either operate with one less employee which may well impact upon the business' ability to meet customer demands, or the employer may decide to roster an additional employee. Bearing in mind that the Fast Food Award prescribes a minimum engagement of three hours for part-time and casual employees, the employer would be precluded from requiring such an employee to work for only the two hour period (or less) that the relevant employee is absent. Accordingly, the minimum cost incurred by the employer would be equivalent to three hours' pay.

122. Another example in relation to the Hair and Beauty Award is also illustrative of the point. Consider an instance in which a suburban salon employs only one beautician. The salon takes appointments from clients for her services in accordance with the times at which she is rostered to work, because no other employee employed by it can perform the same work.

123. The proposed clause only requires that the beautician notify her employer "as soon as possible" of the time and date upon which she seeks to take leave. If this employee decides that she wants to donate blood and accordingly makes an appointment just a day in advance, she would satisfy the requirement created by the clause if she advised her employer of this as soon as possible thereafter, regardless of the very short notice that she would in fact be providing to her employer.

124. If the employee perceived that she was taking leave on a “day suitable to the employer” and her appointment to donate blood was made such that she would be absent for the final two hours of her “ordinary working hours”, her absence would be consistent with the proposed clauses X.2 and X.3.

125. Whilst the employee in these circumstances would appear to have complied with the proposed clause, the employer would be left in circumstances where it would have given appointments to clients who consequently cannot be serviced. The employer would, in all likelihood, need to cancel those appointments, which would have an obvious adverse impact on the business.

126. In general terms, there are a number of reasons for which the automatic grant of leave may be problematic. For instance:

- The employer may be unable to engage another employee to replace the employee taking leave due to the unavailability of its other staff;
- The employer may be unable to engage another employee to replace the employee taking leave because it is cost prohibitive;
- The employer may already be facing a shortage of staff due to other planned and/or unplanned staff absences;
- The employer may be facing a forecasted or otherwise spike in customer demand which cannot be satisfied without adequate staff; etc.

127. Scenarios such as these demonstrate that the proposed clause is contrary to the need to promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d)) and it would have an adverse impact on business (s.134(1)(f)). We anticipate that the consequences that we have here set out would be particularly acute for small businesses because their ability to manage staff absences is especially limited.

128. We earlier made brief reference to the minimum engagement periods in the Fast Food Award for casual and part-time employees. We note that this issue arises also under the Hair and Beauty Award, which prescribes a three hour minimum engagement period for part-time and casual employees, as does the Retail Award (subject to an exemption in relation to full-time secondary students in certain circumstances).

129. For the reasons we have here set out, the absence of any employer discretion in the proposed clause is extremely problematic and inherently unfair, unwarranted and unjustifiable. We reiterate however, that if the proposed clause were amended to include an ability for an employer to refuse access to the entitlement, this would not alter our overarching opposition to the SDA's claim, nor would it overcome the proposition that the provision sought (with or without employer discretion) is not necessary to ensure that the Awards are achieving the modern awards objective.

130. Finally, we acknowledge that it might be argued that the use of the word "requesting" in the proposed clause X.2 necessarily implies that an employer can refuse such a request or decline to allow an employee to take leave pursuant to the proposed clause. This is, however, by no means clear. The drafting of the proposed provision does not adequately convey that this is so. This is a matter that is squarely relevant to the need to ensure that modern awards are simple and easy to understand (s.134(1)(g)).

Clause X.3 – the proposed requirement to arrange an absence on a day suitable to the employer

131. The proposed clause X.3 requires that the employee "shall arrange for his or her absence to be on a day suitable to the employer".

132. It is important to note that the clause sought does not prescribe a process that must precede the employee notifying his or her employer as to when they will be absent, which would enable an employee to ascertain whether a particular day is suitable to their employer. That is, the provision does not require the

employee to have discussions with their employer or undertake any other steps that would ensure that the day selected is in fact suitable to the employer. Contrary to the SDA's submissions, the proposed clause does not "ensure consultation between the employer and employee".[110]

133. The proposed clause appears to leave open the prospect that an employee may select a day to donate leave based on their perception that it is suitable to the employer, regardless of whether that is in fact so. That is, an employee may proceed to make an appointment to donate blood on a day that he or she believes is suitable, which is particularly problematic because the provision does not expressly contemplate any employer discretion, as previously discussed. As a result, if an employee proceeded on the assumption that a particular day is suitable in circumstances where that is not actually so, the employer would not have an ability under the proposed clause to not grant leave.

134. The difficulties arising from the absence of employer discretion are exacerbated by the SDA's failure to propose a robust process that, at the very least, ensures that the day selected by the employee to donate blood is in fact "suitable".

Clause X.3 – the proposed requirement to arrange an absence as close as possible to the beginning or ending of ordinary working hours

135. The element of the SDA's clause that we here consider is somewhat peculiar. It relates to the time at which an employee seeks to donate blood. Relevantly, clause X.3 states:

> **X.3** The employee shall arrange for his or her absence to be … as close as possible to the beginning or ending of his or her ordinary working hours.

136. Clause X.3 creates an express obligation on an employee in relation to the arrangements made by him or her. Specifically, the employee must arrange for their absence for the purposes of donating blood to be as "close as

[110] SDA submission dated 2 May 2017 at paragraph 11.2.

possible" to the commencement of their "ordinary working hours" or the conclusion of their "ordinary working hours". We make the following submissions in relation to this aspect of the SDA's proposed clause.

137. **Firstly**, the meaning of the phrase "ordinary working hours" is not clear. We cannot decipher whether the term is intended to refer only to the ordinary hours of work as defined by the Awards to the exclusion of overtime; or the ordinary working hours of the relevant employee, that is, the hours that they ordinarily work.

138. For instance, it is unclear how the proposed clause would interact with rostering principles under the Hair and Beauty Award. For instance, are an employee's "ordinary working hours" simply the ordinary hours that they are rostered to work pursuant to clause 29? What if the roster is altered by mutual agreement pursuant to clause 29.4 such that the relevant employee's starting/finishing times change? Does ascertaining an employee's "ordinary working hours" require some consideration of previous rosters in circumstances where the roster is not the same each week?

139. The provision is not "simple and easy to understand" in this regard (s.134(1)(g)).

140. **Secondly** and fundamentally, the relevant portion of clause X.3 is based on the erroneous premise that it would "[provide] certainty for the employer such that any disruption or cost to the business [would be] negligible"[111].

141. We cannot identify the basis upon which the SDA has reached this view in formulating its claim. It is by no means a self-evident proposition that must, logically, always hold true. We can very readily conceive of examples in which this would not be so.

[111] SDA submission dated 2 May 2017 at paragraph 11.2.

142. Take for instance a fast food operation in which an employee is engaged to work such that their ordinary working hours are 3pm – 7.30pm. That employee may arrange to be absent as close to the conclusion of their ordinary working hours such that they seek to take leave from 5.30pm – 7.30pm. This coincides squarely with the business' peak period of customer demand for dinner. Another obvious example would arise where an employee working in the morning seeks to take leave at the commencement of their ordinary working hours such that their leave coincides with the peak period of customer demand for breakfast.

143. A similar situation might arise in a hairdressing salon, which experiences high customer demand between 6pm – 8pm (the final two hours of its operating hours for that day) from those who seek to attend the salon after their working day is complete. In such circumstances, if an employee of the salon sought to take leave at exactly that time, the disruption or cost to the business would by no means be "negligible" or even minimised. Indeed it may in fact be the most inconvenient and inappropriate time for the employee to take leave.

144. Such outcomes self-evidently do not ensure that the disruption caused by the proposed clause is "negligible" for the relevant businesses. The impact might instead be quite the contrary.

145. It is unclear why the approach adopted in clause X.3 to the day on which the leave is taken is different to the approach adopted to the *time* at which the leave is taken. We do not understand the rationale for requiring that:

- The *day* upon which the employee arranges his or her absence must be suitable to the employer (noting the difficulties we have raised in relation to this compulsion above); but

- The clause does not require that the *time* at which the employee arranges his or her absence must be suitable to the employer. Rather, it must be "as close as possible to the beginning or ending of his or her

ordinary working hours", regardless of whether this is in fact suitable to the employer.

146. The SDA's case displays a complete disregard for the operational realities facing employers. The presumption underpinning the SDA's proposal, that leave taken as close as possible to the commencement or conclusion of an employee's ordinary working hours will result in "negligible" cost or disruption to the business is entirely unfounded. The union has not undertaken any examination of the rostering practices of employers covered by the Awards, the hours that employees engaged under them are required to work or the potential impact of clause X.3. The proposition that the proposal will cause only minimal consequences for a business is unsubstantiated.

147. **Thirdly**, the very nature of the obligation imposed by clause X.3 is extremely broad, vague and frankly, weak. It merely requires that an employee arrange for his or her absence to be "as close as possible" to the commencement or conclusion of his or her ordinary working hours. It would appear that various factors could readily justify an employee seeking to access the entitlement at a time that is not in fact "close" to the commencement or conclusion of his or her ordinary working hours but is nonetheless "as close as possible".

148. For instance, on a particular day that is deemed by the employee to be "suitable to the employer", the only appointment time offered by the Red Cross to donate blood may be at 2pm in circumstances where the employee's "ordinary working hours" are 9am – 6pm. It seems uncontroversial to us that this is not, objectively, "close" to the commencement or conclusion of the employee's ordinary working hours. Nonetheless, if the employee made an appointment at that time, they would have discharged their obligation under the proposed clause and as earlier discussed, it appears that the employer would not have any discretion to not grant the leave.

149. Alternatively, the same employee with the same ordinary working hours on the relevant day may be offered two appointment times by the Red Cross: 2pm and 5pm. The employee, however, is required by their employer to attend

training on that day, which is scheduled for 4pm – 6pm. Two questions necessarily arise from this scenario:

- Does the proposed clause X.3 require the employee to arrange their absence as close to the end of their ordinary working hours notwithstanding the requirement to attend training, such that they are compelled to make an appointment at 5pm? If so, there are obvious consequences for both the employer and employee that might flow from their absence at the relevant training. This might include a missed opportunity for the employee to receive valuable and important training that would result in the acquisition of new skills/knowledge, or a need for the employer to re-schedule the training because they are obliged to ensure that all relevant employees attend given its nature (e.g. compulsory occupational health and safety training).

- Or, does the proposed clause enable consideration to be given to the requirement to attend training when ascertaining whether the employee has complied with the proposed clause, in which case if the employee made the appointment at 2pm and arranged their absence accordingly, they would have complied with the proposed clause? In this case, the employee would be absent from work at a time that is not in fact close to the commencement or conclusion of their ordinary working hours and may, for any number of reasons, be problematic when regard is had to the business' operational requirements.

150. If the latter outcome is permissible under the proposed clause, any perceived benefit of requiring an employee to arrange their absence as close to the commencement or conclusion of their ordinary working hours may not be realised. That is, to the extent that the SDA considers that disruption to a business will be minimised by virtue of clause X.3 (a contention that we do not accept), the manner in which it has been crafted in fact means that there may be many circumstances in which the leave is taken at a time that is *not* close to the commencement or conclusion of an employee's ordinary working hours.

This is because the clause does not limit an employee's ability to access the leave to circumstances in which it is so taken but rather, it simply requires that, to the extent possible, the leave should be taken at such times.

151. We consider that there would be countless instances in which an employee may seek to assert, legitimately or otherwise, that the time at which they have arranged to be absent is "as close as *possible*" to the commencement or conclusion of their ordinary working hours, notwithstanding that they are in proposing to take leave at a time that is not in fact close to the commencement or conclusion of their ordinary working hours.

152. **Fourthly**, whilst the provision requires an employee to arrange their absence in a certain way, it does not enable an employer to verify that this obligation has in fact been complied with. That is to say, an employee may simply assert that they have arranged to be absent as close as possible to the conclusion of their ordinary working hours, but the proposed clause does not contemplate any ability for the employer to confirm that that is truly the case.

153. Take for instance an employee engaged under the Hair and Beauty Award who works ordinary hours on a particular day from 9am – 5pm. That employee contacts the Red Cross to make an appointment to donate blood. There are three appointments available that day: 9am, 4pm and 2pm. The employee chooses, notwithstanding the requirement at clause X.3 and the absence of any legitimate reason why the employee cannot take either of the other available appointment times, to make a 2pm appointment.

154. The proposed clause would not enable an employer to require the employee to establish that the employee has in fact arranged for their absence to be as close as possible to the commencement or conclusion of their ordinary working hours. The employee could simply assert that no other appointment time was available, and the employer would not have any recourse under the proposed clause to ensure that this is true. Whilst clause X.4 creates an obligation on an employee to provide proof, that proof must establish only that the employee attended a recognised place for the purpose of donating blood

and the duration of such attendance. It does not extend to requiring an employee to establish that he or she has complied with clause X.3.

155. Such an outcome is inherently problematic and inconsistent with the very nature of a minimum safety net. Under the SDA's proposal, an employee could quite clearly choose to be absent at a time that he or she prefers, without being held to account for whether the time selected is consistent with clause X.3. This is unambiguously unfair to employers and entirely unjustifiable.

156. **Fifthly,** the various issues we have here raised must be understood in the context of the clause that has been proposed, which, as we have earlier set out, appears to entitle employees to an absolute right to take paid leave at a time of the employee's choosing. The SDA's failure to include any express employer discretion in this regard exacerbates the difficulties we have highlighted and the likely cost implications and operational difficulties arising from the requirement at clause X.3 that an employee "shall arrange for his or her absence to be … as close as possible to the beginning or ending of his or her ordinary hours".

Clause X.4 – the absence of any consequence of not providing proof to the satisfaction of the employer

157. Clause X.4 requires that an employee shall produce, "to the satisfaction of the employer", "proof of attendance at a recognised place for the purpose of donating blood and the duration of such attendance".

158. Neither clause X.4, nor any other element of the SDA's proposal deals with the consequences of non-compliance by an employee with the requirement imposed by clause X.4. The entitlement to paid leave under the proposed clause is not in fact contingent upon an employee's compliance with clause X.4. If an employee does not provide proof "to the satisfaction of the employer", the clause does not create a barrier to the entitlement to paid leave.

159. The approach taken under the proposed clause can be compared to those provisions of the NES which deal with personal/carer's leave. Section 107 of the Act sets out the relevant notice and evidentiary requirements. Importantly, s.107(4) states as follows:

> (4) An employee is not entitled to take leave under this Division unless the employee complies with this section.

160. The SDA's proposed clause does not contain a comparable provision and as a result, a failure to provide proof as contemplated by clause X.4 would effectively be inconsequential. It would appear that even if an employee did not provide adequate proof, he or she would be entitled to paid leave pursuant to clause X.1.

161. This is self-evidently an entirely unsatisfactory outcome that is inherently inappropriate for the purposes of a safety net. It renders the requirement to provide evidence virtually otiose and does not contemplate any method by which an employer can ensure that the entitlement to paid leave is used only for the purposes of donating blood. It leaves the provision open to abuse and undermines the integrity of the safety net. The Commission can by no means be satisfied that such a provision should form part of a *fair* and relevant minimum safety net.

7. AN ANALYSIS OF PRE–MODERN AWARDS

162. The SDA submits that "blood donor leave was a common feature in old State Awards across Victoria, South Australia, New South Wales and to a limited extent in Queensland which were predecessors" to the Awards.[112]

163. We make the following brief salient points in this regard.

164. **Firstly**, the SDA makes submissions about the incidence of blood donor leave entitlements in Victorian state awards and the relevant determinations made by State Wage Boards.[113] Whilst this aspect of the union's case makes for an interesting history lesson, it has little bearing on the proceedings here before the Full Bench. Such awards were made and varied in a very different industrial and legislative context, which is not comparable to that which now prevails. Accordingly, the SDA's submissions in this regard are of little relevance.

165. **Secondly**, as the SDA's submissions state, as of 1 July 1998, matters that were not allowable pursuant to s.89A of the *Workplace Relations Act 1996* ceased to have effect. Relevantly, blood donor leave provisions were not allowable, as s.89A did not permit the inclusion of award terms dealing with forms of leave other than those that were specifically prescribed (e.g. annual leave (s.89A(2)(e)), long service leave (s.89A(2)(f)) personal/carer's leave (s.89A(2)(g)) and parental leave (s.89A(2)(h)). As a result, to the extent that any federal awards contained such an entitlement, they had no effect from 1 July 1998 in any event.

166. **Thirdly**, a proper analysis of the pre-modern instruments that were relevant to the making of the modern Fast Food Award and Hair and Beauty Award reveals that in fact an entitlement to blood donor leave in those instruments was rare.

[112] SDA submission dated 2 May 2017 at paragraph 24.

[113] SDA submission dated 2 May 2017 at paragraphs 25 – 28.

167. For instance, of each the seven awards[114] identified in the Australian Industrial Relation Commission's (**AIRC**) statement of 20 June 2008[115] during the Part 10A Award Modernisation Process as falling within the 'fast food industry', only one contained an entitlement to blood donor leave; that being the *Quick Service Food Outlets (QSFO'S) Award - State 2004*[116], which was a NAPSA applying in Queensland. It contained the following clause: (emphasis added)

> **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.

168. Whilst the provision above afforded an entitlement that was, in various respects, similar to that which is here proposed by the SDA, it contained an important limitation that does not appear in the clause now. That is, at clause 7.7.2, it required that the employee "must attempt to donate blood outside working time" and it was only "if that [was] not possible" that the employee would have an entitlement to leave pursuant to the award.

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[114] *National Fast Food Retail Award 2000* (AP806313CRV); *Fast Food Industry Award - South Eastern Division 2003* (AN140113); *Fast Food Industry Award - State (Excluding South-East Queensland) 2003* (AN140114); *Quick Service Food Outlets (QSFO'S) Award - State 2004* (AN140250); *Retail Take-Away Food Award - South-Eastern Division 2003* (AN140258); *Fast Food Outlets Award 1990* (AN160127) and *Transport Workers (Mobile Food Vendors) Award 1987* (AN160321).

[115] *Award Modernisation* [2008] AIRCFB 550.

[116] AN140250.

169. Further, the Commission's 'draft audit of awards'[117], last revised in January 2012, identifies 11 pre-modern awards[118] as being of relevance to the making of the Hair and Beauty Award. Not one of them contained an entitlement to blood donor leave.

170. Accordingly, an analysis of the pre-modern awards relevant to the Fast Food Award and the Hair and Beauty Award do not advance the SDA's case.

[117] Fair Work Commission, Draft Awards Audit: https://www.fwc.gov.au/documents/awardmod/Draft_Awards_Audit.xls

[118] *Beauty Therapy Industry Award - State 2003* (AN140026); *Broken Hill Commerce and Industry Agreement Consent Award 2001* (AN120088); *Hairdressers & Beauty Salons Award* (AN150062); *Hairdressers Award 1989* (AN160153); *Hairdressers' Industry Award - State 2003* (AN140140); *Hairdressers', &c (State) Award* (AN120242*); Hairdressing and Beauty Industry (Australian Capital Territory) Award 1998* (AP78349); *Hairdressing and Beauty Industry (Northern Territory) Award 2002* (AP818691); *Hairdressing and Beauty Services - Victoria - Award 2001* (AP806816); *Hairdressing, Health and Beauty Industry Award* (AN170042); and *Personal and Other Services Industry Sector - Minimum Wage Order - Victoria 1997* (AP793092).

8. PRIOR CONSIDERATION OF THE RELEVANT ISSUES

171. It is trite to observe that the SDA has not pointed to a single arbitrated outcome which lends support for the proposition that the Commission or its predecessors have previously found that blood donor leave is a necessary part of the minimum safety net in the sense contemplated by s.138 of the Act. We have similarly been unable to identify any such authority.

172. Nonetheless, during the Part 10A Award Modernisation Process, the AIRC was called upon to consider whether modern awards should supplement the NES by including additional forms of leave and/or supplement a type of leave provided by the NES. In numerous instances, the Full Bench determined that such award provisions would not be included.

173. For instance, in relation to jury service leave, the Full Bench said:

> **[103]** We have given further consideration to whether modern awards should supplement the NES in relation to the amount of jury service leave to which an employee is entitled. The NES provides that jury service leave should be limited to 10 days. So far as we know jury service leave provisions in awards and NAPSAs are not subject to any cap at all. If we were to maintain an unlimited entitlement it would be necessary to supplement the NES in every modern award. Such a course would be inconsistent with the NES and tend to undermine it.
>
> **[104]** A similar consideration arises in relation to the rate of pay while on jury service leave. For similar reasons we shall not make general provision for a rate of pay other than the base rate as defined in the NES. It follows that the standard community service leave clause will simply refer to the NES.[119]

174. Similarly, in relation to annual leave the AIRC stated:

> **[30]** It has not been practical to develop a single model clause for annual leave. While the drafts generally provide for the employer to require that arrears of annual leave be taken the drafts are not uniform. It is not appropriate to supplement the annual leave entitlements provided for in the NES unless it is necessary to maintain the safety net. Depending upon the circumstances of the industry and the existing award arrangements provision may be required for a shift worker definition, annual close down, holiday pay, annual leave loading and payment on termination.[120]

[119] *Award Modernisation* [2008] AIRCFB 1000 at [103] – [104].

[120] *Award Modernisation* [2008] AIRCFB 717 at [30].

175. During Stage 2 of the award modernisation process, the ACTU submitted that the AIRC had taken an overly restrictive view when determining what provisions should be included in modern awards concerning parental leave, community services leave and public holidays, but this argument was rejected by the Full Bench: (emphasis added):

> [48] Turning to another matter, the ACTU submitted that the Commission has so far taken a view of its power to supplement the terms of the NES which is too restrictive. It referred in particular to passages in the 19 December 2008 decision relating to concurrent parental leave, community service leave and public holidays. We adhere to those views. We think that we should give proper weight to the Parliament's decision to regulate minimum standards in relation to the matters covered by the NES. It cannot have been Parliament's intention that the Commission could make general provision for higher standards. We accept, however, that there may be room for argument about what constitutes supplementation in a particular case.[121]

176. Various decisions were also made regarding specific awards.

177. For example, in relation to the *Black Coal Mining Industry Award 2010* the Full Bench said:

> **[165]** When the exposure draft was published we saw merit in the submissions of the CMIEG seeking the removal of pressing domestic need leave from the award but were inclined to think it better that the matter be addressed in a variation application after the modern award had commenced to operate. In light of the limitations in the Fair Work Bill on variation of modern awards we have revisited the issue. The entitlement to pressing domestic need leave was introduced into a federal award applying to production employees in New South Wales by the Coal Industry Tribunal in 1973 as part of a clause headed Compassionate Leave. This was at a time when carer's and compassionate leave were not a common feature of federal awards. With the widespread introduction of personal/carer's leave the rationale for the inclusion of pressing domestic need leave is substantially removed. Nevertheless, the entitlement to pressing domestic need leave remains in the two key pre-reform awards applying to the vast majority of employees in the black coal mining industry. The clause providing for pressing domestic need leave puts no limit on the number of occasions in a year that an employee is entitled to pressing domestic need leave (with payment for the first day of each period of leave). In this respect the clause is most unusual. We accept the argument that such an entitlement is not appropriate in an award intended to provide a fair 'minimum' safety net of enforceable terms and conditions of employment for employees.[122]

[121] *Award Modernisation* [2009] AIRCFB 345 at [48].

[122] *Award Modernisation* [2008] AIRCFB 1000 at [165].

178. In relation to the *Fire Fighting Industry Award 2010* the Full Bench said as follows:

> **[71]** One area requiring specific comment is the area of leave. We have excluded from the exposure draft a number of leave entitlements appearing in the Victorian Fire Award on the basis that they seem excessive or inappropriate as part of a minimum safety net. We will, of course, consider submissions in support of the partial or complete inclusion of those leave entitlements in the award that we finally make. In relation to pressing necessity leave, we note that we rejected a claim for the inclusion of this category of leave in the modern award for the black coal mining industry notwithstanding that it appeared in a pre-reform award applying generally in the industry and notwithstanding the consent of the industry parties to the maintenance of that form of leave.[123]

179. In a subsequent decision it said:

> **[54]** In relation to personal/carer's leave and parental leave, consistent with our approach generally, we have decided not to supplement the National Employment Standards (NES). We are not persuaded that the pressing necessity leave, special leave and study leave provisions in the *Victorian Firefighting Award* are appropriate for inclusion in a modern award that is intended to be a safety net.[124]

180. The AIRC reached a similar conclusion regarding the *Local Government Industry Award 2010:*

> **[144]** In relation to personal/carer's leave and community service leave we have not accepted some of the agreed changes to those clauses. For reasons that we have explained elsewhere we now do not regard it as appropriate to supplement personal/carer's leave or to provide for entitlements in relation to jury service that exceed those in the NES unless there are special circumstances.[125]

181. The AIRC made the following decision regarding an application by the SDA to vary the compassionate leave clause in Hair and Beauty Award soon after it was made:

> **[9]** The SDA seeks to supplement the National Employment Standards (NES) in relation to compassionate leave. Modern awards generally do not provide for the supplementation of the minimum entitlements in the NES on an award by award basis and nothing was advanced which would lead us to depart from that approach in this case. We reject the claim.[126]

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[123] *Award Modernisation* [2009] AIRCFB 865 at [71].

[124] *Award Modernisation* [2009] AIRCFB 945 at [54].

[125] *Award Modernisation* [2009] AIRCFB 945 at [144].

[126] Re *Hair and Beauty Industry Award 2010* [2010] FWAFB 290 at [9].

182. An issue regarding compassionate leave was also considered in the context of the *Aluminium Industry Award 2010*:

> **[36]** We accept the union submission that a critical mass exists in the underlying awards and NAPSAs for an annual leave loading of 20% rather than 17.5% and have amended the annual leave clause accordingly. However, we are disinclined to supplement the National Employment Standards (NES) entitlement to compassionate leave notwithstanding that most of the underlying awards contain an entitlement to compassionate leave that is greater than the NES standard.[127]

183. A union proposal regarding the accrual of various paid leave entitlements in the *Airport Employees Award 2010* had a similar fate:

> **[10]** The AMWU and CPSU seek to carry over a provision from the relevant predecessor award to the effect that absence on paid parental leave is regarded as service for all purposes. The significance of this change appears to be in relation to the accrual of other leave entitlements including annual leave, long service leave and personal leave. These entitlements arise from the National Employment Standards (NES) and not the modern award. We are reluctant to modify the effect of the NES in relation to these entitlements. Our general approach has been to allow such leave to be dealt with by the NES without variation or supplementation on an award by award basis. The proposed variation is rejected.[128]

184. It is clear that a conscious and consistent decision was made by the AIRC to reject proposals to include additional forms of leave or to supplement NES entitlements.

185. The Preliminary Jurisdictional Issues Decision confirms that the Commission should generally follow previous Full Bench decisions that are relevant to a contested issue: (emphasis added)

> **[25]** Although the Commission is not bound by principles of stare decisis it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in Nguyen v Nguyen:
>
> > "When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see Queensland v The Commonwealth (1977) 139 CLR 585 per Aickin J at 620 et seq."

[127] *Award Modernisation* [2009] AIRCFB 826 at [36].

[128] Re *Airport Employees Award 2010* [2010] FWAFB 286 at [10].

[26] While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the Commission. As a Full Bench of the Australian Industrial Relations Commission observed in Cetin v Ripon Pty Ltd (T/as Parkview Hotel) (Cetin):

> "Although the Commission is not, as a non-judicial body, bound by principles of stare decisis, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so."

[27] These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.[129]

186. The SDA has not pointed to any cogent reasons for departing from the above clear and consistent line of authority for the proposition that modern awards should not supplement the NES by including additional forms of leave. Accordingly, we respectfully submit that the Commission ought to follow the previous Full Bench decisions cited.

187. Further, earlier this year, Vice President Watson issued his decision rejecting the ACTU's claim for a new form of leave in modern awards for employees experiencing family and domestic violence, which is also here relevant. In His Honour's decision, the former Vice President said: (emphasis added)

[8] A consideration of context is important to this assessment. The context includes the current make-up of the safety net. Leave entitlements are established by the legislature and are provided on a standard uniform basis to all national system employees in the National Employment Standards (the NES) in the Act. Awards refer to those standards and contain limited additional machinery provisions. The Commission has consistently avoided supplementation of the NES leave standards in awards and has declined to insert additional leave entitlements, including in relation to leave of the nature now proposed. The new form of leave is intended to be available in circumstances where personal/carer's leave or annual leave are currently available. It also seeks to extend the circumstances for taking leave beyond the circumstances of these forms of leave and to make the new form of leave available to a broader class of employees. To that extent the ACTU seeks a departure from the NES and the previous approach of the Commission.

[129] Ibid at [24] – [27].

…

[114] The conscious decision of the [AIRC] not to supplement the NES resulted in awards making reference to the NES for annual leave, personal/carer's leave, community service leave and other NES matters such as public holidays. Any further provisions are of a machinery nature and do not affect the underlying NES entitlement. The approach ensured that entitlements created by the NES are not complicated by supplementary award provisions consistent with the requirement in the modern awards objective that the award system is simple, easy to understand, stable and sustainable. In my view it is not appropriate to depart from that clear approach.[130]

[130] *4 yearly review of modern awards – Family & Domestic Violence Leave Clause* [2017] FWCFB 1133 at [8] and [114].

9. BLOOD DONOR LEAVE IS NOT A MATTER FOR THE MODERN AWARDS SYSTEM

188. It is trite to observe, at the outset, that no other modern award contains an entitlement to paid leave for the purposes of donating blood.

189. Indeed the very vast majority of modern awards do not contain *any* additional form of leave to that which is provided by the NES, save for a small number of exceptions such as unpaid ceremonial leave provisions in a very small number of awards (e.g. *Aboriginal and Community Controlled Health Services Award 2010*) and dispute resolution procedure training leave, which is intended to enhance the operation of the model dispute resolution procedure (e.g. clause 11 of the *Manufacturing and Associated Industries and Occupations Award 2010*).

190. Rather, the creation of different forms of leave is a matter that has largely been left to the legislature. Indeed this has been the case for some time.

191. Prior to the implementation of the Australian Fair Pay and Conditions Standard (**AFPC Standard**) within the *Workplace Relations Act 1996* from 27 March 2006, leave entitlements for federal award covered workers were dealt with in awards, with the partial exception of long service leave.[131]

192. Since 27 March 2006, leave entitlements for employees have been primarily dealt with in legislated minimum standards. That is, within the AFPC Standard between 27 March 2006 and 31 December 2009, and in the NES from 1 January 2010.

193. Whilst we acknowledge that s.139(1) specifies that awards *may* include terms about "leave, leave loadings and arrangements for taking leave" (s.139(1)(h)), this does not of itself render it appropriate for the Awards to introduce a new specific leave entitlement.

[131] During this earlier period, if federal award long service leave provisions were not in place, the relevant State or Territory long service leave laws applied.

194. The SDA has not advanced any cogent reason why the Commission should depart from the approach that it and its predecessors have taken for many years; namely, to defer the creation of different types of leave to Parliament. Put another way, the union has not established that the Commission should adopt an approach that is out of step with that which has consistently been adopted for some time, by introducing to the awards system a new form of leave.

195. In addition, enterprise bargaining (which the minimum safety net is designed to underpin and encourage[132]) provides an appropriate vehicle for the SDA to pursue an ability for its constituents to take paid leave for the purposes of donating blood.

196. It is evident from the material before the Commission that the SDA has indeed availed itself of this opportunity during the course of negotiations with a large number of employers covered by the Awards and has had some degree of success.[133] This is demonstrative of the minimum safety net serving its exact purpose; it provides basic terms and conditions that are necessary to ensure that employees are entitled to a fair and relevant minimum safety net, and if and where it can be accommodated, employers may include an entitlement to blood donor leave in their enterprise agreement.

197. Enterprise bargaining enables the relevant parties to tailor the provision of such entitlements to reflect the individual circumstances and needs of the enterprise. The impact of the claim on employers will vary based on matters including, but not limited to:

- The size of the employer;
- The nature of the employer's operations;
- The capacity of the employer to cover for employee absences; and

[132] Section 3(f) and section 134(1)(b) of the Act.

[133] SDA submission dated 2 May 2017 at paragraph 36.

- The financial resources of the employer.

198. It is also appropriate that such a matter be left to enterprise bargaining because it may not be one that is universally valued or utilised by all employees. Indeed there are a range of reasons why a person may not be eligible to donate blood (e.g. age, pregnancy, certain health conditions or overseas travel). Additionally, many persons might simply decide that they do not seek to donate blood, with or without a paid leave entitlement.

199. In those circumstances, it is apt that the potential inclusion of such an entitlement in the industrial instrument applying to the relevant group of employees be left to enterprise bargaining. Importantly, it would enable employees (and their union, if relevant) to determine whether they seek to pursue the inclusion of paid blood donor leave and/or whether they consider it of greater benefit to pursue some other term or condition of employment that is of greater value to them.

200. The list of enterprise agreements provided by the SDA is reflective of this. We assume it is uncontroversial that not *all* enterprise agreements applying to employers covered by the Awards feature on that list, because they do not all contain a blood donor leave entitlement. This may be because:

- It was not sought by the employees covered by it; or
- It could not be accommodated by the employer.

201. Assumptions cannot fairly be made in the manner the SDA proposes[134] about the potential impact of its claim on employers of various sizes based on the list of enterprise agreements provided by the union. It has not given any consideration to the capacity of those employers to accommodate such a leave entitlement, the specific terms of the provisions in those agreements and the manner in which they operate, whether other employers covered by the Awards with enterprise agreements in place have a comparable ability to

[134] SDA submission dated 2 May 2017 at paragraphs 39 and 42.

accommodate staff absences and additional employment costs, and so on. It is naïve to suggest that based on the list of enterprise agreements presented, the proposed entitlement "can be accommodated by any size business" and that the "cost and burden of paid [blood donor leave] on any size business is negligible"[135].

202. Finally, the potential impact of the introduction of the clause on the application of the "better off overall test" to enterprise agreements underpinned by the Awards should not be underestimated. A recent line of authority[136] to emerge from the Commission regarding the manner in which that test is to be applied demonstrates the importance of having regard to the potential implications of introducing additional entitlements to the safety net when an enterprise agreement comes before the Commission for approval.

[135] SDA submission dated 2 May 2017 at paragraph 39.

[136] See for example *Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited T/A Coles and Bi Lo*; *AMIEU v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited T/A Coles and Bi Lo* [2016] FWCFB 2887.

10. THE SDA'S EVIDENCE

203. The SDA has filed 14 witness statements in support of its claim. Each of those witnesses are individual employees who speak of their experiences related to donating blood. That evidence can be summarised as follows:

- All 14 employees are covered by the Retail Award.
- They are employed by eight employers, all of whom are covered by the Retail Award.
- Most of those employers can be characterised as large retail sector employers that operate a number of stores nationwide (e.g. [redacted]).
- Most of the 14 employees are employed by one of those employers.
- 10 of the 14 employees state that they are presently entitled to, and utilise, a paid blood donor leave entitlement pursuant to the enterprise agreement applying to them.
- Of those 10, 8 employees consider that donating blood would be *more difficult* for them if they did not have the benefit of the aforementioned entitlement, but it is *not* their testimony that it would be *impossible*. Only one of the 14 employees rules out the prospect of donating blood absent the entitlement while another states that they would endeavour to donate blood regardless.
- Of the four witnesses who do not have an entitlement to paid blood donor leave, three donate blood, despite their working hours, personal commitments and family responsibilities.
- None of the witnesses are covered by the Fast Food Award or the Hair and Beauty Award.

204. We consider that only the following factual propositions can be distilled from the SDA's witness evidence:

- That a miniscule proportion of employees covered by the Retail Award donate blood and/or seek to donate blood.
- That some such employees are employed by large employers who provide blood donor leave as an entitlement pursuant to their enterprise agreements.
- That some employees who have access to such an entitlement consider that it would be more difficult for them to donate blood without it.
- That in many such cases, this would be because of the employee's personal circumstances and the manner in which they choose to prioritise their various commitments.
- That some employees covered by the Retail Award do not have access to a paid blood donor leave entitlement.
- That some of those employees donate blood regardless.
- That some of those employees do not donate blood.
- That in some cases, this is because of the employee's personal circumstances and the manner in which they choose to prioritise their various commitments.

205. We also propose to make the following brief additional observations regarding the SDA's evidentiary case.

206. **Firstly**, as none of the evidence relates to the fast food or hair and beauty industries, there is no evidence before the Commission that employees in those industries are in fact donating blood or seeking to donate blood; or that a paid leave entitlement would be utilised in those industries if it were inserted

in the relevant awards. As a result, the Commission cannot properly be satisfied that the provision proposed is *necessary* to ensure that the Fast Food Award and the Hair and Beauty Award achieve the modern awards objective.

207. **Secondly**, the evidence demonstrates that the absence of a paid leave entitlement does not prohibit employees from donating blood. So much can be concluded from the evidence of the witnesses[137] who do not appear to have an entitlement to paid blood donor leave. Three[138] of those witnesses donate blood (or have donated blood) notwithstanding their working hours and personal commitments. Such evidence suggests that the grant of the SDA's claim is not essential or necessary to ensure that employees employed under the Awards can donate blood.

208. **Thirdly**, the evidence also demonstrates that where an employee does not donate blood in the absence of a paid blood donor leave entitlement, or anticipates that it may be difficult for them to do so if they were no longer granted such leave, this is often because of the manner in which such an employee chooses to prioritise their personal commitments and/or their perception of any inconvenience that they might experience if they seek to donate blood outside of working hours. Their decision not to donate blood or their perception that it might be more challenging is *not* because their personal commitments prohibit them from ever doing so.

209. For instance:

- [redacted] used to donate blood until about ten years ago.[139] It is his evidence that it is "difficult for him to donate blood due to [his] family and work commitments".[140] He is employed as a full-time employee[141]

[137] [redacted], [redacted], [redacted] and [redacted].
[138] [redacted], [redacted] and [redacted].
[139] Affidavit of [redacted] dated 13 April 2017 at paragraph 9.
[140] Affidavit of [redacted] dated 13 April 2017 at paragraph 10.
[141] Affidavit of [redacted] dated 13 April 2017 at paragraph 2.

under the Retail Award[142]. His hours of work are such that he is not required to work on Wednesdays.[143] Every second week he either works on Thursday and Friday or on Saturday and Sunday.[144] His sons are 15 years of age[145] and attend school.[146] [redacted] statement does not reveal any reason why he can *never* donate blood on a Wednesday, Thursday or Friday whilst his children are attending school and thus he is relieved of his caring responsibilities[147]. Similarly, his statement does not explain any reason why he can never donate blood on a weekend, save for his attendance at his sons' basketball games[148], which presumably do not run all weekend throughout every weekend of the year.

- [redacted], a part-time employee[149] and a mother of school-aged children[150] testifies that if she did not have an entitlement to paid blood donor leave (as is presently the case under the enterprise agreement applying to her[151]), she would "not donate blood regularly"[152] in part because she "like[s] to participate in fitness classes for [her] own health"[153].

- [redacted] is a full-time employee of [redacted] and is entitled to a paid leave entitlement under the relevant enterprise agreement. He states that if his employer "didn't support blood donation and the blood bank did not make it so easy to do, [he] would not donate so regularly.

[142] Affidavit of [redacted] dated 13 April 2017 at paragraph 4.
[143] Affidavit of [redacted] dated 13 April 2017 at paragraph 5.
[144] Affidavit of [redacted] dated 13 April 2017 at paragraph 5.
[145] Affidavit of [redacted] dated 13 April 2017 at paragraph 6.
[146] Affidavit of [redacted] dated 13 April 2017 at paragraph 8.
[147] Affidavit of [redacted] dated 13 April 2017 at paragraph 6.
[148] Affidavit of [redacted] dated 13 April 2017 at paragraph 7.
[149] Affidavit of [redacted] dated 24 April 2017 at paragraph 3.
[150] Affidavit of [redacted] dated 24 April 2017 at paragraph 16.
[151] Affidavit of [redacted] dated 24 April 2017 at paragraphs 6 and 11.
[152] Affidavit of [redacted] dated 24 April 2017 at paragraph 16.
[153] Affidavit of [redacted] dated 24 April 2017 at paragraph 16.

This is because of family commitments and the desire to spend time with [his] wife, four children and seven grandchildren, along with the need for rest and relaxation. It is also the sort of thing that will drop out of [his] priorities if not regularly present as it currently is in the workplace" (emphasis added). Self-evidently, these are not matters that preclude [redacted] from donating blood. Rather, they reflect the personal decisions he makes regarding the manner in which he allocates his non-working hours.

210. **Fourthly**, we consider that it can reasonably be inferred that even if the relevant witnesses no longer had access to a paid leave entitlement to donate blood, many would continue to endeavour to do so given its special significance to their personal circumstances or to those of a family member or friend. Indeed in most cases, the witnesses do not eliminate such a possibility. They simply state that it would be more difficult to accommodate; a matter that does not render the provision *necessary* to ensure that the Awards are achieving the modern awards objective.

211. **Fifthly,** none of the witnesses contemplate accessing an entitlement other than a designated entitlement to blood donor leave for the purposes of donating blood. This includes annual leave and entitlements such as time off in lieu of overtime. Consequently, the SDA's evidentiary case does not enable the Commission to assess whether access to such entitlements is sought by employees for that purpose and if so, whether it is accommodated by employers.

11. SECTION 138 AND THE MODERN AWARDS OBJECTIVE

212. In exercising its modern award powers, the Commission must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions taking into account each of the matters listed at ss.134(1)(a) – (h).

213. Additionally, the critical principle to flow from the operation of s.138 is that a modern award can only include such terms as are necessary to achieve the modern awards objective. The requirement imposed by s.138 is an ongoing one. That is, at any time, an award must only include terms that are necessary in the relevant sense. It is not a legislative precondition that arises only at the time that a variation to an award is sought.

214. We also note that each of the Awards, considered in isolation, must satisfy s.138. The statute requires that the Commission ensure that each award includes terms only to the extent necessary to ensure that the award, together with the NES, provides a fair and relevant minimum safety net. This necessarily requires an award-by-award analysis. An overarching determination as to whether an additional leave entitlement for the purposes of donating blood should form part of the safety net is insufficient and does not amount to the Commission discharging its statutory function in this Review.

215. As we have earlier stated, the need for this approach is supported by s.156(5), which requires that the Commission review each award in its own right. We again note the following observations made by the Commission in its Preliminary Jurisdictional Issues Decision: (emphasis added)

> **[33]** There is a degree of tension between some of the s.134(1) considerations. The Commission's task is to balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions. <u>The need to balance the competing considerations in s.134(1) and the diversity in the characteristics of the employers and employees covered by different modern awards means that the application of the modern awards objective may result in different outcomes between different modern awards.</u>

> **[34]** Given the broadly expressed nature of the modern awards objective and the range of considerations which the Commission must take into account there may be *no one set* of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective.[154]

216. That the variations proposed by the SDA may not adversely affect all employers in an industry is not the test to be applied in determining whether the variations should be made. By virtue of s.3(g), the object of the Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by, amongst other matters, acknowledging the special circumstances of small and medium sized enterprises. This suggests that regard must be had to specific types of businesses in light of their own circumstances, including the size of the enterprise and the number of employees it engages.

217. The employer parties in these proceedings do not bear any onus to demonstrate that the claim will result in increased employment costs or undermine productivity in a certain industry or for employers covered by the Awards. No adverse inference can or should be drawn from the absence of evidence called by employer parties with respect to a particular award or from the absence of evidence that establishes that the claim will affect all or most employers in an industry.

218. The conduct of the Review differs from an inter-party dispute. Those responding to a claim do not bear an onus. Rather, it is for the proponent of a claim to establish that the variation proposed is necessary in order to ensure that an award is achieving the modern awards objective of providing a fair and relevant minimum safety net of terms and conditions. In determining whether a proponent has in fact established as much, the Commission will have regard to material before it that addresses the various elements of the modern awards objective, including those that go to employment costs, the regulatory burden,

[154] *4 yearly review of modern awards: Preliminary jurisdictional issues* [2014] FWCFB 1788 at [33] – [34].

flexible work practices and productivity. These considerations are both microeconomic and macroeconomic; they require evaluation with respect to the practices of different types of businesses as well as industry at large.

219. As the Full Bench stated in the Preliminary Jurisdictional Issues Decision: (emphasis added)

> The proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective (see s.138). What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations[155]

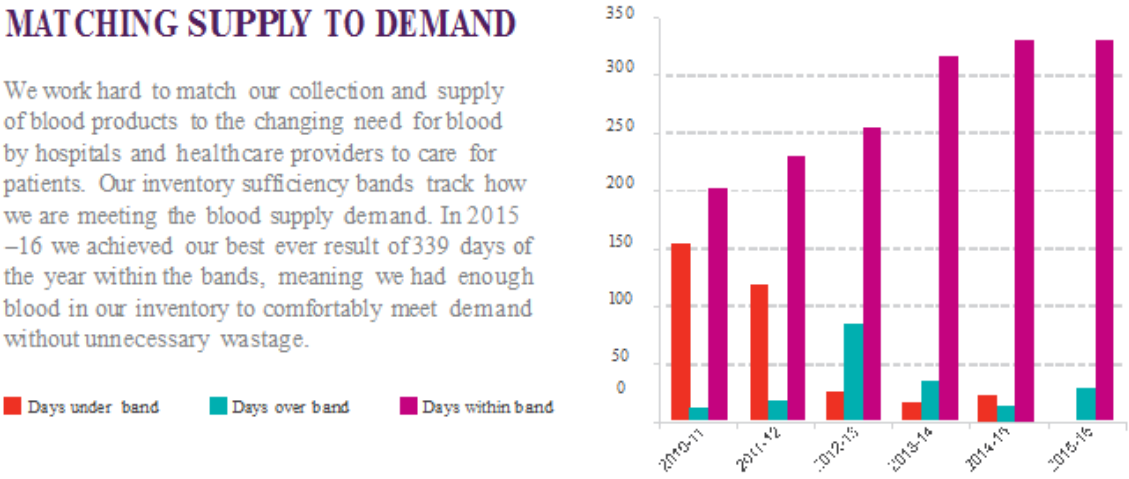
220. It is therefore for the proponent to overcome the legislative threshold established by ss.138 and 134(1), which includes a consideration of the impact upon different types of businesses and industry at large.

221. For all the reasons we have set out in this submission, the SDA has *not* overcome that threshold. It has failed to mount a case that establishes that the provisions proposed are necessary to ensure that each of the Awards meet the modern awards objective. Further, we highlight the following important matters relevant to the requisite assessment that must be made by virtue of s.138 of the Act.

222. **Firstly**, there is no evidence that there is a need to implement measures as drastic as introducing a minimum safety net leave entitlement in order to encourage blood donation because of any significant shortage experienced by the Red Cross. Indeed, their Annual Report suggests quite the contrary. It states:[156]

[155] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [60].

[156] Australian Red Cross Blood Service 2015-16 Annual Report at page 17.



223. As can be seen from the above, there was not a single day during 2015 – 2016 on which there was an insufficient supply (i.e. 'day under band'). Indeed on 26 days of the year, there was an *oversupply* of donated blood. The Annual Report states that some 1.3 million individual donations were made in the Red Cross' donor centres during 2015 – 2016.[157]

224. This quite clearly demonstrates that there is no apparent need for extending the campaign to encourage members of our society to donate blood to the modern awards system due to some serious shortfall of supply. There is no impending crisis associated with a demand that cannot be met by the supply of donated blood available to the Red Cross absent the award entitlement sought.

225. Of course we do not concede that if such factors were present, they would render the provision proposed necessary in the relevant Awards. It is our position that regardless of whether blood donations are adequate to meet the current level of demand, this is not a matter for the modern awards system. It is trite to observe that the modern awards objective in no way relates or refers to the need to encourage participation in social causes or to advance social causes. It is, however, relevant to highlight that whilst the SDA might otherwise

[157] Australian Red Cross Blood Service 2015 – 16 Annual Report at page 8.

have sought to argue that the Red Cross is facing serious challenges in securing an adequate supply of blood, this does not in fact appear to be the case.

226. **Secondly,** the Annual Report reveals the following information about the Red Cross' financial position:

> Thanks to the fantastic efforts of our staff, the Blood Service recorded an outstanding operating result for the financial year with a $5.4 million surplus, after providing for a return of $42 million to the National Blood Authority. The overall surplus, including other comprehensive income, was $21 million. The Capital Program had a surplus of $8.5 million, after allowing for a $46.2 million depreciation cost. A surplus of $7.1 million was recorded across other programs, including processing centre upgrade contributions, movements in the defined benefit superannuation plan and other activities such as transplantation, affiliated and external services.[158]

227. With all due respect, on its face it would appear to us that the Red Cross has adequate resources to implement one or both of the following measures for the purposes of increasing blood donations if it considered that this was necessary:

- Increase the number of permanent and/or mobile blood donor units and/or their opening hours, such that a greater number of persons can attend those centres to donate blood, including those that are employed.

- Expend further resources on campaigning to encourage members of our society to donate blood.

228. The Red Cross website states that its blood service is funded by the Federal, State and Territory Governments:

> "The Australian Red Cross Blood Service is a division of the Australian Red Cross. We're funded by the federal, state and territory governments of Australia to supply the community with safe, high quality blood and blood products, as well as organ and bone marrow services for transplantation".[159]

[158] Australian Red Cross Blood Service 2015 – 16 Annual Report at page 73.

[159] http://www.donateblood.com.au/about-us

229. Accordingly, even if the Red Cross finds itself short of funds at some time in the future, it is likely that the Federal, State and Territory Governments would provide any additional funding needed.

230. In such circumstances, it is especially difficult to justify the imposition of additional employment costs and operational difficulties upon individual employers covered by the Awards.

231. To the extent that the Red Cross elects not to adopt the aforementioned measures or any other that it considers appropriate, the burden should not therefore be shifted to individual employers to effectively facilitate and fund employees' blood donation visits. An award clause that requires employers to supplement the operations of the Red Cross by enabling employees to attend their donor centres is not a *necessary* part of the minimum safety net.

232. **Thirdly**, put simply, the need to maintain adequate supplies of donated blood is a matter for those organisations that carry that responsibility, which cannot fairly be shifted to employers, bearing in mind the special circumstances of small businesses. Such organisations include the Red Cross and any other entity from which it receives funding or other resources. It is not properly a matter for the modern awards system simply because it aligns with the SDA's ideology.

A 'Fair' Safety Net

233. The notion of 'fairness' in s.134(1) is not confined in its application to employees. Consideration should also be given to the fairness or otherwise of an award obligation on employers. So much was confirmed by a recent Full Bench decision of the Commission regarding the annual leave common issues:

> **[109]** … It should be constantly borne in mind that the legislative direction is that the Commission must ensure that modern awards, together with the NES provide

> 'a *fair* and relevant minimum safety set of terms and conditions'. Fairness is to be assessed from the perspective of both employers and employees.[160]

234. Similarly, when considering the appropriate penalty rate for the performance of ordinary hours of work on Sundays by employees covered by the *Shop, Distributive and Allied Employees' Association – Victorian Shops Interim (Roping-in No 1) Award 2003*, Justice Giudice observed that in making safety net awards, the AIRC was to be guided by s.88B of the WR Act. That provision stated that in performing its functions under Part VI of the WR Act, the AIRC was to ensure that a safety net of fair minimum wages and conditions of employment is established and maintained having regard to, amongst other factors, the need to provide fair minimum standards for employees in the context of living standards generally prevailing in the Australian community. Having referred to s.88B, His Honour stated:

> In relation to the question of fairness it is of course implicit that the Commission should consider fairness both from the perspective of the employees who carry out the work and the perspective of employers who provide the employment and pay the wages and to balance the interests of those two groups. …[161]

235. The grant of the SDA's claim would be unfair to employers in various ways, which we here outline. In many cases we have earlier made detailed submissions about some of these propositions, which we need not repeat.

236. **Firstly**, the imposition of an additional financial liability and operational difficulties on employers in the absence of any sound merit basis for it is entirely unfair. This is particularly so in light of the submissions we have made above regarding the role of the Red Cross, its resources and the success it has had in securing a sufficient supply of blood donations. The SDA has not established that there is any serious foundation for the clause it has proposed. On this basis alone, we consider that the claim should be dismissed.

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[160] *4 yearly review of modern awards* [2015] FWCFB 3177 at [109]. See also *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [117] – [118].

[161] *Re Shop, Distributive and Allied Employees' Association* (2003) 135 IR 1 at [11].

237. **Secondly**, it is extremely unfair that an employer be required to provide a paid leave entitlement for the purposes of an activity that results in an employee being absent from work even though that absence is not necessary in the sense that an employee is *compelled* to donate blood and even if they so choose, they can do so outside of working hours. This is particularly important having regard to:

- Part-time employees; and
- The opening hours of donor centres, as discussed earlier in this submission.

238. **Thirdly**, it would be unfair to introduce an entitlement that takes an excessively generous approach by effectively providing a leave entitlement in each instance that an employee could conceivably donate whole blood or double red cells, having regard to the Red Cross' restrictions in this regard.

239. **Fourthly**, it is unfair that, having regard to all of the above, an employer be required to pay an employee if they were to take such leave; and that too at the same rate that they would have been paid if they were performing work.

240. **Fifthly**, the absence of any express employer discretion is extremely unfair when regard is had to the potential operational consequences that might flow from an absolute right to take leave and the nature of the entitlement itself, which can so readily be distinguished from other non-discretionary forms of leave that are afforded where an employee is absent from work due to circumstances that necessitate their absence at that time. In contrast, the proposed leave entitlement is for the purposes of enabling an employee to elect to partake in a social activity that is not necessitated by the employee's own circumstances or because of any inability to perform work.

241. **Sixthly**, it is unfair that an employee may be able to take a period of leave that is longer than that which is essential in order to donate blood under the proposed clause. That is, an employee may elect to donate blood at a location further from their place of work for the purposes of reaping the full benefit of

the two hour entitlement, even if the activity could have been undertaken more efficiently.

242. **Seventhly**, the proposed clause does not enable an employer to not grant an entitlement to the leave in circumstances where an employee does not satisfy the evidentiary requirements. This is because clause X.4 is not in any way connected to the right to take the leave. This is self-evidently unfair. The provision effectively requires the employer to grant an employee leave even in circumstances where the employee falls short of meeting the evidentiary requirements it prescribes.

243. **Eighthly,** it is trite to observe that the safety net already provides entitlements that can be accessed by an employee if they seek to be absent from work for the purposes of donating blood.

244. For example, all full-time and part-time employees have access to annual leave pursuant to the NES. An employer must not unreasonably refuse a request to take annual leave (s.88(2)). The Act does not prescribe any other limitations upon the circumstances in which annual leave can be taken; nor does it impose any requirement to take annual leave within certain prescribed timeframes. Indeed it does not even mandate that leave must be taken. Rather, annual leave accumulates throughout the duration of an employee's service with the employer and is ultimately cashed out upon termination of employment if it remains untaken. In this Review, the Awards have also been varied to allow the taking of leave in advance of its accrual.

245. Another example is the ability to take time off instead of overtime, which is available to all employees under the Awards.[162]

246. There is no evidence in these proceedings that establishes that such entitlements have been inadequate in enabling any employees covered by the Awards to be absent from work for the purposes of donating blood, to the

[162] Clause 26.3 of the Fast Food Award, clause 29.3 of the Retail Award and clause 31.3 of the Hair and Beauty Award.

extent that any employees have in fact sought to do so. In such circumstances, it would be unfair to employers if the safety net were expanded by providing an additional form of leave.

247. **Ninthly**, considerations pertaining to the potential unfairness of the particular clause proposed and the manner in which the provision would operate must be weighted by the Commission. The proposed clause does not balance the needs and interests of employees and employers. We make this submission particularly in light of the problematic way in which it would operate. When consideration is given to the circumstances in which the provision could be accessed and the absence of any discretion of an employer as to how or when the leave is accessed, it has the potential to operate in ways that are particularly unfair to employers. We have previously provided some examples that are illustrative of this possibility.

248. The introduction of the proposed clause in the circumstances described above would not be in keeping with the provision of a *fair* safety net.

A 'Minimum' Safety Net

249. Modern awards are intended to afford employees with a minimum safety net, which is to include the very basic entitlements to be provided to employees covered by the Awards, noting that the system underpins an enterprise bargaining regime that is to be encouraged (s.134(1)(b)). The very notion of a minimum safety net suggests that the relevant set of terms and conditions represent the essential rights and protections that must be afforded to all employees and employers.

250. A minimum safety net is *not* intended to reflect the union movement's wish list for any number of additional terms and conditions that it considers desirable, such as the provision here sought by the SDA. Matters such as these are more appropriately dealt through enterprise bargaining or through a co-operative and flexible approach between employers and employees.

251. It is not the role of the safety net or the Commission as the arbitrator of part of that safety net, to mandate terms and conditions that are designed to advance specific social causes. Rather, a minimum safety net must be such in its design that it can reasonably be applied to the full gamut of employees and businesses (by reference to size, industry, nature of operations, composition of workforce and so on) despite being uniform in its terms.

252. The restraint shown by the legislature in providing for paid leave entitlements that are limited to situations in which an employee cannot attend work by virtue of certain specific personal circumstances, in addition to a single generalised entitlement to annual leave, is reflective of this. The absence of prescriptive obligations or restrictions as well as the ability to supplement or to some extent, deviate from them by way of modern award or enterprise agreement terms is also reflective of an implicit recognition of the role of the safety net. This has been furthered by the general absence of modern award terms that create new categories of leave.

253. In our view, the grant of the SDA's claim would represent an unwarranted and inappropriate expansion of the minimum safety net. In effect, it would introduce a new category of leave that could be accessed by any employee covered by the Awards in circumstances that may be accommodated by way of pre-existing elements of the safety net. In addition, it cannot be assumed that the provision sought can be accommodated by all award covered employers without additional costs and significant operational difficulties.

A 'Relevant' Safety Net

254. In the recent Penalty Rates Decision, the Full Bench expressed the view that: (emphasis added)

> **[120]** … In the context of s.134(1) we think the word 'relevant' is intended to convey that a modern award should be <u>suited to contemporary circumstances</u>. …[163]

[163] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [120].

255. A modern award will suit contemporary circumstances if it reflects modern work practices, working arrangements and operational requirements. Further, it will be drafted having regard to other existing parts of the safety net.

256. We shortly turn to the potential implications that the proposed clause would have with reference to s.134(1)(d), which requires that the Commission take into account the need to promote flexible modern work practices and the efficient and productive performance of work. Having regard to the issues that we there raise, and the pre-existence of other entitlements that already enable an employee to seek to be absent from work for the purposes of donating blood, the proposed clause cannot properly form part of a relevant safety net.

The NES

257. The Commission's task is to ensure that the Awards, *together with the NES*, provide a fair and relevant minimum safety net. Accordingly, consideration must be given to the relevant sections of the Act.

258. **Firstly,** we have already made submissions about the entitlement to paid annual leave, which can be utilised by employees to donate blood if they so choose. To this extent, the safety net already affords employees with a leave entitlement which, importantly, strikes an appropriate balance between the right of employees to take the leave and the discretion granted to employers to refuse a request to take annual leave. As a result, when the Awards are read with the NES, it is clear that the safety net already provides fair and relevant terms and conditions if an employee seeks to be absent from work for the purposes of donating blood.

259. **Secondly**, Division 8 of the NES relates to community service leave. Section 108 prescribes the entitlement in the following terms:

> **Entitlement to be absent from employment for engaging in eligible community service activity**
>
> An employee who engages in an eligible community service activity is entitled to be absent from his or her employment for a period if:

(a) the period consists of one or more of the following:

(i) time when the employee engages in the activity;

(ii) reasonable travelling time associated with the activity;

(iii) reasonable rest time immediately following the activity; and

(b) unless the activity is jury service--the employee's absence is reasonable in all the circumstances.

260. Section 109 defines an "eligible community service activity": (emphasis added)

(1) Each of the following is an ***eligible community service activity***:

(a) jury service (including attendance for jury selection) that is required by or under a law of the Commonwealth, a State or a Territory; or

(b) a voluntary emergency management activity (see subsection (2)); or

(c) an activity prescribed in regulations made for the purpose of subsection (4).

…

(4) The regulations may prescribe an activity that is of a community service nature as an eligible community service activity.

261. The *Fair Work Regulations 2009* (**Regulations**) do not prescribe any eligible community service activity for the purposes of s.109(4) of the Act.

262. As can be seen, whilst the legislature expressly created a separate category of leave for circumstances in which an employee performs certain community services, and contemplated the ability to prescribe additional community services in the Regulations. Neither the current Coalition Government or the previous Labor Government have moved to specify blood donation (or any other community service) as an eligible community service for which an employee would be entitled to leave pursuant to the NES. That is, successive Governments appear to have deemed it unnecessary to prescribe any additional forms of community service. The restraint shown by Governments in this regard is entirely appropriate, given the nature of a *minimum* safety net and the generalised form of annual leave that is available to all permanent employees.

263. The SDA has not established any cogent reason for which the Commission should decide to depart from the approach that has been adopted by Parliament.

The Relative Living Standards and Needs of the Low Paid (s.134(1)(a))

264. The *Annual Wage Review 2014 – 2015 Decision* dealt with the interpretation of s.134(1)(a): (emphasis added)

> **[310]** The assessment of relative living standards requires a comparison of the living standards of workers reliant on the NMW and minimum award rates determined by the annual wage review with those of other groups that are deemed to be relevant.
>
> **[311]** The assessment of the needs of the low paid requires an examination of 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, assessed in the context of contemporary norms.[164]

265. The term "low paid" has a particular meaning, as recognised by the Commission in its Annual Wage Review decisions:

> **[362]** There is a level of support for the proposition that the low paid are those employees who earn less than two-thirds of median full-time wages. This group was the focus of many of the submissions. The Panel has addressed this issue previously in considering the needs of the low paid, and has paid particular regard to those receiving less than two-thirds of median adult ordinary-time earnings and to those paid at or below the C10 rate in the Manufacturing Award. Nothing put in these proceedings has persuaded us to depart from this approach.[165]

266. The Commission's Penalty Rates Decision provides the most recent data for the 'low paid' threshold:[166]

Two-thirds of median full-time earnings	*$/week*
Characteristics of Employment survey (Aug. 2015)	818.67
Employee Earnings and Hours survey (May 2016)	917.33

[164] *Annual Wage Review 2014 – 2015* [2015] FWCFB 3500 at [310] – [311].

[165] *Annual Wage Review 2012 – 2013* [2013] FWCFB 4000. See also *Annual Wage Review 2013 - 2014* [2014] FWCFB 3500 at [310].

[166] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [168].

267. The SDA seeks to argue that all employees in the "accommodation and food services and retail industries are low paid by comparison to employees generally"[167]. It relies on a decision of the Commission regarding penalty rates during the 2 year review of modern awards[168] in support of this proposition. The relevant passage of that decision, which the SDA cites, is as follows: (emphasis added)

> **[212]** We are satisfied that a high proportion of employees in the accommodation and food services and retail industries are low paid. …[169]

268. To the extent that the SDA seeks to argue that *all* employees covered by the Awards are low paid, this has not been made out in the material before the Commission nor decision cited above lend support to that proposition.

269. Further, and in any event, the material presented by the SDA does not establish:

- That the relevant group of employees (i.e. those covered by the Awards who would utilise the proposed clause) are low paid;
- That the absence of a paid leave entitlement in the minimum safety net has a material impact on the needs of any such low paid employees;
- That the grant of the claim would address the needs of any such low paid employees;
- That the absence of a paid leave entitlement in the minimum safety net has a material impact on the relative living standards of employees reliant on the minimum wages prescribed by the Awards; or
- That the grant of the claim would improve the relative living standards of such employees.

[167] SDA submission dated 2 May 2017 at paragraph 46.

[168] *Modern Awards Review 2012 – Penalty Rates* [2013] FWCFB 1635.

[169] *Modern Awards Review 2012 – Penalty Rates* [2013] FWCFB 1635 at [212].

270. As a consequence, the Commission cannot be satisfied that s.134(1)(a) lends support to the union's claim.

271. Further and in any event, even if the Commission were to so conclude, it is but one of many factors that must be taken into account, none of which are to be attributed any particular primacy[170]. As the submissions that follow will demonstrate, a consideration of those factors collectively tells against the grant of the claim.

The Need to Encourage Collective Bargaining (s.134(1)(b))

272. Section 134(1)(b) requires that the Commission have regard to the need to encourage collective bargaining. For the reasons that follow, we submit that this factor lends support to the proposition that the claim should be dismissed.

273. **Firstly**, the SDA's submissions in the current proceedings and the long list of enterprise agreements that contain a blood donor leave entitlement in its written submissions[171] suggest that this is an issue of extreme importance to the union, which, absent its inclusion in the awards system, would encourage it and its constituents to engage in enterprise bargaining. To this extent, a decision to dismiss the claim is consistent with the need to encourage collective bargaining.

274. **Secondly**, the SDA submits that the grant of its claim will not be a disincentive to collective bargaining as "evidenced by the existence of [blood donor leave] in enterprise agreements that operate in the same industries in which the pre-modern industry awards existed that also contained [blood donor leave]"[172]. However of the 39 enterprise agreements identified by the union in its written submissions[173], it appears that the very vast majority were negotiated by reference to the relevant *modern* award. In those circumstances, the

[170] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [32].

[171] SDA submission dated 2 May 2017 at paragraph 36.

[172] SDA submission dated 2 May 2017 at paragraph 55.

[173] SDA submission dated 2 May 2017 at paragraph 36.

existence or otherwise of a blood donor leave entitlement in the relevant pre-modern awards is beside the point.

275. In any event, as we have earlier stated, not one of the pre-modern awards to the Hair and Beauty Award contained an entitlement to blood donor leave and only one Queensland NAPSA underpinning the Fast Food Award included such a clause. Further, by virtue of s.89A of the *Workplace Relations Act 1996*, any such provisions were of no effect since 1 July 1998. It also trite to observe that legislative provisions governing enterprise bargaining and the threshold for approval of such agreements differs significantly under the Fair Work regime to that which prevailed at a time when pre-modern awards were in operation.

276. Accordingly, a consideration of pre-modern awards does not assist the Commission in assessing whether the inclusion of the entitlement sought in the current minimum safety net will serve to disincentivise collective bargaining.

277. **Thirdly**, the SDA argues that the provision proposed would introduce an entitlement "so 'small' in quantitative terms that [it] will not remove the impetus to bargaining around the issue and therefore will not discourage collective bargaining"[174]. We do not accept this proposition.

278. A continuing rise to the minimum floor of entitlements will, over time, have the effect of precluding employers from engaging in collective bargaining. It is inevitable that multiple award variations that increase employment costs and impose additional operational constraints will have a cumulative effect, as a result of which there is less scope for employers to engage in bargaining. Conversely, a more generous safety net will not incentivise employees to engage in enterprise bargaining.

[174] SDA submission dated 2 May 2017 at paragraph 56.

279. We make this submission in the context of the current Review, as a result of which a number of variations may be made to the Awards, each of which would have the effect of introducing additional costs and inflexibilities.

280. For instance, in addition to the proposal here before the Commission, the unions are seeking very restrictive casual conversion provisions, increased minimum engagement periods for casual and part-time employees, limitations on the circumstances in which additional casual and part-time employees can be engaged, additional entitlements in relation to public holidays, paid family and domestic violence leave, an absolute right to part-time work or reduced hours if an employee has parenting or caring responsibilities and more. If the union movement is successful in their pursuit of some or all of these proposed award variations, the minimum safety net will be significantly lifted, which would undoubtedly have a bearing on the extent to which employers and employees seek to participate in collective bargaining.

281. In our view, in the context of this Review, it is appropriate that the Commission bears in mind the potential cumulative impact of the many claims that the unions are pursuing which, if granted, will ultimately undermine the need to encourage collective bargaining.

The Need to Promote Social Inclusion through Increased Workforce Participation (s.134(1)(c))

282. For the reasons that follow, the grant of the claim will not promote social inclusion through increased workforce participation.

283. **Firstly,** a Full Bench of the Commission, in the context of the 'award flexibility' common issues, considered the proper interpretation of s.134(1)(c). It stated: (emphasis added)

> **[166]** The first point is not relevant to the consideration identified in s.134(1)(c), namely the promotion of 'social inclusion *through* increased workforce participation'. The social inclusion referred to in this context is employment. In other words,

s.134(1)(c) requires the Commission to take into account the need to promote increased employment.[175]

284. These comments were echoed in the more recent Penalty Rates Decision: (emphasis added)

> **[179]** Section 134(1)(c) requires that we take into account 'the need to promote social inclusion through increased workforce participation'. The use of the conjunctive 'through' makes it clear that in the context of s.134(1)(c), social inclusion is a concept to be promoted exclusively 'through increased workforce participation', that is obtaining employment is the focus of s.134(1)(c).[176]

285. There is no material before the Commission to suggest that the proposed clause would promote increased employment. Similarly, the Commission cannot be satisfied that its absence is having an adverse effect on the need to increase workforce participation.

286. **Secondly,** the SDA cites the Annual Wage Review 2010 – 2011 decision in its written submissions as follows:

> In the *Annual Wage Review 2010 – 2011*, the FWC expressed the broad view that pay and conditions of employment are an important aspect of social inclusion because they impact on the employee's capacity to engage in community life and the *'extent of their social participation'.* [Footnote: *Annual Wage Review 2010 – 2011* [2011] FWAFB 3400 at paragraph [210]].[177]

287. We have reviewed the decision and paragraph number cited by the SDA, however that paragraph relates to another matter and does not deal with any issue associated with social inclusion. We have also considered those parts of the decision that deal with social inclusion through increased workforce participation, but cannot locate any passage that states that which the SDA asserts. Accordingly, we do not propose to respond to the above paragraph of the SDA's submission and the Commission should also disregard it. It purports to rely on a decision that does not in fact appear to "express the broad view that pay and conditions of employment are an important aspect of social

[175] *4 yearly review of modern awards – Common issue – Award Flexibility* [2015] FWCFB 4466 at [166].

[176] *4 yearly review of modern awards – Penalty rates* [2017] FWCFB 1001 at [179].

[177] SDA submission dated 2 May 2017 at paragraph 58.

inclusion because they impact on the employee's capacity to engage in community life and the '*extent of their social participation*'"[178].

288. **Thirdly**, the SDA rather disingenuously submits as follows at paragraph 59 of its written submissions:

> In the *Annual Wage Review 2015 – 2016,* the FWC accepted that 'social inclusion' requires more than simply having a job. The FWC adopted a broader understanding of the relationship between workforce participation and social inclusion, such that a *job with inadequate pay can create social exclusion if the level of income limit's* (sic) *a person's capacity to engage in cultural, economic, political and social aspects of life*. [Footnote: *Annual Wage Review 2015-16* [2016] FWCFB 3500 at paragraphs [466] – [467]].[179]

289. The SDA's submission disregards the context in which the text cited appears in the decision and to this end, its submission is misleading.

290. At paragraph [18] of the Annual Wage Review 2015 – 2016 decision, the Full Bench stated: (emphasis added)

> **[18]** These public policy considerations inform the way AWRs are conducted. This does not mean that the Panel's consideration of the statutory framework is stagnant. As the Panel made clear in the *Annual Wage Review 2013–14* (2013–14 Review) decision, there is nothing wrong with a party advancing a submission that a past Panel decision had wrongly construed a statutory provision and advancing an alternate construction. The Panel has reconsidered past decisions regarding the interpretation of particular provisions. <u>For example, in the 2012–13 Review decision, the Panel accepted an ACCI submission that past decisions had wrongly concluded that "social inclusion", in the context of s.284(1)(b), encompassed both the obtaining of employment *and* the pay and conditions attaching to the job concerned. The Panel accepted that its consideration of "social inclusion", in the context of s.284(1)(b) was limited to increased workforce participation.</u>[180]

291. As can be seen, the Full Bench referred to an earlier annual wage review decision in which it concluded that s.284(1)(b) of the Act, which is in relevantly identical terms to s.134(1)(c) of the Act, relates only to increased workforce participation and does *not* encompass the conditions attaching to a job.

[178] SDA submission dated 2 May 2017 at paragraph 59.

[179] SDA submission dated 2 May 2017 at paragraph 59.

[180] *Annual Wage Review 2015 – 2016* [2016] FWCFB 3500 at [18].

292. Later in the decision, including the paragraphs cited by the SDA in its written submissions, the Full Bench stated as follows: (emphasis added)

> **[464]** The Act requires the Panel to take into account, in giving effect to the minimum wages objective, "promoting social inclusion *through* increased workforce participation" [emphasis added] (s.284(1)(b)).
>
> **[465]** Consistent with past decisions, we interpret this to mean increased employment.
>
> **[466]** In the present proceeding, the Victorian Government submitted that the Panel should adopt "a broader understanding of the relationship between workforce participation and social inclusion". In support of this proposition the Victorian Government submitted that:
>
> > "… while employment is a key determinant, merely having a job is not always enough to facilitate social inclusion. A job with inadequate pay can create social exclusion if the level of income limits a person's capacity to engage in the cultural, economic, political and social aspects of life."
>
> **[467]** As discussed in Chapter 2, we endorse the above observation and on that basis we accept the thrust of the Victorian Government's submission as set out above, and this forms part of our broader consideration.[181]

293. As can be seen, the passage cited by the SDA is not a statement made by the Full Bench. Rather, that was a submission put by the Victorian Government. The Commission again ruled that social inclusion through increased workforce participation relates to increased employment only, however an employed person's capacity to engage in other aspects of life is a discretionary matter that the Commission may nonetheless have regard to. Notwithstanding, it is not a mandatory consideration by virtue of the Act.

294. **Fourthly,** and in any event, even if the Commission were to consider whether the safety net afforded by the Awards permits employees covered by them to engage in social activities such as blood donation as a broader consideration, we do not consider that it can or should conclude that either:

- The safety net does *not* so permit employees, as there is no probative evidence to this effect; or

[181] *Annual Wage Review 2015 – 2016* [2016] FWCFB 3500 at [464] – [467].

- If it finds otherwise, that the safety net should be varied such that it does, because of the numerous factors that weigh against the grant of the claim, as identified by our submission.

295. Accordingly, s.134(1)(c) cannot be relied upon in support of the SDA's claim.

The Need to Promote Flexible Modern Work Practices and the Efficient and Productive Performance of Work (s.134(1)(d))

296. The provision proposed by the SDA is contrary to the needs to promote flexible modern work practices and the efficient and productive performance of work for the reasons that follow.

297. **Firstly**, the clause would grant an employee an absolute right to leave for the purposes of donating blood, which would result in additional staff absences.

298. Virtually any form of leave taken by employees can have an adverse impact upon the need to promote flexible modern work practices and the efficient and productive performance of work. This is because staff absences have an impact not only on employment costs incurred by an employer, but can also cause disruption to an employer's operations.

299. In some circumstances, it may not be possible for an employer to engage relief staff to cover the absent employee. To the extent that this adversely affects the efficiency with which the relevant work is performed in the employee's absence or indeed whether the work can be performed at all, an entitlement to additional leave is inconsistent with s.134(1)(d). We refer to an example we earlier provided regarding the absence of the only beautician employed by a salon and the impact that this would have on the business.

300. However, an employer's access to relief staff is not necessarily the end of the matter. For instance, if the replacement employee does not possess the necessary skills, knowledge or experience to undertake the work ordinarily performed by the absent employee, this self-evidently will also undermine the

need to promote flexible modern work practices and the efficient and productive performance of work.

301. **Secondly**, the SDA submits that the proposed provision "affords employers a substantial amount of discretion to manage the taking of the leave by the employee"[182]. For all the reasons we have earlier stated, the proposed clause does not appear to contain any express employer discretion. If it is intended that such a discretion should be afforded to employers, that should be made clear.

302. The various implications of an absolute right to take blood donor leave have been identified earlier in this submission, which would quite clearly adversely impact upon flexible modern work practices and the efficient and productive performance of work.

303. **Thirdly**, the SDA submits that the leave would be taken "with adequate notice" [183] . Earlier in this submission we have explained our concerns regarding the proposed clause X.2 which requires only that an employee notify their employer "as soon as possible" of their intended absence (which does not necessarily afford an employer "adequate notice" as alleged by the SDA) and the likely difficulties that this would cause an employer, which would also be contrary to s.134(1)(d) of the Act.

304. **Fourthly**, the SDA submits that the leave "is predictable since the entitlement is taken on a day suitable to the business"[184]. We refer the Full Bench to the submissions we have made earlier regarding the proposed requirement that an employee must "arrange his or her absence to be on a day suitable to the employer". The deficiencies in the drafting of the proposed clause X.3 in this regard render it inconsistent with the need to promote the efficient and productive performance of work.

[182] SDA submission dated 2 May 2017 at paragraph 65.

[183] SDA submission dated 2 May 2017 at paragraph 65.

[184] SDA submission dated 2 May 2017 at paragraph 66.

305. **Fifthly**, the SDA submits that the leave "is predictable since the entitlement is taken … at a time during the shift with minimal disruption to the business"[185]. We have earlier set out, at some length, why the SDA's submission in this regard is misguided. We rather consider that the requirement at clause X.3 that the employee must "arrange for his or her absence to be … as close as possible to the beginning or ending of his or her ordinary working hours" is potentially in direct contradiction to the need to promote the efficient and productive performance of work. It will likely lead to scenarios in which an employee takes leave at times which are particularly problematic because, for instance, they coincide with peak consumer demand.

306. **Sixthly**, we do not understand the basis upon which the SDA asserts that its proposal in relation to the day and time at which an employee may choose to take leave means that access to the leave entitlement will be "predictable"[186]. It seems to us that in fact the absence of a minimum notice period and the absence of employer discretion would render access to the leave particularly *un*predictable.

307. **Seventhly**, the SDA boldly makes the following assumptions:

> … This means that efficiency and productivity of work is unaffected, since it would be relatively easy to find replacement staff with the necessary skills, knowledge and experience to undertake the work or work can be easily reorganised during the blood donor's short absence. Moreover, there would be no disruption to the operation of the business.[187]

308. The basis upon which the SDA considers itself qualified to express a view about the ease with which an employer will supposedly be able to find appropriate replacement staff and/or make the necessary rearrangements is entirely unclear to us. There is no probative evidence in support of the proposition that there would be no disruption to the operations of any business in any circumstance where an employee seeks to take leave pursuant to the proposed clause. Indeed it seems to us self-evident that, for the many reasons

[185] SDA submission dated 2 May 2017 at paragraph 66.

[186] SDA submission dated 2 May 2017 at paragraph 66.

[187] SDA submission dated 2 May 2017 at paragraph 66.

we have earlier stated, staff absences by virtue of the clause sought *will* cause disruption and impede upon the productive performance of work.

309. **Eighthly**, the SDA refers to the Red Cross' "Red 25 – Group Donation Program", which "requires the support of an organisation to register with the program and promote group blood drives in the work place (sic) with the assistance of the [Red Cross]"[188]. To the extent that the involvement by an employer in the program results in employees seeking to donate blood together and therefore to take blood donor leave concurrently, this is likely to be particularly disruptive to a business' operations.

310. **Ninthly,** whilst the union submits that blood donation, if adopted as a workplace activity, "promotes team building amongst staff improving productive performance within its own business"[189], there is absolutely no probative evidence to that effect. The opinion of one lay witness regarding his supposed increase in productivity on the day that he donated blood[190] by no means establishes that the above proposition as a fact in these proceedings.

311. **Tenthly**, to the extent that the proposed provision results in employers making alterations to their rostering arrangements or other practices such that its efficiency and productivity is adversely impacted, the proposed provision is contrary to s.134(1)(d).

The Need to Provide Additional Remuneration for Working at Certain Specified Times or under Certain Specified Circumstances (s.134(1)(da))

312. This is a neutral consideration in this matter.

[188] SDA submission dated 2 May 2017 at paragraph 68.

[189] SDA submission dated 2 May 2017 at paragraph 67.

[190] Affidavit of Drew Gibson dated 13 April 2017 at paragraph 13 and SDA submission dated 2 May 2017 at paragraph 67.

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

313. This is a neutral consideration in this matter.

The Likely Impact on Business, including on Productivity, Employment Costs and the Regulatory Burden (s.134(1)(f))

314. The clause sought by the SDA would adversely impact business in various ways. In so submitting we note that s.134(1)(f), in our view, involves a consideration of the likely impact of the claim on different types of businesses.

315. It is important to note that s.134(1)(f) involves microeconomic considerations in relation to individual businesses, as well as consideration of the likely impact of the claim on industry at large. Submissions about the anticipated "take up rate" of the proposed entitlement[191] do not overcome the basic proposition that in any case where any one employee takes leave pursuant to the proposed clause, this may have an adverse impact on their employer. This is relevant to s.134(1)(f).

316. **Firstly**, for the reasons we have set out above in relation to s.134(1)(d), the proposed clause may adversely impact productivity.

317. **Secondly,** the claim would result in increased employment costs. This is self-evident. Those costs would arise because the proposed clause provides an entitlement to paid leave.

318. **Thirdly**, the aforementioned cost implications are compounded given that an employee would have an entitlement to payment at a rate that includes penalties, loadings and allowances that would have fallen due had the employee been working.

[191] SDA submission dated 2 May 2017 at paragraphs 74 – 75.

319. **Fourthly**, indirect costs would also arise in circumstances where an employer engages staff to cover resulting staff absences. This includes such employees' wages (remembering the submission we have previously made about minimum engagement periods for part-time and casual employees under the Awards) and costs incurred due to losses in productivity, which we have referred to at s.134(1)(d).

320. **Fifthly**, additional costs would also be incurred where the business is unable to meet consumer demand due to staff absences, which would effectively result in a loss of revenue.

321. **Sixthly,** the costs incurred and productivity losses experienced would be exacerbated by the absence of a minimum notice period that the employee must give and the absence of any employer discretion. As a result, the proposed clause does not provide an employer with any mechanisms to attempt to alleviate the adverse impact that the proposed clause would otherwise have on the business.

322. **Seventhly,** the proposed clause would increase the regulatory burden by virtue of the fact that it is not "simple and easy to understand".

The Need to Ensure a Simple, Easy to Understand, Stable and Sustainable Modern Award System that Avoids Unnecessary Overlap of Modern Awards (s.134(1)(g))

Simple and Easy to Understand

323. It is self evident that the proposed clause is not simple and easy to understand for the reasons that follow. Many of these issues have been canvassed in greater detail previously, which we do not here repeat.

324. **Firstly**, the proposed clause does not prescribe the manner in which the leave would accrue.

325. **Secondly,** the clause sought does not make clear that the leave would not accumulate from year to year.

326. **Thirdly**, it is not clear whether the use of the term "year" in the provision proposed is intended to refer to a calendar year or a year of service by the employee.

327. **Fourthly**, the lack of clarity as to whether there is any employer discretion afforded by the clause is a matter of serious implication. It is entirely unsatisfactory that a provision be inserted in the Awards that fails to make such a fundamental issue clear.

A Stable Modern Awards System

328. The need to ensure a stable system tells against granting the claim in the absence of a sound evidentiary and meritorious case.

329. The SDA has failed to mount any probative evidence that might establish the many factual propositions upon which it seeks to rely, nor has it established any sound rationale for expanding the safety net in the manner sought. This too weights against the grant of the claim.

The Likely Impact on Employment Growth, Inflation and the Sustainability, Performance and Competitiveness of the National Economy (s.134(1)(h))

330. To the extent that the proposed clause is at odds with ss.134(1)(b), 134(1)(d), 134(1)(f) and 134(1)(g), it may also have an adverse impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

12. CONCLUSION

331. For all of the reasons set out in our submission, the SDA's claim should not be granted.