IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M160 of 2019

BETWEEN: **MONDELEZ AUSTRALIA PTY LTD**

Appellant

and

AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION KNOWN AS THE AUSTRALIAN MANUFACTURING WORKERS UNION (AMWU)

First respondent

NATASHA TRIFFITT

Second respondent

BRENDON MCCORMACK

Third respondent

MINISTER FOR JOBS AND INDUSTRIAL RELATIONS

Fourth respondent

No. M165 of 2019

BETWEEN: **MINISTER FOR JOBS AND INDUSTRIAL RELATIONS**

Appellant

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MONDELEZ AUSTRALIA PTY LTD

Fourth respondent

SUBMISSIONS OF THE FIRST TO THIRD RESPONDENTS

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Part I: Certification as to suitability for publication

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues arising for determination in the appeal

2. What is a "day" of paid personal/carer's leave (**PCL**) in s 96(1) of the *Fair Work Act 2009* (Cth) (**FW Act**)?

Part III: Notice under s 78B of the *Judiciary Act 1903* (Cth)

3. The first to third respondents to both appeals (**respondents**) agree that no s 78B notice is required.

Part IV: Material facts

4. The material facts are summarised in the judgment of the majority of the Full Court of the Federal Court (**majority**), reproduced at CAB 8ff, at [8]-[19]. There were no contested facts.

Part V: Argument

Summary

5. Section 96 of the FW Act provides a form of limited statutory income protection for employees[1] when unable to work due to injury, illness or family responsibilities.

6. Specifically, s 96(1) provides employees with an entitlement to 10 days of paid personal/carer's leave (**PCL**) for each year of service with their employer, which they may take in the circumstances set out in s 97 – in which case, pursuant to s 99, they are to be paid for the ordinary hours (but not the overtime hours) that they would otherwise have worked.

7. In that context, each "day" of PCL is a unit of time, and the word "day" would be given its natural and ordinary meaning of a 24 hour period, such that the entitlement created is to paid leave from working whatever rostered hours fall in that 24 hour period. The majority below accepted this, and noting that "leave" is only referable to the time that was to be worked, called the unit of time a "working day".

8. The appellants contend that, notwithstanding a clear change in statutory language from "hours" to "days", the word "day" (and the expression "10 days") in fact continues to mean

[1] National system employees as defined by the FW Act (s 60), other than casual employees (s 95).

a number of "hours" derived from a complex formula that is either referable to an average of worked hours divided into a notional 5 day week multiplied by 10 (Mondelez) or the hours that would constitute a "usual" fortnight (Minister). Such words, not based on a dictionary or ordinary meaning, and using expressions not found in the FW Act, are said to be preferable to avoid unlikely outcomes. However, these interpretations create the unlikely outcome that, for an employee who works 3 shifts a week of 12 hours duration, the entitlement in s 96(1) to "**10** days" of paid leave provides a right to only **6** days off work (6 periods of 12 hours). Given s 96's location in a Part that provides standard national employment conditions, there is no place for an interpretation that would see two employees treated differently because of their different roster patterns. The fact that those standard national employment conditions must be understood and applied by all employees and employers in the workplace provides a further reason to prefer a natural and ordinary meaning.

9. The appellants rely heavily on the Explanatory Memorandum to the Fair Work Bill 2008 (Cth) (**EM**). Of course, the literal or ordinary meaning of a statutory phrase will not be preferred if it does not conform to the law's purpose as determined by considering it in context, which includes both the text of the statute and extrinsic materials such as an EM. Here, the EM confirms that which is apparent from the text: a statutory purpose to provide something akin to insurance against sickness. It is not inconsistent with that purpose to give the words their ordinary meaning. As for the parts of the EM which purport to express or paraphrase the entitlement, they are not to be used in lieu of the text of the statute.

Key principles of construction

10. The Minister's submissions in his appeal (**MJIR**) at [23]-[26] correctly identify that a statute is construed by considering the words themselves read in their context, and "context" encapsulates surrounding statutory provisions, the mischief that the statute is intended to remedy, the provision's purpose or policy, and extrinsic materials.[2] However, that general statement of interpretive methodology is to be applied consistent with the following principles.

11. "Statutory construction involves attribution of meaning to statutory text".[3] The text – specifically, the "ordinary grammatical sense of the statutory words … having regard to

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[2] See *R v A2* (2019) 93 ALJR 1106 (***R v A2***) at [32]-[33], [37].
[3] *Theiss v Collector of Customs* (2014) 250 CLR 664 (***Theiss***) at [22].

their context and the legislative purpose"[4] – is the starting point, and the end point.

12. Context must be considered in the first instance, but it must be remembered that context is a tool that "assists in fixing the meaning of the statutory text".[5] This focus on a provision's language is consistent with "elementary considerations of fairness", which dictate that "those who are subject to the law's commands are entitled to conduct themselves on the basis that those commands have meaning and effect according to ordinary grammar and usage".[6] This is particularly important for a statutory provision intended to be read and understood by employees generally. It also aligns with the proper role of the courts under our system of government, as "too great a departure" from the statutory text "may violate the separation of powers in the Constitution".[7]

13. From those foundational propositions concerning the primacy of the statutory text, various other principles flow.

14. First, the search for legislative purpose is not an exercise in identifying the collective (or subjective) intention of legislators unmoored from the text. "Legislative intention", as an expression of the constitutional relationship between the courts and the legislature, is the objective intention of the law as inferred *from* the text[8] – to which the actual language employed is the "surest guide".[9] This intention also emerges from "the application of rules of interpretation accepted by all arms of government in the system of representative democracy".[10] One such rule is that beneficial and remedial legislation – eg legislation conferring an entitlement to long service leave[11] – should be given a liberal construction.[12]

15. Second, and relatedly: although context is a necessary part of the construction process, "the meaning of the statutory text cannot be displaced by legislative history and extrinsic materials … The function of the Court is to give effect to the will of the Parliament as expressed in the law, not to bend it according to what an officer of the executive may have

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[4] *Alcan (NT) v Territory Revenue* (2009) 239 CLR 27 (***Alcan***) at [4].
[5] *Theiss* at [22], quoting *FCT v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [39].
[6] *Alcan* at [4], quoting from *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 at 340; see also *International Finance v Crime Cmn* (2009) 240 CLR 319 at [42] and *Acts Interpretation Act 1901* (Cth) (**AIA**), s 15AB(3)(a).
[7] *Taylor v Owners – Strata Plan 11564* (2014) 253 CLR 531 at [40].
[8] *Singh v Commonwealth* (2004) 222 CLR 322 at [19].
[9] *Alcan* at [47].
[10] *Zheng v Cai* (2009) 239 CLR 446 at [28].
[11] *Lindner Pty Ltd v Builders Licensing Bd* [1982] 1 NSWLR 612 at 613.
[12] *IW v City of Perth* (1997) 191 CLR 1 at 12.

conjectured to be its meaning".[13] Thus, "[p]araphrases of the statutory language" in extrinsic material cannot "stand in place of the words used in the statute",[14] and extrinsic material may only be used to "determine the meaning" of a provision consistently with s 15AB(1)(b) of the AIA.

16. Third, changes of drafting style aside, where statutory language has been re-enacted in a different form, it should be taken to have a different meaning.[15] It would "set … at naught the very clear intention of the legislature" if the court gave to the new enactment "the same construction that had been judicially given to the prior one".[16] This is an instance in which comparing a statute with its legislative predecessor is useful because it "illuminates the actual text of the new provision"[17] – relevantly, by highlighting changes in the law.

Statutory text

17. Section 96(1) of the FW Act reads:

> *Amount of leave*
>
> (1) For each year of service with his or her employer, an employee is entitled to 10 days of paid personal/carer's leave.

18. The appellants contend that a "day" in fact means a number of *hours* – that number being derived by a formula calculated in different ways by each of them. As explained further below, in the absence of any statutory definition it strains the language to take the words "10 days of [PCL]" and say that means a period of hours consisting of either:

    a. "[10 times] the employee's average daily ordinary hours of work based on a standard five-day working week" (Mondelez's submissions in its appeal (**MA**) at [6]); or

    b. "[2 times] an employee's usual weekly hours of work over a 2 week (fortnightly) period" (MJIR [71.2]).

19. Even those elaborate and complicated definitions are incomplete. As to Mondelez's proposal, averaged over what period? And what is a "standard 5-day working week"? As to the Minister's formula, given that an employee's ordinary hours under certain roster patterns may vary from fortnight to fortnight (eg 2 weeks on/1 week off), averaged over

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[13] *Taylor v Attorney-General (Cth)* (2009) 93 ALJR 1044 at [87] (Nettle and Gordon JJ dissenting in the result); see also *Alcan* at [47]; *R v A2* at [35]; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [31].
[14] *Baini v The Queen* (2012) 246 CLR 469 (***Baini***) at [14].
[15] See *Baini* at [43] (Gageler J dissenting in the result).
[16] *City of Ottowa v Hunter* (1900) 31 SCR 7 at 10, quoted in *Baini* at [44].
[17] See *Baini* at [20].

which 2 week period?

20. These substantial departures from the text of s 96(1) rest on the contention that the word "day" is ambiguous. It is said to be ambiguous because (inter alia) there are a number of dictionary definitions such that there is no "single clear ordinary meaning" (MA [19]-[21]). Yet the appellants adopt none of those defined meanings. Ambiguity does not arise simply because there are competing arguments about a provision's meaning. The competing interpretations must be available on the text of the provision. Here, the appellants' constructions are not.

Natural and ordinary meaning

21. First, and contrary to MA[19]-[23] and MJIR [26], the word "day" *in the context of a period of leave* does have a natural and ordinary meaning (see FFC [91]-[95]). The issue is not the meaning of "day" in a vacuum, but the proper construction of that expression framed as a measurement of an entitlement to an authorised absence from work, ie "leave".

22. Understood against that backdrop, there is in reality little difference between the four dictionary meanings identified by Mondelez at MA [21]. A "calendar day" is a "24 hour period", during which a worker may ordinarily be required to work; and for most workers, the "period between sunrise and sunset" will overlap with the "portion of a day allotted to working". These are not mutually exclusive; rather they are alternative expressions, referable to the same underlying concept that a "day" is a unit, or measurement, of a period of time.[18] The definitions illustrate that the most accurate way to frame the basal idea captured by a "day" of "leave" in s 96(1) is the majority construction: a working day, or "the portion of a 24 hour period that would otherwise be allotted to working" (FFC [93]) – which addresses the issue of the worker rostered to work a shift that ends after midnight.

23. It is in this context unsurprising that the same conclusion has been reached each time the Federal Court has considered the question,[19] with the exception of the minority judgment in the decision below. Contrary to the Minister's submissions at MJIR[66]-[68], the Full Court in *Glendell* did not simply rely on the Full Bench's reasoning in *RACV Road Service* but instead undertook a detailed examination of the language of s 96.

24. Second, and in contrast with the majority construction, neither the Minister's nor

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[18] FFC [92]; see also, e.g. *WCG v The Queen* (2007) 233 CLR 66 at [8].

[19] *CFMEU v Anglo Coal (Drayton Management) Pty Ltd* (2016) 258 IR 85 at [10], [35]; *CFMEU v Glendell Mining Pty Ltd* (2017) 249 FCR 495 (***Glendell***) (at [133], citing with approval *RACV Road Service Pty Ltd v Australian Municipal, Administrative, Clerical and Services Union* (***RACV Road Service***) (2015) 249 IR 150).

Mondelez's proposed meaning is actually available on the text. Mondelez's proposal is expressed as follows (MA [6]):

> *the employee's average daily ordinary hours of work based on a standard five-day working week.*

25. None of the additional words in this formulation are found in or near s 96. Nor are they foundational statutory concepts. The FW Act contemplates averaging of an employee's weekly hours, in that it permits it (see ss 63 and 64), but does not presume it. The statute itself does not conceive of a "standard five-day working week". Division 7 of Part 2-2 makes no reference to either concept. Nor does this proposed meaning describe an actual period of time: instead it creates a notional figure, reached by averaging various periods of time according to a formula.

26. The Minister's construction does not attribute a meaning to a "day" of "leave", but treats the phrase "10 days" as composite. He posits at MJIR [71]:

> *The expression "10 days" in s 96(1) of the FW Act comprehends an amount of paid personal/carers leave accruing for every year of service equivalent to an employee's usual weekly hours of work over a 2 week (fortnightly) period.*

27. There is no textual support for the Minister's purported definition. It assumes "10 days" means "2 weeks" despite the fact that the legislature decided not to use the word "week" in s 96(1) while using it in other provisions of the FW Act. It is unclear why reference would be made to "usual weekly hours", a concept used only in s 20 (to define, in effect, ordinary hours of work for employees not covered by an award or enterprise agreement who work fewer than 38 hours per week). The notion of a "fortnight" is nowhere to be found in the FW Act. Ordinary hours may be averaged over any period up to 26 weeks, or as otherwise provided for in a modern award or enterprise agreement: ss 63-64. Under such a rostering system, it is possible for an employee's weekly hours to vary week to week, or fortnight to fortnight, if not more.

28. Chapter 2 Part 2-2 of the FW Act, containing the National Employment Standards (**NES**), is meant to have provisions which are "easy to understand and apply for employers and employees at the workplace".[20] It is not an obscure or specialist piece of legislation. Every employee in Australia, on commencing her employment, must be provided by her employer

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[20] EM at p (x) r.25.

with information about the NES: FW Act, ss 124-125. Interpretations which are not clearly apparent, and require extensive historical investigation, are unlikely to be correct unless there is truly no alternative. And yet, there is no real way an employer or employee reading s 96(1) could discern either Mondelez's or the Minister's construction. To arrive at either interpretation requires extensive recourse to extrinsic material, including predecessor legislation and the EM. For the reasons set out below, that recourse is impermissible.

Text of other provisions

29. Third, the broader statutory context of s 96 and Part 2-2 is consistent with the majority construction. Key provisions are addressed below. That interpretation also aligns with the manner in which "day" is otherwise used throughout the statute to define leave, periods of industrial action, or related entitlements, which work only if interpreted as referring to a "working day".[21]

Section 99

30. Section 99 is illustrative. It requires an employer to pay an employee for the "ordinary hours of work" that fall within any period of PCL. From this, it emerges that the NES provides employees with an entitlement to:

    a. take a certain period of leave – that is, a right to absent themselves from work without penalty; and

    b. be paid for *part* of that period (being whatever rostered ordinary hours fall within it).

31. It does not follow that the entitlement to leave itself must be quantified in hours.

32. Section 99 does identify, however, a difficulty with the appellants' constructions: see FFC [194]-[197]. If the entitlement to leave is defined only by reference to ordinary hours, employees who are rostered to work overtime as well as their ordinary hours on a particular day are left in an awkward position: how do they absent themselves for that additional

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[21] See, e.g.: s 85 (2 days adoption leave); s 104 (2 days compassionate leave – unpaid for casuals per s 106, and thus unlikely to be referable to hours for the purpose of calculating monetary entitlements); s 116 (payment for public holidays, distinguishing between "day" and "part-day"); s 474 (payment for periods of industrial action, distinguishing between the "day" and the duration, in hours, of the industrial action taken on that day); s 471 (partial work bans, defining "industrial action period" by reference to "days"). In addition, where the FW Act uses days otherwise to define periods of time, it refers to calendar days and a construction reducing this to hours is not available: see, e.g. s 394(2)(a) (time period for filing an unfair dismissal application); s 180(4) (access period for enterprise agreements); s 441 (time for determining application for protected action ballot; note that the expression "working day" used in this provision is defined in s 12 as "a day that is not a Saturday, a Sunday or a public holiday"); s 642 (suspension of FWC members, defining time by reference to sitting days).

overtime if they fall ill?

33. Consider a full-time employee who works 7.6 ordinary hours each day, Monday to Friday, and is also rostered (i.e. required by her employer) to work an hour of overtime each day. On the appellants' constructions, if that worker falls ill on Tuesday, ss 96(1) and 97 entitle her to take leave for her ordinary hours, but not her overtime hours: see FFC [196].

34. The right under ss 62(2)-(3) to refuse to work "unreasonable" additional hours does not resolve this problem (cf MJIR [65]). It is a right that only arises where an employee is requested or required to work more than 38 hours (or, for a part-time employee, the lesser of 38 hours and the employee's ordinary weekly hours) in a week. Even when it is available, it is highly contingent, depending on a balancing test that weighs a range of factors, most of which are outside the employee's control. Thus, a situation could arise where an employee – in a crucial role at a time where the needs of the business were particularly significant (see ss 62(3)(c), (h)) – would be entitled to take leave for 8 hours to care for her child, but would be required to return to work for an hour of overtime.

35. Section 62 has, in truth, nothing to do with entitlements to leave. Implicit within the notion of the employee's discretionary "refus[al] to work" in s 62(2) is the idea that the employee is exercising a choice – and yet the taking of leave due to illness, injury or caring responsibilities cannot be characterised as a circumstance of the employee's choosing. The better view is that s 96(1) read with s 97 confers an entitlement to leave for all the ordinary and overtime hours that an employee would have worked that "day" – which result is effectuated by construing a "day" of leave within s 96(1) to mean a working day (FFC [195]).

Section 96(2)

36. Nor does s 96(2) require a "day" of "leave" to be quantified by reference to hours: cf MA [58]-[59]; MJIR [43], [46]. Although s 96(2) refers to "ordinary hours", this subsection is concerned with the *rate* at which PCL accrues up to a set quantum over the course of a year of service. It does not define or condition the quantum of the leave entitlement itself: this is set by s 96(1), in days. The reference to ordinary hours therein can be understood as a mechanism for ensuring that the rate remains steady – in particular, by avoiding the acceleration of accrual when an employee works (often unpredictable) overtime hours. In other words, it ensures that leave accrues by reference to the period of time during which ordinary hours are worked, confirming that an employee who works a full year will accrue

10 days of paid leave in total regardless of whether she works in excess of her ordinary hours at any given point. Correspondingly, s 96(2)'s reference to "service" (as defined in s 22) operates to stall accrual during periods of unauthorised absence and certain types of unpaid leave. The point is to ensure a uniform, ascertainable pace at which the entitlement accrues based on periods of ordinary employment. Read with s 99, s 96(2) is also a means of accommodating the accrual and taking of a part-day of leave "as a fraction of the ordinary hours of work for that day" (FFC [171]).

Section 101

37. The appellants, and Mondelez in particular, place heavy reliance on s 101, dealing with cashing out of accrued PCL: MA [48]-[56]; MJIR [50]. However, these submissions proceed from an incorrect assumption that cashing out is inevitable. Consistently with the compensatory nature of PCL, neither s 101 nor any other provision confers a statutory *right* to cash out accrued PCL during employment or on termination. In contrast, annual leave (a benefit that is an economic asset obtained as remuneration for work performed) may be cashed out during employment by agreement, and must be cashed out upon termination: ss 94, 90. The most that can be said is that s 101 envisages that certain awards or agreements *may* provide for cashing out of PCL, by permitting a cashing out clause to be negotiated into an enterprise agreement or included in a modern award. Thus, the submission at MA [55] that Parliament would not have intended workers who change rosters to "become instantly ineligible" to cash out their PCL misfires, because there is no presumption that any worker will ever be entitled to do so.

38. It may be that in certain outlier arrangements – such as the volatile roster patterns suggested by Mondelez (MA [56]) – an employee's pattern of work is too unpredictable to permit a compliant cashing out scheme to be designed: FFC [176]. But that problem is reconcilable with the majority's construction in any event. Where employees work volatile hours, s 101(2) accommodates a solution in the form of calculating the payment to the employee "upon an assumption that the employee would have taken leave on the days when they had the greatest number of ordinary hours": FFC [177]. So much is shown by the phrase "at least" in s 101(2)(c). The fact that this potentially advantages an employee does not, in the context of beneficial protective legislation, mean that it is wrong.

39. Finally , it is relevant to note that s 101(2)(a) requires any term providing for the cashing out of PCL to ensure that an employee's "remaining accrued entitlement to [PCL]" is at least "15 days". This reinforces the view that the PCL is an entitlement quantified in days,

not hours.

Section 106E

40. During the course of proceedings below (and after the Minister had intervened), Parliament amended the FW Act to insert a new Subdivision CA – Unpaid Family and Domestic Violence Leave into Division 7 of Part 2-4.[22] Relevantly, this included s 106E. Mondelez contends that this new provision evidences "the ambiguity of the word 'day'", by defining it to pick up the meaning of that word in sections other than s 96(1) ("section 85 and Subdivisions B and C"): MA [24]-[28].

41. Reliance on a later-enacted provision, although permissible, is a curious way to interpret an existing part of an Act – particularly where the later provision is unrelated to, and does not refer to, the provision being construed.[23] One would expect that, if the legislature had intended to affect the meaning of s 96(1), it would have done so directly: FFC[191].

42. As the majority held, the mere fact that s 106E omits to mention the leave entitlement in s 96(1) does not mean that s 96(1) is "intended to have a different meaning from the provisions included": FFC [189]. Section 106E also omits any reference to other uses of the word "day" in the FW Act, such as ss 79A(1), 111(5) and 114(1), all of which can only sensibly be read as referring to "working days" (see FFC [189]). Properly construed, s 106E has a narrow purpose. It "confirm[s] that what constitutes a day of leave for the purpose of unpaid family leave and domestic violence leave is the same as for the purposes of unpaid pre-adoption leave, unpaid carer's leave and paid compassionate leave" (FFC [190]). A "day" of leave within s 85 and Pt 2-4 Div 7 Subdivs B and C can only mean a "working day", and the appellants do not seek to argue against that proposition; on one view, they must tacitly accept it. The difference between the parties is that the respondents say this is *consistent* with the ordinary and natural meaning of "day" in the context of s 96(1). In its terms, s 106E does not evince an intention to alter the latter meaning: FFC [191].

Note to s 147

43. Finally, the appellants' construction is not advanced by the note to s 147, which says only that ordinary hours are "significant in determining [an] employee's entitlements under the [NES]": cf MJIR [43]. For one thing, the note does not form part of the Act.[24] For another,

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[22] Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018 (Cth), introduced on 13 September 2018 and commenced 12 December 2018.
[23] *Interglo AG v Croner Trading Pty Ltd* (1992) 39 FCR 348 at 382.
[24] FW Act, s 40A and AIA as at 25 June 2009, s 13(3).

it is too vague to be of any real assistance. Which entitlements? "Determining" in what sense? In respect of PCL, it could just as easily be a reference to the entitlement to payment under s 99, which, as discussed above, is dependent on ordinary hours.

Purpose

44. Contrary to MA [47] and MJIR [48]-[49], the majority's construction of s 96(1), applying the natural and ordinary meaning, achieves the purpose of the entitlement to PCL understood in light of the broader objects of the FW Act.[25] Accordingly, that construction should be preferred: AIA, s 15AA.

45. The majority explained that this provision "must be understood as establishing a statutory form of income protection" (FFC [148]), having regard to the historical context including a succession of federal and State awards which "guarantee[d] a given number of days off work in the case of illness of the employee (and subsequently of a family member)".[26] The mischief, or the defect in the law sought to be remedied,[27] was to prevent loss of income that would otherwise arise when an employee is unable to work due to injury or illness (her own or that of a family member). That mischief is confirmed by the EM (see [73] below).

46. The appellants accept, albeit in qualified terms, that s 96(1) reflects a statutory purpose of providing employees with "income protection" (MJIR [48]) or "insurance against loss of wages" (MA [41]). Ultimately, however, they mischaracterise PCL as a "financial benefit", earned through a worker's labour in the same way as wages, from which the worker derives economic "value" (MA [44]; MJIR [50.1]). That mischaracterisation infects their analysis of the so-called "anomalies and inequities" flowing from the majority's construction (MA [60]; MJIR [51]).

47. The legislative income protection scheme enshrined in s 96(1) has three critical features.

48. First, the entitlement in s 96(1) is not an economic asset. It is neither a "part of remuneration" nor a "future income stream".[28] The right to "leave" is a right to paid time off when adverse incidents prevent an employee from working. In the ordinary course, it only manifests in a financial outcome for employees when these incidents occur, by ensuring that they are protected from what would otherwise be a *loss of income* – i.e. by

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[25] See *R v A2* at [13], [32], [37].
[26] FFC [141], quoting from *RACV Road Service* at [81].
[27] See *R v A2* at [33].
[28] C.f. *Amaca Pty Ltd v Latz* (2018) 264 CLR 505 at [113], [115] (comparing the age pension with superannuation benefits).

receiving payment for their ordinary hours of work while on leave (s 99). Thus, where an employee takes leave, the pay she will receive depends upon the ordinary hours she would have worked "in the period". Unlike annual leave, however, there is no guarantee that PCL will ever express itself in a monetary payment: cf [37] above.

49. Second, although the entitlement "accrues progressively" during each employee's year of service (s 96(2)), it hinges on, and responds to, the occurrence of events that:

    a. are divorced from employees' income-producing activities;

    b. generally lie outside their control; and

    c. affect similarly situated employees in inconsistent ways: personal illness/ injury, or illness/ injury/ an unexpected emergency affecting a member of the employee's family or household (s 97).

50. Third, the same entitlement is afforded, without distinction, to *all* permanent employees (s 95), regardless of the nature of their work or their number or pattern of weekly hours.

51. The proposition that the majority's construction of s 96(1) is "inequitable" across different employee cohorts is central to the appellant's arguments. By this, they suggest that the provision as interpreted by the majority below fails to achieve the FW Act's objective of achieving "fairness" between employees (MJIR [51] citing FW Act, s 3; MA [45]). And yet, it is against the backdrop outlined at [48]-[50] above that the objectives in s 3 of the FW Act must be understood and applied. Section 96(1) grants all employees "minimum terms and conditions" (s 3(b)) in the form of 10 days of PCL, regardless of their divergent circumstances. That is the "fair" and "guaranteed safety net" that the provision establishes (cf MJIR [49.4]). Both the 12 hour shift worker and the 9-to-5, Monday to Friday office worker can take 10 days off work to recover from an injury or care for a sick relative without losing income – but neither can do so unless and until those adverse events occur. Section 96(1) reflects a judgment that the way to ensure fairness in the provision of a statutory benefit akin to insurance is to treat all workers the same.

52. To explain why the majority's construction results in no "unfairness" contrary to s 3 and the statutory purpose of affording all employees a level of income protection, it is necessary to emphasise two points.

53. First, all of the constructions of s 96(1) advanced in this proceeding lead to differences of some kind or another between employees. This is unsurprising; it reflects the fact that non-

standard work arrangements do not fit entirely comfortably within a standardised statutory regime for leave entitlements. The appellants' construction of s 96(1) would lead to their own "perverse anomalies" in that an employee working 12-hour shifts across 3 days in a 7-day week (as the second and third respondents do) would exhaust her "10 days" PCL balance after 6 calendar days, while an employee working the same weekly hours but across 5 days would exhaust her balance after 10 calendar days (FFC [151]). The issue is which construction best coheres with the nature of the entitlement. And in that context, any contention that "10 days" of paid leave actually means "6 days" of paid leave for some employees only has to be stated to be rejected.

10 54. Second, the comparative exercise between the leave entitlements of different employees under the various constructions of s 96(1) must reflect the true character of the benefit conferred, as explained above. Here, that character reveals that the differences of which the appellants complain are not *relevant* differences for the purposes of assessing whether there has been unequal treatment.[29] The correct comparison is *not* between the number of *ordinary hours* for which two employees may receive pay under s 99, or the "dollar amount" they receive after a period of leave (MA [45]; MJIR [14]), but between the number of *absences from work* that those two employees may take in circumstances of illness or injury without loss of ordinary time earnings. As the majority reasoned (FFC [156]), "[i]f both employees are able to take an equal number of 'working days' of [PCL] and neither
20 loses income, how can there be inequity or unfairness to one of them? Neither has had to work on the relevant days. Neither has suffered a loss of earnings as a consequence of not working".

55. In any event, the "mere entitlement of some employees to what may amount to a greater number of hours of [PCL] than other employees will not necessarily translate to a difference in the entitlement to take leave" (FFC [158]) because leave may *only* be taken when illness or injury strikes (s 97). Thus, the appellants' focus on the number of theoretical hours of leave accrued by employees in a year (see MA [12], [14]; MJIR [51]) does not identify any real world differences in the leave entitlement as it crystallises for different employees.

30 56. There is no basis for the suggestion that Parliament intended similarly situated employees to "receive the same dollar amount" under the PCL provisions (MA [45]). Nothing in

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[29] See, in the discrimination context, *Street v Queensland Bar Association* (1989) 168 CLR 461 at 510, 570-571.

s 96(1), or indeed ss 96(2) or 99, contemplates any comparison as between employees of the amount of pay received on the taking of a PCL day. The fact that the core entitlement in s 96(1) is expressed as a measure of time ("10 days"), rather than as a proportion of an employee's hours or pay, suggests that Parliament did not view such a comparison as relevant to the content of the entitlement.

57. For these reasons, none of the so-called "anomalies", "inequities" or "perverse" results identified by the appellants militate against the majority's construction. The examples and hypothetical outcomes canvassed in their submissions (MA [14]-[16], [46], [56], [60]; MJIR [51]) – most of which, incidentally, rely on highly unlikely work patterns[30] – are all "natural consequences of a construction that reflects the legislative purpose" of "providing, within the delineated limits, income protection for all part-time and full-time national system employees" (FFC [140], [150]; [161]). This includes the scenarios in which the pay received by the employee under s 99 for a PCL day will vary depending upon the ordinary hours that the employee would have been required to work on that day – a result that sits comfortably with the goal of ensuring that an employee does not lose ordinary time income from a sick day. Whatever an employee's hours or patterns of work, by the end of a year's service (assuming no interim leave is taken) she will be in the position where, if she or a family member is afflicted by illness or injury such that she is unable to work on a day she would otherwise have been required to, she may absent herself without loss of ordinary pay on *10 full working days* (FFC [150]). This aligns with the propositions underpinning the NES scheme: cf MJIR [49.3]. To say that Parliament has not sought to pursue the income protection objective "at all costs" (see MA [43]; MJIR [48]) is unavailing because the "costs" the appellants identify are consistent with the benefit conferred by s 96(1).

58. Mondelez's contention that the majority's construction affords an unfair level of income protection to part-time workers and employees working long shifts is unsustainable. There is no evidence or finding to support the premise of this argument, namely that those workers "need fewer hours of leave" (MA [46]).[31] It is equally plausible, for example, that a person working 12-hour shifts will fall ill more often than an employee working standard hours because of the toll that those long shifts take on the person's health. But even if the

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[30] See MJIR [51.3], hypothesising an employee who has permanent (not casual) employment with 5 employers simultaneously; MA [15], hypothesising a permanent (not casual) employee working 8 hours one day and 4 hours the next day.

[31] Cf FFC [157], accepting as a matter of probability theory that there is a "greater chance" that an employee working a 5-day week will fall ill on a work day as compared with an employee working a 3-day week. See further FFC [158] ("There may be almost as many variations in the need to take [PCL] as there are employees").

shiftworker is less likely than the other employee to use her accrued PCL days, the argument misses the point: since the leave is a protection against the vagaries of illness and injury rather than "mere entitlement to paid time off work, there is no inequity" (FFC [157]).

59. The appellant's arguments, although couched in terms of inequity between employees, are really underpinned by a complaint that a decision to roster staff on extended shift patterns (eg 3 x 12-hour shifts as opposed to 5 x 7.2-hour shifts) should not cause the cost of providing PCL to be increased. The Act provides flexibility to employers, including notably by the broad discretion in respect of how ordinary hours are arranged. However, it balances this by imposing corresponding costs. An employer may choose, like Mondelez, to roster its workers as continuous shiftworkers. It must, in exchange, deal with the consequences: additional annual leave, per s 87(1)(b)(iii), and potentially higher PCL costs to it than if its employees worked "standard" (see eg MA[12]) patterns of work. Allowing those consequences to flow from the employer's rostering choices effectuates, rather than undermines, the statutory scheme.

60. Finally on this topic, the Minister is wrong to suggest that the majority's interpretation of s 96(1) undermines the statutory objective of ready ascertainment and "enforcement" of rights under the NES (MJIR [49.4], [50.1], [50.3]). To "enforce" the right to take paid time off work for illness or injury, an employee simply needs to know how many unused days of PCL she has accrued under s 96(2) – and this can be identified at any time (see FFC [169], [171]). There is no reason why that entitlement must be reduced to hours to be known. As to ascertainment and enforcement of the right to payment for leave under s 99 according to the employee's "ordinary hours of work in the period" – the quantum of that statutorily guaranteed payment is precisely identifiable at the time the leave is taken, which is the time that s 99 requires this to be calculated. The claim that, at some unidentified "upfront" point (MJIR [50.1]) in advance of when an employee's work rosters are set for the coming weeks or months,[32] an employee must be able to (i) select a day to take PCL that maximises the ordinary pay she will receive under s 99, and (ii) precisely calculate the pay she will receive on that day, illustrates the Minister's mischaracterisation of paid sick leave as a monetary benefit rather than an insurance against lost wages (see FFC [159]).

[32] Under the Enterprise Agreement governing the second and third respondents, Mondelez must give employees four weeks' notice of shift rosters, and when shift arrangements are changed, the new arrangement must subsist for a minimum of 8 calendar weeks unless the employee otherwise agrees: cll 32, 32.6 (Mondelez BFM 42, 44).

Legislative history

61. The majority's construction of s 96(1) aligns with the most striking aspect of the legislative history: the radical differences between the provisions governing the entitlement to and accrual of PCL under Pt 7 Div 5 Subdiv B of the *Workplace Relations Act 1996* (Cth) (**WR Act**), which specified an entitlement calculated in hours, and those enacted by the Parliament in ss 95-101 of the FW Act. The appellants consider this history only in order to avoid its effect: they seek declarations that would turn the statutory expression into an hours-based formula akin to the old legislation.[33]

62. The WR Act created a guarantee of PCL (s 245(1)); provided that an employee was entitled to take "an amount of [PCL]" if "that amount of leave" was "credited to the employee "(s 246(1)); explained that, for each 4 week period of continuous service, an employee was entitled to "accrue an amount of [PCL]" consisting "of 1/26 of the number of nominal hours worked by the employee" (s 246(2)); stated that PCL "accrue[d] on a pro-rata basis" (s 246(3)); and required employers to credit the accrued "amount" of PCL to their employees each month (s 246(4)). "Nominal hours" was defined in s 241 – broadly speaking, as hours of work per week as "specified" by the employer up to a maximum of 38, after certain deductions were taken into account. Where an employee took PCL during a period, the employer had to pay her "a rate for each hour … of [PCL] taken" that was no less than the employee's basic periodic rate of pay (s 247). There was an annual limit on the amount of carer's leave that could be taken, again calculated by reference to the employee's nominal hours (s 249).

63. For present purposes, the three key features of this scheme were as follows. First, the WR Act did not separate out the content of the PCL benefit from the accrual of the leave. By providing that an employee was entitled to "take" the "amount" of leave that she had "accrued" and been credited with for each 4-week period (subject to the cap in s 249), the statute effectively defined the quantum of the leave entitlement by reference to whatever "amount" the employee accrued each month. Second, that "amount" consisted of a fraction of the "nominal hours" worked by the employee over a 4-week period. Third, those "nominal hours" reflected either the number of hours actually worked by the employee in a week or, in certain circumstances, a figure reached by averaging out the employee's hours

[33] MA [63](b) (which differs significantly from the declarations Mondelez sought below); FFC [200]); MJIR [71.2].

as if she worked a certain number of hours per week (see s 241(3)).

64. The provisions governing PCL under the FW Act have none of those features. The quantum of the leave entitlement (s 96(1), headed "Amount of leave") is described separately from, and is not dependent upon, the accrual of the entitlement (s 96(2), headed "Accrual of leave"). That quantum is "10 days", with no reference to the hours actually or nominally worked by the employee. Indeed, there is no longer any definition of "nominal hours", and the new term "ordinary hours" features only in the provisions governing accrual (s 96(2)) and payment for leave (s 99). There is also no longer any cap on the carer's leave that can be taken. PCL may be taken so long as s 97's requirements for illness or injury are satisfied.

10 65. The appellants seek to read s 96(1) of the FW Act as if it were identical to s 246 of the WR Act. But it is not. The statutory text is markedly different. This contrasts with the sections where Parliament *did* see fit to copy WR Act drafting across into the FW Act with no amendment other than the cosmetic.[34] Within the NES, a significant example is in respect of unpaid carer's leave (available where PCL has been exhausted). Section 250 of the WR Act quantified this entitlement as being "a period of up to two days for each occasion". Section 102 of the FW Act is identical. Both are a pure right of absence.[35]

66. The changes reflected in ss 96, 97 and 99 of the FW Act are not merely an expression of "the same idea in a different form of words for the purposes of using a clearer style" (cf s 15AC, invoked at MA [34]). They express substantively different ideas.[36] The Court should
20 give effect to them, consistently with the principles described at [16] above. This legislative history stands in contradistinction to the series of enactments examined by this Court in *CFMEU v Mammoet Aust Pty Ltd* (2013) 248 CLR 619 at [4], [54]-[56], which were substantially similar and responded to the same mischief identified when the law was altered by the first provision in the series (cf MJIR [60]).

67. The numerous departures from the WR Act provisions, including the severing of the link between quantum of entitlement and fraction of weekly hours, cannot sensibly be characterised as the "continu[ation of] a pre-existing drafting expression" (MJIR [58]) – a conclusion the Minister draws from examples in the footer of several provisions in the WR

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[34] See for example: WR Act, s 576J(1), cf FW Act, s 139(1); WR Act, s 576K(2), cf FW Act, s 140(1); WR Act, s 567M(1), cf FW Act, s 142(1); WR Act, s 666(1), cf FW Act s 570(1) (as enacted); WR Act s 226 (4), cf FW Act s 62(3).

[35] Similar duplication occurred with compassionate leave: WR Act s 257; FW Act s 104.

[36] See FFC [132]; *Pfizer v Samsung Bioepis AU* (2017) 257 FCR 62 at [107]; *Clipsal Australia Pty Ltd v Clipso Electrical Pty Ltd (No 4)* [2017] FCA 436 at [30].

Act, and passages in extrinsic material, which say that the hours of leave accumulated by certain hypothetical employees would amount to a certain number of days or weeks (MJIR [53]-[56], cf [15] above). If Parliament understood "nominal hours" and "days" to be coextensive concepts, why would it bother to change the former concept to the latter? Moreover, why would it remove a clear formula for calculating hours of accrued leave entitlements and replace it with a looser "shorthand reference" (MJIR [52], [58])? It is relevant in this regard that, while the 2005 explanatory memorandum cited by the Minister stated that the legislation would "ensure all federal employees [would be] entitled to...at least ten days paid personal/carers leave",[37] the WR Act did not achieve this for many shiftworkers. The more plausible explanation of the legislative history is that Parliament recognised the shortcomings of the old provisions – which did not in fact give all shiftworkers 10 authorised paid absences from work for illness or injury – and sought to overcome them.

68. The appellants' only answer to these arguments is to invoke the FW Act's extrinsic material, to which we now turn.

Explanatory Memorandum

69. The central factor relied upon by Mondelez to support its construction is a series of statements in the EM (MA [31]-[40]; see also MJIR [61]-[64]). However, the majority was right to conclude that the EM could not assist in ascertaining the meaning of s 96(1) of the FW Act (FFC [134], [135]-[192]). There is no ambiguity to the concept of a day of leave within s 96(1). And whilst it is permissible to use the EM to provide context and illuminate the mischief to which the provision was directed,[38] that usage cannot rise to the displacement of the statutory text. Where the natural and ordinary meaning is consistent with the purpose or object as determined by consideration of context, it is not permissible to apply the text of extrinsic material to prefer a different meaning.[39]

70. Contrary to the Minister's conflation at MJIR [61], taking account of the EM as part of the *context* for a provision is not the same exercise as using that material to identify the provision's *meaning*. The latter is permissible only in accordance with s 15AB of the AIA. Under that provision, the means by which extrinsic material may be used to "ascertain ... the meaning" of a provision are: (i) to "confirm" the ordinary meaning (s 15AB(1)(a)); or

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[37] Explanatory Memorandum to the *Workplace Relations Amendment (Work Choices) Bill 2005* at p.13.
[38] See *R v A2* at [15].
[39] See *R v A2* at [13], [32], [37].

(ii) where the provision is "ambiguous or obscure" or the ordinary meaning leads to a manifestly absurd or unreasonable result, to "determine the meaning" (s 15AB(1)(b)). Further when considering the weight to be given to such material, regard is to be had "to the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision ..." (s 15AB(3)(a)).

71. For the reasons given above, the natural and ordinary meaning of the word "day" in the "specific context of an authorised absence from work" (FFC [93]) is not ambiguous, obscure, manifestly absurd or unreasonable (see [57]-[60] above, cf MA [19]-[30], [60]; MJIR [51], [70]). Against that backdrop, how do Mondelez and the Minister seek to use the EM? As support for the propositions that "Parliament intended the Average Day Construction" (MA [31]); that the "FW Act was intended to preserve the quantum of the [PCL] entitlement that existed under the [WR Act]" (MA [32]); and that "not every employee was intended to be entitled to 10 full days of [PCL] per annum, because the entitlement was intended to be proportional ... based on an employee's ordinary hours of work" (MJIR [63]). Properly understood, these propositions represent an impermissible attempt to use the EM to determine the meaning of, by revising, the statutory text (FFC [134]; see also [15] above). Where the EM states that (eg) employees in stipulated circumstances "would accrue 76 hours of [PCL]" (p64), that purported explanation of how s 96(1) should be construed is inconsistent with, and cannot alter, the provision's language.

72. To the extent that the appellants do deploy this extrinsic material to discern a statutory purpose and mischief consistent with their construction, they face two difficulties. First, key passages on which they rely are patently inaccurate. As to the Regulatory Analysis, the statement that the new scheme would "not change the quantum of the entitlement to [PCL]" (MA [32]; MJIR [62]) is wrong on any construction of the FW Act's PCL provisions, because those new provisions removed the caps on PCL that existed under ss 241 (limiting "nominal hours"), 246 (limiting accrual of amounts of leave) and 249 (limiting carer's leave) of the WR Act (FFC [129]-[130]). The EM was also incorrect to say that the FW Act replaced rules about accrual and crediting of PCL with "a single, simple rule that consolidates notice and evidence rules for taking leave": the rules about accrual, notice and evidence are spread across ss 96(1), 96(2) and 107 (FFC [131]). These are not minor

aberrations. Nor are they surprising; the EM has been found to be unreliable in the past.[40]

73. Second, other parts of the EM are consistent with the majority's construction. The EM describes the Bill as providing an opportunity to "reconceptualise the legislation from first principles" (p (iv)). It says that the new NES "contains provisions that provide increased access to leave" (p (v)), and is "structured in a way that ensures the provisions are easy to understand and apply for employers and employees at the workplace" (p (x)). It notes that the "minimum entitlement to [PCL]" under s 96(1) is "ten days for each year of service" (p63). It says that an employee's ordinary hours of work are "central to the [PCL] entitlement", not because they define the quantum of the entitlement but because they determine the "rate" of accrual and the "entitlement to payment when leave is taken" (p64). And it explains that PCL may be taken if an employee is "not fit for work" due to illness or injury, or needs to "provide care and support" to a family member "because of a personal illness or personal injury, or an unexpected emergency" (p63).

74. All in all, the EM is not the model of "clarity" (MA [40]) that the appellants describe; and its paraphrases of the statutory text in the appellants' favoured passages are not a permissible lodestar for the interpretive exercise.

Part VI: Estimate of time required for presentation of oral argument

75. It is estimated the respondents will take 2.5 hours to present their oral argument in respect of both appeals.

Dated: 28 February 2020

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[40] See, eg, *JJ Richards & Sons Pty Ltd v Transport Workers' Union of Australia* (2010) 202 IR 180 at [71] (approved in *JJ Richards & Sons Pty Ltd v Transport Workers' Union of Australia* (2012) 201 FCR 297); *Fair Work Ombudsman v Step Ahead Security Services Pty Ltd and Anor* [2016] FCCA 1482; *Sponza v Coal Face Resources Pty Ltd* [2015] FCCA 1140.

ANNEXURE TO THE SUBMISSIONS OF FIRST TO THIRD RESPONDENTS

LIST OF LEGISLATIVE PROVISIONS

Acts Interpretation Act 1901 (Cth) (as at 25 June 2009) – ss 13(3), 15AA, 15AB, 15AC.

Fair Work Act 2009 (Cth) – ss 3, 60, 62, 63, 64, 79A(1), 85, 87(1)(b)(iii), 95, 96, 97, 99, 101, 104, 106, 106E, 107, 111(5), 114(1), 116, 124, 125, 139(1), 140(1), 142(1) 147, 180(4) 394(2), 441, 471, 474, 570, 642.

Workplace Relations Act 1996 (Cth) – ss 226(4), 241, 245(1), 246, 247, 249, 576J(1), 576K(2), 576M(1).

10 **OTHER MATERIALS**

Explanatory Memorandum to the Fair Work Bill 2008

Explanatory Memorandum to the Workplace Relations Amendment (Work Choices) Bill 2005