IN THE HIGH COURT OF AUSTRALIA, MELBOURNE REGISTRY
ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

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

Mondelez's Submission

Part I: Publication on the internet

1. This submission is in a form suitable for publication on the internet.

Part II: Concise statement of the issue

2. What is a "day" of leave in s 96(1) of the *Fair Work Act 2009* (**FW Act**)?

Part III: No s 78B notice is required

3. Mondelez considers that no notice under s 78B of the *Judiciary Act 1903* is required.

Part IV: Citation of the Judgment Below

4. The decision below, being a decision of the Federal Court exercising original jurisdiction, is reported in *Mondelez v AMWU* (2019) 289 IR 29 (**Judgment Below**).

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Part V: Relevant facts

5. Mondelez is a national system employer. The second and third respondents (**Employees**) are Mondelez employees and members of the first respondent (**AMWU**). In the proceeding below, Mondelez sought declarations about the disputed personal/carer's leave entitlements of the Employees. The case turned wholly on the proper construction of s 96 of the FW Act, which provides:

> **96 Entitlement to paid personal/carer's leave**
>
> *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.
>
> *Accrual of leave*
>
> (2) An employee's entitlement to paid personal/carer's leave accrues progressively during a year of service according to the employee's ordinary hours of work, and accumulates from year to year.

6. Mondelez contended that the word "day" in s 96(1) means an *average working day*, that is, the employee's average daily ordinary hours of work based on a standard five-day working week (**Average Day Construction**). The fourth respondent (**Minister**) intervened below to support the Average Day Construction. O'Callaghan J (dissenting) accepted this construction, pointing out that the Explanatory Memorandum to the *Fair Work Bill 2008* (**EM**) makes it clear that Parliament intended the Average Day Construction.

7. In contrast, the AMWU and the Employees (collectively, the **AMWU Parties**) contended that a "day" in s 96(1) means a "calendar day" or alternatively a "twenty-four hour period" (**Calendar Day Construction**).

8. The majority of the Federal Court (Bromberg and Rangiah JJ) adopted a third construction, holding that a day in s 96(1) "refers to the portion of a 24 hour period that would otherwise be allotted to work"[1] (**Majority Construction**).

9. The Employees work an average of 36 ordinary hours per week in 12-hour shifts. As explained below, on the Average Day Construction, s 96(1) entitles them to 72 hours

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[1] Judgment Below [199(1)] at Joint Core Appeal Book (**CAB**) 53.

of leave per year. In contrast, on the Calendar Day Construction and the Majority Construction, s 96(1) entitles them to an equivalent of 120 hours of leave per year.[2]

Part VI: Mondelez's argument

Summary of Mondelez's argument

10. Mondelez's argument can be summarised as follows:

    a. The meaning of the word "day" in s 96(1) is ambiguous. Each of the competing constructions in this case is open on the text of s 96(1). To resolve this ambiguity, it is necessary to consider the usual interpretive factors.

    b. Here, the relevant interpretive factors all point strongly to the Average Day Construction and against the Majority and Calendar Day Constructions:

        i. the EM makes it clear that Parliament intended the Average Day Construction;

        ii. the Average Day Construction better promotes the purpose of s 96;

        iii. unlike the Average Day Construction, the Majority Construction and the Calendar Day Construction are inconsistent with s 101 of the FW Act;

        iv. s 96(2) points to the Average Day Construction; and

        v. the Majority Construction and the Calendar Day Construction produce serious anomalies and inequities.

    c. Taken in combination, these factors show that the Average Day Construction is correct. Bromberg and Rangiah JJ erred in holding otherwise.

The different results produced by the competing constructions

11. To understand the arguments for and against the competing constructions, it is necessary to outline the results produced by each construction.

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2 The *Mondelez Australia Pty Ltd, Claremont Operations (Confectioners & Stores) Enterprise Bargaining Agreement 2017* entitles the Employees to 96 hours of personal/carer's leave per year: cl 24.2 at Appellant's Book of Further Materials (**Mondelez Further Materials**) 37. But on the Calendar Day Construction and the Majority Construction, the Employees' entitlement to "10 days" of leave under s 96(1) of the FW Act is more beneficial and overrides the lower agreement entitlement.

12. The critical feature of the Average Day Construction is that the leave entitlement, while expressed in days, is effectively converted into hours based on the employee's ordinary hours of work.[3] The leave accrual depends solely on the employee's weekly ordinary hours, *irrespective of how they are distributed during the week.* For an employee who — like the Employees in this case — works 36 ordinary hours per week, an average working day based on a standard five-day working week is 7.2 hours (36 ÷ 5). Over the course of a year, they therefore accrue 72 hours of leave (ten average working days of 7.2 hours each). They accrue this quantum of leave irrespective of whether their 36 ordinary hours per week are spread over five 7.2-hour days or compressed into three 12-hour shifts.

13. Another key result of the Average Day Construction is that part-time employees accrue leave pro-rata based on their ordinary hours. For example, a 50% part-time employee will accrue half the amount of leave of a full-time employee.

14. In contrast, on the Majority Construction, the leave accrual varies depending on how the employee's hours are distributed. An employee who works 36 ordinary hours per week as five 7.2-hour days will be able to be absent on leave for 72 hours per year (ten absences of 7.2 hours). But if the 36 ordinary hours are compressed into three 12-hour shifts — as is the case for the Employees — the employee will be entitled to be absent for 120 hours (ten absences of 12 hours).

15. Further, for employees who work different hours on different days, the hourly equivalent of one "day" of leave depends on when the leave is taken. For example, suppose that an employee works 8 ordinary hours on Mondays and 4 ordinary hours on Tuesdays. On the Majority Construction, one "day" of leave is used up if the employee is absent on either Monday or Tuesday. Hence, one "day" of leave will be equivalent to 8 hours if taken on a Monday or 4 hours if taken on a Tuesday.

16. Finally, on the Majority Construction, part-time employees do not accrue leave pro-rata but rather get the full ten absences per year. This means that, depending on

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[3] An employee's ordinary hours of work depend on the terms of their employment, with a full-time default of 38 hours per week: FW Act s 20. Here, the Employees work an average of 36 ordinary hours per week: Judgment Below [15] at CAB 11.

how their hours of work are structured, they can accrue *more leave* per year than a full-time employee. For example, a part-time employee who works only 12 ordinary hours per week as a single shift would accrue the equivalent of 120 hours of leave per year (ten absences of 12 hours) — almost double the 72 hours of leave of a full-time employee working 36 ordinary hours per week over five 7.2-hour days.

17. The Calendar Day Construction seems to produce the same results as the Majority Construction in all but one situation. Where a shift crosses midnight — spanning two calendar days — on the Majority Construction an absence for that shift would count as one "working day" of leave, whereas on the Calendar Day Construction it may count as two "calendar days" of leave.

18. For brevity, this submission will from here on refer only to the Majority Construction but the same arguments also apply to the Calendar Day Construction.

The word "day" in s 96(1) is ambiguous and the Average Day Construction represents one of the available meanings of that word

19. The word "day" in s 96(1) is ambiguous, with the Average Day Construction representing one of the available meanings of that word that is open on the text of the statute. This is so for the following reasons.

20. *First*, the word "day" does not have a single clear ordinary meaning.

21. The dictionary meanings of the word "day" include:

    a. a calendar day starting and ending at midnight;

    b. a 24-hour period not necessarily starting at midnight;

    c. the period between sunrise and sunset; and

    d. the portion of a day allotted to working.[4]

22. The absence of a single clear ordinary meaning of the word "day" is amply illustrated by the shifting meanings ascribed to that word by the AMWU Parties. Throughout this matter, the AMWU Parties have been trying to ride a constructional "high horse",

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4 See, eg, *Macquarie Dictionary* (7th ed, 2017) 392.

claiming that their construction represents the single clear ordinary meaning of the word "day". Yet the content of that single clear ordinary meaning has been evolving:

a. The AMWU Parties started by claiming that the word "day" in s 96(1) means a "calendar day" — this is what they alleged in their defence.[5]

b. Then, in their primary submission below, they shifted their position to rely on two ordinary meanings of that word — "indivisible calendar day" and "24-hour period".[6] Tellingly, they refused to elect between these two distinct meanings, seemingly positing both of them as the "clear and well-understood ordinary meaning" of the word "day".[7]

10 c. The majority expressly rejected both of these meanings,[8] finding instead that "in the specific context of an authorised absence from work", the "natural and ordinary meaning" of the word day is a "working day", that is "the portion of a 24 hour period that would otherwise be allotted to working".[9]

d. In this Court, the AMWU Parties have abandoned their earlier positions and are now unblushingly adopting the majority's meaning as the new "clear" and "[un]ambiguous" single "natural and ordinary meaning of the word 'day'".[10]

23. With respect, the AMWU Parties' assertion that the word "day" in s 96(1) has a single and unambiguous ordinary meaning cannot be reconciled with their shifting positions as to what that meaning is.

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5 They pleaded that s 96 entitles the Employees to "ten calendar days" of personal/carer's leave per year of service: Defence (27 July 2018) [6(c)], [7] and [8] at Mondelez Further Materials 5–6.

6 The Respondents' Submissions (15 October 2018) [10] at Mondelez Further Materials 61.

7 The Respondents' Submissions (15 October 2018) [63] at Mondelez Further Materials 72.

8 Judgment Below [95] at CAB 26.

9 Judgment Below [93] at CAB 26.

10 At least this was the AMWU Parties' position at the special leave stage: see Response (8 October 2019) [15], [26] at Mondelez Further Materials 78, 82.

24. *Secondly*, the ambiguity of the word "day" is made clear by s 106E, which provides:

> **106E Entitlement to days of leave**
>
> What constitutes a day of leave for the purposes of this Subdivision is taken to be the same as what constitutes a day of leave for the purposes of section 85 and Subdivisions B and C.

25. Section 106E is part of Subdivision CA of Division 7 of Part 2-2 of the FW Act. Part 2-2 contains the National Employment Standards (**NES**). Subdivision CA creates an entitlement to unpaid domestic and family violence leave. Section 85 and Subdivisions B and C — to which s 106E refers — create entitlements to, respectively, unpaid pre-adoption leave, unpaid carer's leave and paid compassionate leave. The effect of s 106E is therefore to deem the meaning of a "day" of domestic and family violence leave to be the same as a "day" of pre-adoption leave, unpaid carer's leave and compassionate leave. Importantly, s 106E leaves out paid personal/carer's leave, contained in Subdivision A.

26. While Subdivision CA was inserted into the FW Act by a subsequent amendment,[11] the whole Act must now be construed together with s 106E as a combined statement of the will of the legislature. Section 96(1) must be construed in light of s 106E.[12]

27. The majority below acknowledged that s 106E:[13]

> demonstrates that the word "day" may have more than one meaning under the FW Act. ... [T]he omission of paid personal/carer's leave from s 106E may imply that "a day of leave" may have a different meaning under s 96(1).

28. But, with respect, the effect of s 106E goes beyond that. Section 106E:

    a. discredits the proposition that the word "day" has some single ordinary meaning that should be presumptively attributed to that word in s 96(1);

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11 *Fair Work Amendment (Family and Domestic Violence Leave) Act 2018*.

12 *Acts Interpretation Act 1901* (**AI Act**) s 15 (under s 40A of the FW Act, the AI Act as in force on 25 June 2009 applies to the FW Act; all references to the AI Act are therefore to the AI Act as of that date); *Commissioner of Stamps v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453, 463 (Brennan CJ, Dawson and Toohey JJ); *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 179 [25] (Crennan, Bell, Gageler and Keane JJ).

13 Judgment Below [187] at CAB 50.

b. rebuts the default interpretive presumption[14] that the word "day" has the same meaning throughout the FW Act; and

c. makes it clear that — even in the "specific context of an authorised absence from work" — the word "day" not only *may* have but *does* have more than one meaning for different kinds of leave under the NES. Section 106E would have no work to do if the word "day" had a single meaning for all types of leave.

29. *Thirdly*, the Average Day Construction is itself premised on treating the word "day" in s 96(1) as meaning a "working day". On the Average Day Construction, that word refers to an *average working day*. In contrast, on the Majority Construction, it means a *discrete working day*, in the sense of working hours falling within a single discrete occasion when an employee would ordinarily be required to work. The real constructional dispute between the parties is therefore not whether the word "day" means a "working day" but what *kind* of "working day" s 96 is referring to — an *average* working day or a *discrete* working day.

30. These matters demonstrate that the constructional question presented by s 96(1) cannot be resolved by a ritualised appeal to some single natural and ordinary meaning of the word "day". Rather, the word is ambiguous and each of the competing constructions in this case is open on the text of s 96(1). Resolving between them requires consideration of other interpretive factors.

The relevant interpretive factors strongly point to the Average Day Construction and against the Majority Construction

The EM makes it clear that Parliament intended the Average Day Construction

31. Because the word "day" in s 96(1) is ambiguous, the EM can be used to "determine the meaning of the provision".[15] Here, the EM contains a very detailed explanation of s 96 that makes it plain that Parliament intended the Average Day Construction.

32. The explanation comes in three parts. First, the Regulatory Analysis section of the EM states that the FW Act was intended to preserve the quantum of the

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14 See, eg, *Tabcorp Holdings Ltd v Victoria* (2016) 328 ALR 375 [65].

15 AI Act s 15AB(1)(b).

personal/carer's leave entitlement that existed under the *Workplace Relations Act 1996* (**WR Act**) but express that entitlement in a simpler way:

> *Personal/carer's leave and compassionate leave*: the NES will not change the quantum of the entitlement to personal/carer's leave and compassionate leave but will extend unpaid compassionate leave to casual employees. In addition, the number of paid carer's leave days which can be used is no longer capped at 10 days per year. The NES will also replace complex rules about the accrual and crediting of paid personal/carer's leave with a single, simple rule that consolidates notice and evidence rules for taking leave. ...[16]

10 33. Under the WR Act, personal/carer's leave accrued in hours. Per year of service, an employee accrued a number of hours of leave equal to their average fortnightly "nominal hours worked".[17] On the Average Day Construction, s 96(1) now provides a similar entitlement of a number of hours of leave equal to the employee's average fortnightly ordinary hours. In contrast, the Majority Construction fundamentally alters the entitlement by changing the unit of measurement from hours to authorised absences. This substantially changes the quantum of the entitlement for employees whose working hours are not structured as five equal working days per week. The change is particularly radical for part-time employees, who can receive a yearly leave entitlement that is a multiple of what they received under the WR Act.[18]

20 34. The Regulatory Analysis excerpt quoted above therefore supports the Average Day Construction and is inconsistent with the Majority Construction. The excerpt also rebuts any implication that might otherwise arise that the change in the way in which the entitlement is expressed was intended to alter its quantum.[19]

35. The second part of the explanation is found in the main body of the EM and describes the intended operation of s 96:[20]

> The concept of an employee's ordinary hours of work is central to the paid personal/carer's leave entitlement as it determines the rate at which the entitlement accrues and also the entitlement to payment when leave is taken.

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16 EM xi (original emphasis).

17 WR Act s 246(2).

18 See [16] above.

19 AI Act s 15AC.

20 EM 64.

General principles

Leave accrues according to an employee's ordinary hours of work (which may be set out in a modern award or enterprise agreement, or are calculated in the manner set out in clause 20). Such hours are often expressed as a number of hours per week. In effect, therefore, the Bill ensures an employee will accrue the equivalent of two weeks' paid personal/carer's leave over the course of a year of service.

Although this is expressed as an entitlement to 10 days (reflecting a 'standard' 5 day work pattern), by relying on an employee's ordinary hours of work, the Bill ensures that the amount of leave accrued over a period is not affected by differences in the actual spread of an employee's ordinary hours of work in a week.

Therefore, a full-time employee who works 38 hours a week[21] over five days (Monday to Friday) will accrue the same amount of leave as a full-time employee who works 38 ordinary hours over four days per week. Over a year of service both employees would accrue 76 hours of paid personal/carer's leave...

36. Again, this explanation is consistent with the Average Day Construction and squarely inconsistent with the Majority Construction:

a. The statement that "an employee will accrue the equivalent of two weeks' paid personal/carer's leave over the course of a year of service" is correct on the Average Day Construction but wrong on the Majority Construction. For example, on the Majority Construction, the Employees accrue the equivalent of more than three weeks' leave per year because they work an average of three shifts per week and accrue enough leave to be absent for ten shifts.

b. The first two paragraphs under the sub-heading "General principles" accurately describe the Average Day Construction. But they cannot be reconciled with the Majority Construction. On the Majority Construction, the amount of leave accrued over a period *is affected* by the "actual spread of an employee's ordinary hours of work in a week". Further, on the Majority Construction, the 10-day entitlement is not linked to the "'standard' 5 day work pattern".

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[21] The examples in the EM use 38 hours per week as the weekly full-time ordinary hours but nothing turns on that number. The same issues arise for employees whose weekly full-time ordinary hours are 36 hours per week or any other number.

c. The last paragraph extracted above gives an example that is consistent with the Average Day Construction and squarely inconsistent with the Majority Construction. On the Average Day Construction, both employees would indeed accrue 76 hours of leave. But on the Majority Construction, the employee who works 38 ordinary hours over four days per week (ie four 9.5-hour days) would accrue the equivalent of 95 hours of leave (ten absences of 9.5 hours each).

37. The third part of the explanation gives a series of specific examples of the intended operation of s 96:[22]

> Illustrative examples
>
> The following examples illustrate the intended operation of the accrual and payment provisions.
>
> - Tulah is a full-time employee whose ordinary hours of work are 38 per week. On average, she also works an additional two hours of overtime per week. Tulah will accrue ten days' personal/carer's leave based on her ordinary hours of work (76 hours) over a year of service. If she takes a week's personal/carer's leave because she is sick or to care for a member of her immediate family who is sick, she will be entitled to be paid for 38 ordinary hours at her base rate of pay.
> - Brendan is a part-time employee whose ordinary hours of work are 19 per week. He will accrue half the amount of paid personal/carer's leave over a year of service as Tulah (38 hours), reflecting the lower number of ordinary hours that he works. This is also reflected in how much he is entitled to be paid if he takes a week's paid personal/carer's leave. If he takes a week's personal/carer's leave, he will be entitled to be paid for 19 ordinary hours at his base rate of pay.
> - Sudhakar is a full time employee who has entered into a permissible averaging arrangement under the NES and works an average of 152 hours every four weeks (based on 38 ordinary hours per week). The number of ordinary hours that Sudhakar works on any given day may vary according to the averaging arrangement. However, over a year he accrues ten days (76 hours) of paid personal/carer's leave. If he is sick and takes leave for a day, he will be entitled to be paid for the number of ordinary hours he was rostered to work on that day (but not for any additional overtime hours that he was to work).
>
> If an employee changes the basis of their employment (e.g., if the employee changes from a fulltime employee to a part-time employee), they would not lose

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22 EM 65.

accrued leave, although the future rate of accrual will be different (based on the employee's new ordinary hours of work).

38. The Average Day Construction produces the exact results stated above. But the Majority Construction produces different and inconsistent results:

a. On the Majority Construction, Tulah's ten days of leave cannot be converted into hours without knowing her roster. For example, if Tulah works her 38 ordinary hours per week as four 9-hour shifts, on the Majority Construction she would accrue the equivalent of 90 hours of leave (ten absences of 9 hours each) rather than 76 hours. And if she works a different number of ordinary hours on different days, on the Majority Construction her leave accrual has no fixed hourly equivalent at all. Rather, the hourly equivalent of her leave accrual will depend on when Tulah actually takes the leave.

b. On the Majority Construction, Brendan accrues neither 38 hours of leave nor half as much leave as Tulah. Rather, he accrues ten absences — the same as Tulah. The hourly equivalent of this accrual depends on Brendan's roster and could be higher than Tulah's. For example, if Tulah works her 38 ordinary hours as five 7.6-hour days while Brendan works his 19 ordinary hours as two 9.5-hour shifts, Tulah will accrue the equivalent of 76 hours of leave while Brendan will accrue the equivalent of 95 hours of leave, despite working half of Tulah's hours.

c. On the Majority Construction, the hourly equivalent of Sudhakar's ten days of leave is not 76 hours. Rather, his entitlement simply cannot be converted into hours until he actually takes the leave. This is because he works different hours on different days so each of his ten absences could cover a different number of hours depending on when he takes the leave.

d. When an employee changes the basis of their employment from full-time to part-time or vice versa, the Majority Construction produces results that are squarely inconsistent with the last paragraph of the EM excerpt quoted above. On the Majority Construction, an employee who changes the basis of their employment *may* lose accrued leave. For example, suppose that a full-time employee who works five 7.6-hour days per week has an accrued

personal/carer's leave balance of five "days". On the Majority Construction, this is equivalent to 38 hours (five absences of 7.6 hours each). Now suppose that the employee goes part-time, continuing to work five days per week but working half the full-time ordinary hours each day (ie 3.8 ordinary hours per day). On the Majority Construction, their accrued leave balance is now equivalent to only 19 hours (five absences of 3.8 hours each) — they lost half of their accrued leave.

39. As O'Callaghan J points out in his dissent, the EM "indicates – in terms – that Parliament did not intend that the spread of an employee's ordinary hours of work should produce the disparate result contended for by [the AMWU Parties]", where employees who compress their hours into 12-hour shifts get more leave than employees who work the same hours over five days a week. "That ... is precisely the result that the [EM] says that Parliament sought to avoid".[23]

40. The clarity of the EM enabled O'Callaghan J to write a very short dissenting judgment. His Honour's reasoning was simple — the meaning of the word "day" in s 96(1) is ambiguous, hence resort may be had to the EM. And the EM makes it clear that Parliament intended the Average Day Construction. With respect, this reasoning is unimpeachable and should be accepted.

<u>The Average Day Construction is consistent with the purpose of the entitlement</u>

41. It is apparent from the nature of the entitlement to personal/carer's leave under the FW Act that its purpose is to provide employees with a limited insurance against loss of wages in the event of being unable to work due to illness, injury or caring responsibilities. (For simplicity, this submission will refer to illness but the same reasoning applies to inability to work due to injury or caring responsibilities.) The insurance is limited because the period of leave is limited and because employees are only indemnified for their *ordinary* hours at the *base* rate of pay.[24]

42. Three consequences follow from that purpose.

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23 Judgment Below [213] at CAB 57.

24 FW Act s 99.

43. *First*, the fact that a particular construction results in a greater quantum of the entitlement does not make that construction more consistent with the purpose of s 96. The cost of the insurance provided by s 96 is borne by the employer. It is clear that Parliament intended to limit that insurance, striking — as it does throughout the FW Act — a delicate balance between the interests of employees and employers. It should not be assumed that, in striking this balance, Parliament intended the greatest possible entitlement open on the words of s 96.[25] Here, the Majority Construction often — though not always — produces a greater entitlement than the Average Day Construction but this does not make the former more consistent with the purpose of the entitlement than the latter.

44. *Secondly*, the purpose of s 96 is to provide a form of *financial* benefit. The entitlement does not cease to be a *financial* benefit merely because it is contingent on the occurrence of an event. Indeed, as explained below, the FW Act expressly contemplates that the provisions of the relevant industrial instrument may permit "cashing out" of personal/carer's leave, making the financial benefit unconditional.

45. Because s 96 provides a *financial* benefit, it seems likely that Parliament intended employees in like circumstances to receive the same dollar amount. On the Average Day Construction, employees who work the same average weekly ordinary hours at the same base rate of pay accrue the same dollar amount of the entitlement. On the Majority Construction, two employees who work the same average ordinary hours at the same base rate of pay can accrue radically different dollar amounts of the entitlement depending on how their hours of work are structured.

46. *Thirdly*, it can be inferred from the purpose of the entitlement that Parliament intended that, as much as possible, the entitlement will enable all employees, on average, to deal with the same period of illness without loss of pay. The Average Day Construction does so but the Majority Construction does not. This is because part-time employees who work fewer hours need fewer hours of leave to deal with the same period of illness. Similarly, employees who compress their hours into

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25 Cf *Carr v Western Australia* (2007) 232 CLR 138 [5] where Gleeson CJ observed that "Legislation rarely pursues a single purpose at all costs."

longer shifts need fewer authorised absences from work to deal with the same period of illness. The Average Day Construction accommodates this distinction. The Majority Construction does not. The following example illustrates the problem:

a. Suppose that A and B both work 30 ordinary hours per week, with A working five 6-hour days per week and B working three 10-hour shifts per week. Both have worked with their employer for one year, thus accruing ten "days" of personal/carer's leave.

b. Suppose that both A and B are sick for a contiguous period of one fortnight. For simplicity, suppose that no public holidays fall within this period. Hence, both A and B will have 60 working hours falling into this period, being ten 6-hour days for A and six 10-hour shifts for B.

c. On the Average Day Construction, A and B's accrued balance of ten "days" translates into 60 hours of leave for each of them. Thus on the Average Day Construction, their accrued leave entitlement will enable both A and B to be sick for the fortnight without loss of pay and both will have zero leave balance afterwards. This is a fair and equitable result.

d. But the Majority Construction produces a very different result. On the Majority Construction, A and B's accrued leave balance of ten "days" translates into ten *absences*. Because A works five days a week, he will use all ten absences to cover his fortnight of illness. But B works three shifts per week, so she will only need to use six of her absences to cover the same period of illness. Thus, if both A and B are sick for a fortnight, on the Majority Construction, A will use up all of his accrued leave entitlement while B will have four "days" of leave left over. This is both unfair and arbitrary.

47. This analysis shows that the Average Day Construction is more consistent with the purpose of the entitlement than the Majority Construction.

<u>The Majority Construction is inconsistent with s 101</u>

48. The Majority Construction cannot be reconciled with s 101 of the FW Act.

49. Section 101 provides that an award or enterprise agreement may contain terms permitting "cashing out" of personal/carer's leave subject to certain conditions.

50. Section 101(2)(c) prescribes one of the conditions — "the employee must be paid at least the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone". The latter amount is to be calculated under s 99, which provides that when "an employee takes a period of paid personal/carer's leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period".

51. Hence, s 101(2)(c), read together with s 99, assumes that an employee's accrued personal/carer's leave balance must be capable of being expressed in hours to make it possible to calculate — under s 99 — what the employee would have been paid had they taken the leave that they are cashing out.

52. This presents no difficulty on the Average Day Construction, which effectively measures leave in hours. But on the Majority Construction, leave is measured in a number of absences and each absence is not necessarily referable to a fixed number of hours. If an employee works for 4 ordinary hours on Mondays and 8 ordinary hours on Tuesdays, a day of leave taken on a Tuesday is equivalent to twice as many hours as a day of leave taken on a Monday, and therefore worth twice as many dollars under s 99. Hence, on the Majority Construction "the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone" simply cannot be calculated because it depends on *when* the employee would have taken the leave. The Majority Construction thus makes the statutory condition in s 101(2)(c) unworkable.

53. The majority acknowledged this problem but did not resolve it, other than proffering two potential solutions.[26]

54. The first was as follows:[27]

> Modern awards and enterprise agreement often contain clauses that distinguish between the entitlements of different categories of employees. If s

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26 Judgment Below [173]–[178] at CAB 47–48.

27 Judgment Below [176] at CAB 48.

101(2)(c) of the FW Act cannot be complied with in relation to some categories of employees, a modern award or enterprise agreement simply cannot include a cashing out provision for those employees.

55. With respect, this is an unsustainable construction of s 101. The FW Act does not require an award or enterprise agreement to separate employees who work the same number of ordinary hours on each working day into a different "category" from those who do not. Further, this construction would mean that an employee who switches to irregular working hours becomes instantly ineligible to cash out their personal/carer's leave. This would penalise employees on all kinds of common flexible working arrangements, such as part-time employees working different hours on different days or full-time employees who compress their hours to take off one afternoon a week. This harsh and arbitrary result flies in the face of one of the express objects of the Act — "assisting employees to balance their work and family responsibilities by providing for flexible working arrangements".[28] This construction would also unfairly penalise workers in industries where irregular working hours are common, such as health and hospitality. Parliament could not have intended s 101 to operate in this discriminatory fashion.

56. The majority's second solution is that s 101 may permit employees who work irregular hours to cash out their leave by requiring the payment to be "calculated upon an assumption that the employee would have taken leave on the days when they had the greatest number of ordinary hours".[29] With respect, this construction of s 101 finds no support in the text and also leads to arbitrary results. Suppose that a part-time employee works 4 ordinary hours per day, Monday to Friday. If the employee switches their roster to work 8 hours on Mondays and take Tuesdays off, on this construction of s 101 the dollar value of their accrued personal/carer's leave entitlement doubles. Again, Parliament is unlikely to have intended this result.

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28 FW Act s 3(d).

29 Judgment Below [177] at CAB 48.

57. On proper analysis, s 101 requires a construction of s 96 that expresses the leave balance in hours. This supports the Average Day Construction and excludes the Majority Construction.

Section 96(2) points to the Average Day Construction

58. Under s 96(2), paid personal/carer's leave "accrues progressively during a year of service according to the employee's ordinary hours of work". As O'Callaghan J points out, "[o]nce it is apparent that the entitlement to be paid [personal/carer's] leave and the relevant rate of pay used to calculate the amount to be paid in respect of it are founded on ordinary **hours** of work, then the entitlement to '10 days' leave for each year of service under s 96 must operate as a unit of time directly referrable to, or expressed as, ordinary hours of work" (original emphasis).[30]

59. In other words, consistently with s 101, s 96(2) strongly suggests that the leave balance must be capable of being expressed in hours. This supports the Average Day Construction and excludes the Majority Construction.

The Majority Construction leads to anomalies and inequities

60. The Majority Construction leads to what O'Callaghan J described as "inequities between different classes of employees that Parliament did not intend".[31] These inequities and anomalies include the following:

    a. Employees who work the same number of ordinary hours per week have different leave entitlements depending on how their hours are structured.

    b. Part-time employees have a leave entitlement that bears no relation to the proportion of full-time hours that they work and that can be greater than the entitlement of a full-time employee.

    c. Employees who split their working hours across multiple jobs accrue more leave than employees who work the same hours in a single job. For example, an employee who splits their hours across three different employers accrues three

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30 Judgment Below [210] at CAB 56.

31 Judgment Below [217] at CAB 58.

times as much leave as an employee who works the same hours with one employer (30 absences vs 10 absences).

d. An employee's accrued leave balance may increase or decrease if they change how their hours of work are structured. This can happen even if their total weekly ordinary hours remain the same.

e. Employees who work irregular hours either cannot cash out their leave or must be paid for their cashed-out leave on an unfair and arbitrary basis.

f. Employees who compress their hours into longer shifts can deal with a longer period of illness, injury or caring responsibilities without loss of pay compared to employees who work five days per week.

61. These anomalies and inequities point strongly against the Majority Construction.

Conclusion

62. For these reasons, Bromberg and Rangiah JJ erred by adopting the Majority Construction and rejecting the Average Day Construction. The Average Day Construction is correct. The Court should set aside the judgment below and make a declaration expressing the correct leave entitlements of the Employees.

Part VII: Orders sought by Mondelez

63. Mondelez seeks orders that:

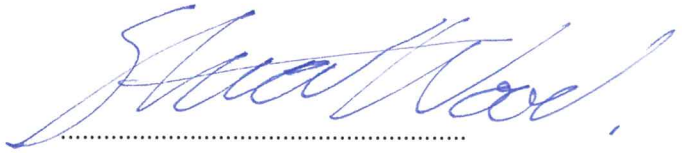
a. the appeal be allowed; and

b. the order made by the Federal Court on 21 August 2019 be set aside and substituted with a declaration that s 96 of the FW Act entitles the second and third respondents to 72 hours of paid personal/carer's leave per year of service.

Part VIII: Estimate of time required for oral argument

64. Mondelez estimates that it will require 2 hours to present its oral argument.

Friday, 31 January 2020



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Annexure — Relevant Statutory Provisions

1. *Acts Interpretation Act 1901*:

    a. Compilation dated 10 December 2008.

    b. Sections 15, 15AB and 15AC.

2. *Fair Work Act 2009*:

    a. Compilation 35, dated 12 December 2018.

    b. Sections 3, 20, 40A, 85 and Subdivisions A, B, C and CA of Division 7 of Part 2-2.

3. *Fair Work Amendment (Family and Domestic Violence Leave) Act 2018*:

    a. As enacted.

    b. Whole Act.

4. *Judiciary Act 1903*:

    a. Compilation 47, dated 25 August 2018.

    b. Section 78B.

5. *Workplace Relations Act 1996*:

    a. Compilation dated 6 January 2009.

    b. Section 246.