IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY NO M165 OF 2019

BETWEEN: MINISTER FOR JOBS AND INDUSTRIAL RELATIONS

Appellant

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

First Respondent

AND: NATASHA TRIFFITT

Second Respondent

AND: BRENDON MCCORMACK

Third Respondent

AND: MONDELEZ AUSTRALIA PTY LTD

Fourth Respondent

APPELLANT'S SUBMISSIONS

PART I FORM OF SUBMISSIONS

1. The submissions of the Hon Christian Porter, the Minister for Industrial Relations (**the Minister**),[1] are in a form suitable for publication on the internet.

PART II ISSUES

2. Whether the expression '10 days' in s 96(1) of the *Fair Work Act 2009* (Cth) (**the FW Act**), properly construed in light of other provisions of the FW Act (especially s 96(2)),

[1] The Minister was a party to the proceeding below, his predecessor, the Minister for Jobs and Industrial Relations, having intervened before the Full Court of the Federal Court of Australia pursuant to s 569 of the *Fair Work Act 2009* (Cth).

Filed on behalf of the Applicant by:

The Australian Government Solicitor
Level 34
600 Bourke St
Melbourne, VIC 3000
DX 50 Melbourne

Date of this document: 31 January 2020
Contact: Craig Rawson
File ref: 19006661
Telephone: 03 9242 1248
Facsimile: 03 9242 1333
E-mail: Craig.Rawson@ags.gov.au

guarantees national system employees (other than casuals) a minimum, progressively accruing entitlement to paid personal/carer's leave (**PPCL**) equivalent to: (i) an employee's usual weekly hours of work in a 2 week (fortnightly) period; or (ii) 10 'working' days (of whatever duration would have been worked on the day in question), per year of service?

3. The Minister submits s 96(1) guarantees a minimum PPCL entitlement equivalent to an employee's usual weekly hours of work in a 2 week (fortnightly) period and that the Full Court of the Federal Court (Bromberg and Rangiah JJ; O'Callaghan J dissenting) erred in concluding otherwise.

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

4. The Minister considers no notice is required under s 78B of the *Judiciary Act 1903* (Cth).

PART IV CITATION

5. This is an appeal from the whole of the judgment of the majority of the Full Court of the Federal Court of Australia in *Mondelez v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers Union (AMWU)* [2019] FCAFC 138 (**FC**).

PART V FACTS

(a) Background

6. The relevant facts, agreed by the parties, are primarily set out in the majority's reasons for judgment: FC[8] CAB10.15 – FC[19] CAB12.05.
7. Mondelez Australian Pty Ltd (**Mondelez**), a national system employer, operates various food manufacturing plants: FC[8] CAB10.15.
8. The *Mondelez Australia Pty Ltd, Claremont Operations (Confectioners & Stores) Enterprise Bargaining Agreement 2017* (**the EA**) came into effect on 11 May 2018, and applies to Mondelez, the Union, Ms Triffitt and Mr McCormack: FC[9] CAB10.19 and FC[12] CAB10.29.
9. Ms Triffitt and Mr McCormack each work 36 hours per week in 12 hour shifts, averaged over 4 weeks: FC[15] CAB11.05. Clause 24.1 of the EA provides that (i) 12 hour shift workers accrue 96 hours of PPCL per annum and (ii) employees other than 12 hour shift workers accrue 80 hours of PPCL per annum: FC[16] CAB11.09.
10. In accordance with cl 24.2, Mondelez credits Ms Triffitt and Mr McCormack with 96 hours of PPCL per year of service. If they take PPCL for a single 12 hour shift,

Mondelez deducts 12 hours from their accrued PPCL balance. Under the EA they thus accrue sufficient PPCL per year of service to cover 8 x 12 hour shifts (96 hours): FC[18] CAB11.30.

11. Whether cl 24.2 of the EA provides a PPCL entitlement that is more, or less, beneficial than the guaranteed National Employment Standards (**NES**) minimum depends upon the proper construction of s 96(1) of the FW Act: FC[204] CAB55.16.

(b) The reasoning of the majority concerning s 96(1) of the FW Act

12. The majority acknowledged that although s 96(1) of the FW Act is expressed 'simply', 'its interpretation is surprisingly complex': FC[2] CAB9.10.
13. The majority accepted that s 96(1) should be construed in its wider statutory context, particularly the NES: FC[65] CAB21.20 - FC[67] CAB21.30. The majority reasoned (correctly) that, as the NES establishes uniform minimum employment standards applying to all national system employees (unless excluded), 3 propositions underpin the NES scheme: *first*, the standards contained in the NES are uniform for all national system employees; *second*, no distinction is made on the basis of employees' work patterns; and *third*, the rate of accrual for each category of leave is usually standard for all employees: FC[67] CAB21.30.
14. The Minister pauses to observe that the application of these 3 NES-related propositions to s 96 would strongly suggest that employees working the same number of ordinary weekly/fortnightly hours, but in different work patterns, would accrue PPCL at exactly the same rate, and in the same amount per annum.
15. However, the majority concluded otherwise: it held that although s 96 is part of the NES, the PPCL regime lacks each of the 3 NES features identified by it.
16. The fulcrum upon which the majority reasoned to this conclusion was its identification of the purpose of s 96(1): namely, to protect employees against loss of earnings: FC[148] CAB40.34 and FC[155] CAB42.15 respectively.
17. A key increment in the discernment of that purpose was the majority's examination of the competing constructions of s 96 by reference to a particular group of employees, namely:

> ..... a group of employees who work the same number of average ordinary weekly hours, have the same base rate of pay, *have the same quantum of paid personal/carer's leave entitlements accrued* and are unable to work because of illness on the same days... [but]... *the employees' shift patterns vary* such that they have different numbers of hours each day.
>
> (FC[84] CAB24.30 - CAB25.10, emphasis added).

18. The majority considered (wrongly) that on the construction favoured by Mondelez and the Minister, some employees in that situation could 'lose earnings … whereas others would not': FC[84] CAB24.30 - CAB25.10 and FC[151] CAB41.22. The majority also considered that a virtue of the construction adopted by it was that, although s 96 means that some employees are entitled to take more hours of PPCL than others (despite, on the example given, having accrued *the same amount* of PPCL), those employees would not 'lose earnings': FC[84] CAB24.30 - CAB25.10, FC[150] CAB41.10 - FC[151] CAB41.22.

19. The majority embraced this interpretive outcome despite accepting that, for employees who work different hours on different days of the week, accrual of PPCL can only be calculated in advance *within a range*. The majority reasoned that this was not incongruous because calculating PPCL entitlements in advance of leave being taken necessarily requires speculation as to (i) the timing of future illness or injury (usually a random event at a random time); and (ii) whether the employee remains employed: FC[165] CAB45.16.

20. The majority also accepted that on its approach, whereby some employees accrue PPCL *within a range,* difficulties necessarily arose with respect to the 'cashing out' of their accrued entitlements under s 101(2)(c) of the FW Act – since the actual amount payable had the employee taken PPCL would not be calculable (or could not sensibly be assessed): FC[173] CAB47.16. However, the majority reasoned this did not provide a *sufficient* obstacle to its preferred construction because: (i) s 101(1) 'has work to do' as it operates sensibly in relation to *other* employees (eg employees working an even spread of ordinary weekly hours); and (ii) a calculation of the 'cashing out' of entitlement under s 101(2)(c) could be made on 'an assumption that the employee would have taken leave on the days when they had the greatest number of ordinary hours': both at FC[177] CAB48.16.

21. The majority also accepted that there were statements in the *Explanatory Memorandum to the Fair Work Bill 2008* (**the EM**) which supported the construction favoured by the Minister: namely, (i) a statement that 'the legislative intention was not to change the quantum of the entitlement, but merely to use simpler words to express the same entitlement': FC[131] CAB29.19; and (ii) express statements and examples directed to the operation of s 96 to the effect that accrual of PPCL thereunder would not be affected by the spread of ordinary hours of work: FC[127] CAB28.18, FC[133] CAB30.8. The majority discounted the relevance of these statements in the EM on the bases that (i) the

exact pre-existing entitlement was not maintained for *all* employees (because of the abolition of a cap which applied under the *Workplace Relations Act 1996* (Cth) (the **WR Act**)): FC[128] CAB35.2 - FC[131] CAB36.20; and (ii) although the EM could be taken into account in discerning the meaning of s 96, the meaning of '10 days' in s 96(1) was so clear (despite its 'surprisingly complex' nature) as to be incapable of alteration or adjustment by reference to extrinsic materials: FC[134] CAB37.22 and FC[198] CAB53.19.

22. The majority identified a final factor which it considered supported its preferred construction: namely, it accommodated an employee's entitlement to be relieved of the supposed obligation, which would otherwise arise on the Minister's interpretation, to perform overtime on days they used PPCL: FC[196] CAB53.01.

PART VI ARGUMENT

23. Courts must give effect to what Parliament has enacted.[2] In doing so, a provision must be construed so that it is consistent with the language and purpose of all the provisions of the statute.[3]

24. The method to be applied in construing a statute to ascertain the intended meaning of the words used is well settled, as Kiefel CJ and Keane J observed in *The Queen v A2 and Others* [2019] HCA 35; 93 ALJR 1106 at 1117 (Nettle and Gordon JJ agreeing generally at 1136 [14]):

> [32] ... It commences with a consideration of the words of the provision itself, but it does not end there. A literal approach to construction, which requires the courts to obey the ordinary meaning or usage of the words of a provision, even if the result is improbable, has long been eschewed by this Court. It is now accepted that even words having an apparently clear ordinary or grammatical meaning may be

---

2 *Northern Territory v Collins* [2008] HCA 49; (2008) 235 CLR 619 at 642 [99] per Crennan J; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 at 46-47 [47] per Hayne, Heydon, Crennan and Kiefel JJ; *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23; (2010) 241 CLR 252 at 264-265 [31]; *Certain Lloyd's Underwriters v Cross* [2012] HCA 56; (2012) 248 CLR 378 at 389-390 [25] per French CJ and Hayne J.

3 *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at 381 [69] per McHugh, Gummow, Kirby and Hayne JJ; see also *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* [1985] HCA 48; (1985) 157 CLR 309 at 315 per Mason J; *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 at 31 [4] per French CJ, 46-47 [47] per Hayne, Heydon, Crennan and Kiefel JJ; *Certain Lloyd's Underwriters v Cross* [2012] HCA 56; (2012) 248 CLR 378 at 389 [24], 391 [30]-[31] per French CJ and Hayne J, 411 [88] - 412 [89] per Kiefel J; *Regional Express Holdings Ltd v Australian Federation of Air Pilots* (2017) 262 CLR 456 at 465 [19] per Kiefel CJ, Keane, Nettle, Gordon and Edelman JJ; *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 262 CLR 362 at 368 [14] per Kiefel CJ, Nettle and Gordon JJ.

ascribed a different legal meaning after the process of construction is complete. This is because consideration of the context for the provision may point to factors that tend against the ordinary usage of the words of the provision. (citation omitted)

25. In relation to the crucial significance of context in the interpretive exercise, their Honours stated as follows:

> [33] Consideration of the context for the provision is undertaken at the first stage of the process of construction. Context is to be understood in its widest sense. It includes surrounding statutory provisions, what may be drawn from other aspects of the statute and the statute as a whole. It extends to the mischief which it may be seen that the statute is intended to remedy. "Mischief" is an old expression. It may be understood to refer to a state of affairs which to date the law has not addressed. It is in that sense a defect in the law which is now sought to be remedied. The mischief may point most clearly to what it is that the statute seeks to achieve.
> ...
>
> [37] ...When a literal meaning of words in a statute does not conform to the evident purpose or policy of the particular provision, it is entirely appropriate for the courts to depart from the literal meaning. A construction which promotes the purpose of a statute is to be preferred. (citation omitted)

26. Thus whilst the text of a statute is the undoubted starting point for construction, the context (including legislative history), the general purpose and policy of a provision, and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed.[4] Even when the ordinary meaning of a statutory expression is clear (which is not the case in relation to the meaning of a 'day'), context and purpose may warrant rejection of that ordinary meaning.[5]

(a) The starting point: the text of s 96 and related provisions

The legislative framework

27. There are a number of provisions of the FW Act which lend textual support to the proposition that '10 days' in s 96(1) is a shorthand reference to the number of ordinary hours of work over a period of 2 working weeks.

28. Section 3 of the FW Act, entitled 'Object of this Act', relevantly states:

> The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:
>
> (a) providing workplace relations laws that are **fair to working Australians**, are

---

4 *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) CLR 355 cited and applied in *Certain Lloyd's Underwriters v Cross* [2012] HCA 56; (2012) 248 CLR 378 at 389 [24] per French CJ and Hayne J.

5 *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 262 CLR 362 at 368 [14] per Kiefel CJ, Nettle and Gordon JJ.

flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and

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

29. The NES comprise 10 minimum employment entitlements which cannot be displaced, and include the entitlement of employees to PPCL under s 96. The NES are found in Part 2–2 of the FW Act.

30. Section 96 of the FW Act establishes the minimum entitlement of employees to PPCL and sets out the overall per annum entitlement and the mechanism by which that entitlement accrues:

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.

31. Having regard to the objects of the FW Act extracted at [28] above, the legislature intended that the operation of s 96 should be fair as between employees, and readily enforceable. It almost goes without saying that enforceability of an accrued leave regime (such as PPCL) turns significantly upon the ability of both employers and employees to ascertain, with precision, the quantum of accrued entitlements at any point in time.

32. Section 97 sets out the circumstances in which PPCL may be taken, namely:

(a) because the employee is not fit for work because of a personal illness, or personal injury, affecting the employee; or
(b) to provide care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because of:
(i) a personal illness, or personal injury, affecting the member; or
(ii) an unexpected emergency affecting the member.

33. In light of the terms of s 97 the legislature must have contemplated that PPCL might often be taken in hourly periods (not just whole days).

34. Section 99 deals with the taking and payment of PPCL:

99 Payment for paid personal/carer's leave
If, in accordance with this Subdivision, 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.

35. Section 99 suggests strongly that whether an employee takes a period of 3 hours PPCL, or 2 days of PPCL, they will be paid for the ordinary *hours* they were absent from work. This is reinforced by the reference in s 97 to the 'base rate of pay', which is defined in s 16 of the FW Act to be 'the rate of pay payable to the employee for his or her ordinary hours of work'.

36. Section 100 provides for the conditions that must be satisfied before any PPCL is cashed out and s 101 permits modern awards and enterprise agreements to include terms relating to cashing out of accrued PPCL. Section 101(2) sets out certain matters relevant to when PPCL can be cashed out, one mandatory condition being:

> (c) 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.

37. Section 147 deals with 'ordinary hours of work'.[6] It provides:

> **147 Ordinary hours of work**
> A modern award must include terms specifying, or providing for the determination of, the ordinary hours of work for each classification covered by the award and each type of employment permitted by the award.
>
> Note: An employee's ordinary hours of work are significant in determining the employee's entitlements under the National Employment Standards.

38. For so-called 'award/agreement free' employees, s 20(1) provides that the 'ordinary hours of work' are the hours agreed with the employer and, if there is no agreement, s 29(2) provides that the ordinary hours of work in a week are:

> (a) for a full-time employee – 38 hours; or
> (b) for an employee who is not full-time – the lesser of:
> (i) 38 hours; and
> (ii) the employee's usual weekly hours of work.[7]

The majority's failure to respect the textual significance of ss 96(2), 97, 147 and the 'Note' appended to s 147

39. The majority failed to respect the textual significance of s 96(2) and other provisions (in particular ss 97, 99, 147 and the 'Note' appended to s 147) in interpreting s 96(1).

40. As noted by O'Callaghan J at FC[209] CAB56.20, ss 96(1) and (2) are inextricably related provisions. The text of s 96(2) makes clear that PPCL accrues in the course of a

---

6 Section 20 of the FW Act deals with 'ordinary hours of work' in respect of award free employees.

7 See also s 20(3).

year, for all employees, by reference to ordinary *hours* worked (not by reference to days, or to working patterns); pursuant to s 96(2) all employees working the same number of ordinary hours of work accrue PPCL at the same rate, and in the same amount (ie after working the same number of ordinary hours) – whatever be the pattern in which those ordinary hours are worked.

41. The same is true in relation to the taking of accrued PPCL. Sections 96, 97 and 99 expressly contemplate that for each hour of accrued PPCL which is taken in a period, the accrued entitlement of *all employees* is reduced by the actual amount of hours taken (whatever the pattern of work).

42. Yet, according to the majority, if an employee takes an hour of PPCL on a Monday (when they usually work 12 hours), accrued PPCL is reduced by $1/12^{th}$ of a day; but if they take an hour of leave on a Tuesday (when they usually work 4 hours), accrued PPCL is reduced by $1/4^{th}$ of a day: see FC[169] CAB46.20 and FC[171] CAB47.01. The notion that a single hour of leave taken on different days results in differential impacts on an employee's accrued PPCL entitlement is quite inconsistent with the text of ss 96(2), 97 and 99.

43. The plain terms of s 96(2) – particularly when read in light of ss 99, 147, and the 'Note' appended to s 147 – indicate that an employee's 'ordinary hours of work' are the fulcrum for the calculation of the quantum of the employee's progressively accrued entitlement to PPCL. Section 96(2) is clearly directed to accrual of PPCL by reference to ordinary hours worked, not by reference to working days. Similarly, s 99, which deals with *taking* PPCL, does not refer to working days but instead makes reference to 'hours' twice: *first*, in referring to 'ordinary hours of work'; *second*, in referring to 'base rate of pay' which is defined in s 16 as 'the rate of pay payable to the employee for his or her ordinary hours of work'. The 'Note' appended to s 147 expressly states that an employee's ordinary hours of work (as opposed to working days, patterns of work etc) are significant in determining their NES entitlements.[8]

---

[8] Section 40A of the FW Act states that the *Acts Interpretation Act 1901* (Cth) (**AIA**) as in force on 25 June 2009 applies to the FW Act. Whilst s 13(3) of the AIA (as in force on 25 June 2009) provided that no 'marginal note, footnote or endnote' shall be taken to be part of the Act, s 15AB(2)(a) of the AIA and relevant authorities establish that matters not forming part of an Act may be taken into account when interpreting it: see for example *X v Australian Prudential Regulation Authority* [2007] HCA 4; (2007) 226 CLR 630 at 641 [35]-[38] per Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ and 663 [114] per Kirby J; *IMF (Australia) Ltd v Sons of Gwalia Ltd (admin apptd)* [2005] FCAFC 75; (2005) 143 FCR 274 at 290 [61].

44. The majority interpreted '10 days' to mean '10 working days': FC[93] CAB26.16 – something quite different to the ordinary meaning of '10 days'. For many employees 'working days' vary considerably from *day* to *day* (10 hours on Mondays, 2 hours on Tuesdays etc), thereby making it impossible, on the majority's interpretation, to calculate the 'upfront' hourly entitlement per annum under s 96(1) which is a necessary integer in working out and administering progressive accrual of PPCL under s 96(2). The statutory meaning given by the majority renders accrual of PPCL under s 96(2) unworkable for many employees.

45. The example of so-called lost earnings given by the majority at FC[84] CAB24.30, which is discussed at [16] - [19] above, is quite misconceived. The majority did not explain how one employee could, consistent with s 96(2), take more hours of leave than another in circumstances where both employees had, to that point, accrued the same amount of PPCL. The example cited by the majority is expressly predicated on both employees having the same quantum of accrued PPCL, and working the same number of ordinary hours of work. In responding to that example the majority lost sight of 2 inter-related propositions which emerge from the text of ss 96, 97 and 99: *first*, no employee is entitled to take more hours of PPCL than they have accrued; *second*, for all employees, at whatever point their accrued hours of PPCL are exhausted, earnings will be lost. Contrary to the reasoning of the majority at FC[84] CAB24.30 - FC[85] CAB25.10, that result does not give rise to 'unequal outcomes' – rather, it is the intended consequence of the progressive accrual regime. Further, contrary to the reasoning of the majority, on the Minister's construction both employees receive exactly the same economic value from their accrued PPCL; no 'loss of earnings' actually arises: for every hour of PPCL which is accrued an hour of leave may be taken, payable at the employee's base rate of pay.

46. The expression '10 days' in s 96(1), when read with the accrual provision in s 96(2), must be understood as a reference to an entitlement to take a particular number of hours of PPCL for every year of service. This is because, in part, under s 96(2) the number of PPCL hours progressively accrued must be ascertainable at any point in time ('during a year of service') for every employee. Unless the s 96(1) entitlement is capable of 'upfront' quantification in hours per annum, the progressive accrual regime in s 96(2) cannot be implemented 'across the board' as intended.

47. The majority's conclusion at FC[169] CAB46.20 that the accrual and taking of PPCL is determined by reference to days, not hours, insufficiently respects the text of the provisions referenced above.

(b) Errors in the majority's identification and use of purpose

48. The majority approached the construction of s 96(1) on the basis that the statutory purpose of ensuring income protection was a decisive consideration. It is axiomatic that (i) much care needs to be taken in discerning the purpose of a statutory provision; (ii) ordinarily, the statutory purpose of a particular provision should be consonant with the objects and purposes of related or cognate provisions in a law (in this case, the objects of the NES, s 96(2), and other provisions discussed above); (iii) courts should not fall into the trap of thinking that Parliament intends to pursue a single purpose at all costs, whatever anomalies might arise; (iv) to construe legislation as though it pursues an identified purpose to the fullest possible extent may be contrary to the manifest intention of the legislature; and (v) '...there may be found in the text, or in relevant extrinsic materials, an indication of a more specific purpose which helps to answer the question' as to how far legislation goes in pursuing an identified purpose.[9]

49. The majority's identification and use of 'purpose' strayed from these interpretive maxims:

    49.1. On proper analysis, the 'income protection' purpose of s 96(1) is heavily, and expressly, qualified: it is to be effected subject, at all times, to the progressive accrual regime stipulated in s 96(2).[10]

    49.2. In interpreting s 96(1) the majority gave 'controlling' effect to the broad purpose of income protection despite strong pointers in both legislative history and extrinsic material to the effect that the reference to '10 days' in s 96(1) was not intended to effect any change to the basic entitlement to PPCL under the WR Act but was intended, instead, to simplify how that entitlement was expressed (as to which see further below).

    49.3. The broad statutory purpose identified by the majority (income protection) must be assessed and applied in light of the propositions underpinning the whole NES scheme which the majority itself identified at FC[67] CAB21.30 – uniformity of standards for all NES employees, no distinction by reference to work patterns, and

---

9 *Carr v Western Australia* (2007) 232 CLR 138 at 142–143 [5]–[7] per Gleeson CJ cited and applied in the context of the FW Act in *Construction Forestry Mining & Energy Union v Mammoet Australia Pty Ltd* [2013] HCA 36; (2013) 248 CLR 619 at 632 [40] per Crennan, Kiefel, Bell, Gageler and Keane JJ; *The Queen v A2 and Others* [2019] HCA 35; 93 ALJR 1106 at 1121 [58] per Kiefel CJ and Keane J.

10 O'Callaghan J, in the minority, refers to this at FC[209] CAB56.20 - FC[210] CAB56.28.

standardisation of the period or rate of accrual. In this regard the Minister repeats and relies upon what is stated above at [13] - [15] and [40] - [46] above.

49.4. The broad statutory purpose identified by the majority must also be understood and applied in light of the overall objects of the FW Act which include providing 'workplace relations laws that are *fair* to working Australians' and ensuring 'a guaranteed safety net of *fair,* relevant and *enforceable* minimum terms and conditions through' the NES.[11] In this regard the majority accepted that fulfilment of the statutory purpose identified by it meant that (i) many employees and employers might not be able to ascertain accrued entitlements and obligations, respectively, with precision; and (ii) difficulties arise for many employees and employers with respect to enforcement of the cashing-out regime under s 101(2)(c): see at [20] above.

50. The majority's responses to these enforcement difficulties are quite unconvincing:

50.1. Firstly, on the Minister's approach to s 96, calculation of accrued PPCL requires no speculation whatsoever as to (i) the timing of future illness or injury; and (ii) whether the employee remains employed: FC[165] CAB45.16. Rather, at any point in time (including in advance of taking PPCL or the employment coming to an end), employees and employers can ascertain the exact amount of PPCL that has been accrued. The Minister's approach reflects the fact that PPCL is a benefit of definite financial value (albeit contingent on the need to take such leave) earned through a worker's labour on a pro rata basis under s 96(2) – such that the precise amount of accrued PPCL is calculable at any point in time, thereby enabling employees and employers to know what their accrued rights and liabilities are.[12] The construction adopted by the majority makes it impossible to undertake any precise upfront calculation of accrued PPCL in respect of all employees who work different hours on different days of the week.

50.2. Secondly, in relation to cashing out, the fact that the statutory provisions can work sensibly for some employees (at FC[176] CAB48.05) is, with respect, no answer to the difficulties which arise from the majority's approach for *other* employees. And the majority's suggested solution – an employer agreeing to cash out on the basis of the unstated and highly contestable assumption (legally and factually) at

---

11 Subsections 3(a)-(b) of the FW Act.

12 For example, to enable an employee to make an informed decision about when to take time off work to undergo non-time sensitive treatment for an injury or illness.

FC[177] CAB48.16 – is self-evidently unpersuasive.[13] The majority erred in interpreting s 96(1) in a manner which does not permit ss 96 and 101 to operate harmoniously for all employees.

50.3. Thirdly, courts should, whenever possible, adopt an interpretation of the FW Act which enables rights, entitlements and liabilities to be readily ascertained and enforced.[14] The majority departed from this principle.

51. Furthermore, real (indeed perverse) anomalies arise from application of the majority's approach to various work arrangements which are inconsistent with the FW Act's object of fairness referred to above. For instance, on the majority's approach:

51.1. If employee 'A' works 18 hours per week in 2 daily shifts of 9 hours, on the majority's construction 'A' is entitled to 90 hours per annum of PPCL – more than a full-time worker whose shifts are evenly spread over 5 days each week.[15]

51.2. A part-time employee employed 1 day per week for 7.6 hours would be entitled to 10 days of PPCL per annum (the same outcome as for a full-time employee) and would, perversely, accrue PPCL at 5 times the rate of a full-time employee.

51.3. A part-time employee employed by multiple employers would be entitled to accrue 10 'working days' of leave from each individual employer (and thereby be entitled to a minimum of 20, 30, 40 or 50 'working' days of PPCL depending on whether they have 2, 3, 4 or 5 employers).

51.4. Full-time employees who work full-time hours (ie 38 hours per week) but in shifts of less than a 7.6 hour day (eg in a pattern of 6 x 6.4 hour shifts per week) would be substantially short changed. They would be guaranteed only a minimum of 64 hours of PPCL which is 12 hours short of the 76 hours of leave accruing to another full-time employee who works 38 hours in 7.6 hours x 5 days per week.

51.5. Confounding problems and inequities would arise whenever employees change their work pattern with the same employer. For example, assume (i) employee 'B' works 36 hours per week in even shifts over 5 days and has 72 hours of PPCL accrued (10 of their 'working days') and (ii) employee 'C' works the same hours in 3 shifts of 12 hours and has 72 hours of PPCL accrued (6 of their 'working

---

13 Apart from anything else the assumption is inconsistent with the random nature of injury and illness as accepted by the majority at FC[165] CAB45.16.

14 *Australian Building and Construction Commissioner v Powell* [2017] FCAFC 89; (2017) 251 FCR 470 at 474 [15] per Allsop CJ, White and O'Callaghan JJ; see also s 3(b) of the FW Act and s 44 of the FW Act pursuant to which contraventions of the NES can activate enforcement action.

15 On the construction of the Minister, employee 'A' is entitled to 36 hours of PPCL per annum.

days'). If 'B' then converts to the same working pattern as 'C', the accrued PPCL of 'B' will suddenly increase to 10 x 12 hour days (FC[171] CAB47.01, FC[195] (first sentence) CAB52.21, FC[199] CAB53.20). That sudden and dramatic increase in the supposedly 'accrued' entitlement to take leave is quite inconsistent with the express terms of s 96(2).

(c) Error in the majority's approach to legislative history

52. Prior to the insertion of PPCL provisions into the WR Act (the predecessor to the FW Act) in 2005 – effected by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth)[16] – there was no guaranteed minimum entitlement to PPCL under Commonwealth law. Significantly, from the 'get-go' the expression '10 days' was used by and in Parliament to explain, by way of example, the quantum of the PPCL entitlement under the WR Act (being a shorthand reference to the nominal hours[17] worked in a fortnightly period).

53. As enacted in 2005 s 93F(2) of the WR Act (renumbered as s 246(2)) stated:

> *Accrual*
>
> 93F(2) An employee is entitled to accrue an amount of paid personal/carer's leave, for each completed 4 week period of continuous service with an employer, of 1/26 of the number of nominal hours worked by the employee for the employer during that 4 week period.
>
> Example: An employee whose nominal hours worked for an employer each week over a 12 month period are 38 hours would be entitled to accrue 76 hours paid personal/carer's leave (which would amount to **10 days** of paid personal/carer's leave for that employee) over the period. (emphasis added)

54. The *Explanatory Memorandum to the Workplace Relations Amendments (Work Choices) Bill 2005* relevantly stated as follows in relation to the guaranteed entitlement conferred by s 93F(2):

> 556. This is **equivalent to two weeks of personal leave for employees whose hours do not change over the course of a 12 month period** – for example, an employee whose nominal hours worked for a 12 month period were 38 hours per week would be entitled to 76 hours of personal leave (**which is two weeks of 38 hours each**). However, the formula also ensures that employees whose hours vary accrue appropriate amounts of personal leave. (emphasis added)

---

16 See *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) Schedule 1 Division 5 Sub-Division B, s 93F.

17 The FW Act replaced nominal hours with ordinary hours (excluding overtime).

55. Section 93I (renumbered s 249(2)) set an annual limit of paid carer's leave for an employee who had a continuous period of at least 12 months immediate continuous service with the employer.[18] Subsection 249(2) contained the following example:

> Example: An employee whose nominal hours worked for an employer each week were 38 hours during a 12 month period of continuous service with the employer would not be entitled to take any paid carer's leave from his or her employment with the employer if the employee had, during the period, already taken **76 hours paid carer's leave (which amounted to 10 days paid carer's leave for that employee)** from that employment. (emphasis added)

56. Section 247A(1)(b) of the WR Act, which was added by s 20 of the *Workplace Relations Legislation Amendment (Independent Contractors) Act 2006* (Cth), contained the following example of how PPCL accrued under the WR Act by reference to nominal hours:

> Example: Tina is employed by Terrific Videos Pty Ltd. She works 8 hours a day for 5 days a week, giving a weekly total of 40 hours per week (consisting of 38 hours plus 2 reasonable additional hours).
>
> Under subsection 246(2), Tina is entitled to accrue paid personal/carer's leave of 1/26 of her nominal hours worked for each completed 4 week period of continuous service with Terrific Videos. Because of subparagraph 241(1)(a)(ii), Tina's nominal hours worked in a week are capped at 38 hours. If Tina works her normal hours for a 12 month period, she will accrue 76 hours of paid personal/carer's leave.
>
> The above subsection ensures that **Tina will be able (subject to the requirements of this Division relating to entitlement to paid personal/carer's leave) to be absent from work for 10 full 8 hour days**. Tina's absence for the additional 4 hours over those 10 days will not be paid leave, and will not count as service, but it will not break her continuity of service (see subsection (2)). (emphasis added)

57. Section 247 of the WR Act stipulated a 'payment rule' for when an employee took PPCL 'during a period': namely, 'the employee must be paid a rate for each hour (pro-rated for part hours) of paid personal/carer's leave taken....'. That provision is emblematic of a legislative intention that accrual and taking of PPCL under the WR Act would actually operate by reference to hours (despite shorthand references to '10 days').

58. The upshot of this history is that (i) when the WR Act was replaced by the FW Act there was a move away from a legislated cap on PPCL in favour of a stipulated *minimum* entitlement of PPCL for employees; (ii) the general accrual regime of 2 weeks ('10 days') per annum was retained (albeit by reference to ordinary hours rather than

---

[18] This limit is not present and was intentionally removed by the FW Act: *Explanatory Memorandum to the Fair Work Bill 2008*, Regulatory Analysis Statement p xi.

nominal hours); and (iii) the FW Act was enacted against the backdrop of the WR Act wherein the expression '10 days' was a shorthand reference to an amount of PPCL per annum equal to the hours (nominally) worked in a period of 2 weeks. This last point is significant. Section 96 of the FW Act picked up and continued a pre-existing drafting expression.

59. As noted above the majority appeared to accept at one point that the pre-existing per annum entitlement to PPCL under the WR Act was *broadly* equivalent to the number of hours usually worked in a 2 week period. So much appears, in any event, from the express terms of the relevant provisions extracted by the majority at FC[122] CAB33.14, FC[124] CAB34.12 and FC[125] CAB35.01. In particular, the examples contained in ss 246(2), 247A(1) and 249(2) of the WR Act give content to the expression '10 days' of PPCL per annum and make clear that nominal hours and not work patterns determined the per annum entitlement under the WR Act. It is beyond doubt that under the WR Act employees working the same weekly hours, albeit in different patterns, received exactly the same PPCL entitlement per annum; and they accrued their entitlements pro rata as a percentage of an upfront per annum entitlement based on their nominal hours in a fortnightly period.

60. The majority erred in attaching little or no weight to this legislative history. The mere fact that some details of the PPCL regime changed when the WR Act was replaced by the FW Act does not gainsay the significance of this legislative history to the proper interpretation of s 96. The approach of the majority in this case can be contrasted with the significance which this Court attached to the legislative history of the FW Act in *CFMEU v Mammoet.*[19]

(d) Error in the majority's approach to extrinsic material

61. The majority was wrong to characterise extrinsic materials as simply lending 'support' to the Minister's construction. As noted by O'Callaghan J at FC[213] CAB57.10 - FC[214] CAB57.28 statements in the EM directly addressed the specific interpretive choice presented to the Court below, and those statements are wholly antithetical to the interpretation adopted by the majority. The EM forms part of the context of the FW Act and properly informs identification of the purpose – and, therefore the meaning – of

---

[19] [2013] HCA 36; (2013) 248 CLR 619 at 636 [52]-[56] and 637 [59] per Crennan, Kiefel, Bell, Gageler and Keane JJ.

s 96(1).[20] Extrinsic material was considered to be a factor which pointed strongly to the correct construction of the FW Act in *CFMEU v Mammoet.*[21]

62. The Regulatory Analysis and the EM make unmistakeably clear that (i) the legislature considered that the PPCL regime under the FW Act 'will not change the quantum of the entitlement to personal/carer's leave' but 'will ...replace complex rules about the accrual and crediting of paid personal/carer's leave with a single, simple rule...' – thereby identifying both the purpose and the mischief to which the language of s 96(1) was directed;[22] (ii) the intention of Parliament was that an employee would accrue the equivalent of 2 weeks' PPCL over the course of a year; (iii) the yearly PPCL entitlement was expressed in s 96(1) as '10 days' because this reflected a standard 5 day work pattern; and (iv) the accrual of PPCL was not intended to be affected by the actual spread of ordinary hours of work in a week. As to propositions (ii)-(iv) see the following statements in the EM:[23]

> General principles
>
> Leave accrues according to an employee's ordinary hours of work... 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 services.
>
> **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 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**... (emphasis added)

---

20 *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* [2006] HCA 50; (2006) 228 CLR 566 at 599 [98] per Heydon and Crennan JJ citing *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; (1997) 187 CLR 384 and *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355. See also *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* [1005] HCA 26; (2005) 221 CLR 568 at 584 [48] and 585 [53] per McHugh J, 592 [79] - 593 [81], 594 [84], 594 [86], 596 [96] and 598 [101] per Gummow, Hayne and Heydon JJ, and 599 [106] per Callinan J.

21 [2013] HCA 36; (2013) 248 CLR 619 at [57] and 637 [59] per Crennan, Kiefel, Bell, Gageler and Keane JJ; see also the weight attached to extrinsic materials in *The Queen v A2* [2019] HCA 35; (2009) 96 ALRJ 1106 at 1118 [43]-[44] and 1121 [58] per Kiefel CJ and Keane J.

22 *Explanatory Memorandum to the Fair Work Bill 2008*, 5th dot point in r 26 p xi.

23 *Explanatory Memorandum to the Fair Work Bill 2008,* p 64.

63. The 'illustrative examples' of the 'intended operation of the accrual and payment provisions' appended at the end of cl 396 in the EM (at p 65) are to the same emphatic effect. The example of Brendan shows that not every employee was intended to be entitled to 10 full days of PPCL per annum, because the entitlement was intended to be proportional (using the benchmark of the 38 hour worker), based on an employee's ordinary hours of work:

> 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) [whereas Tulah, who appears in the first illustrative example, accrues 76 hours], reflecting the lower number of ordinary hours that he works…
> 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**… (emphasis added)

64. Contrary to the reasoning of the majority, the meaning of s 96(1) is not so clear as to rob these statements of significant interpretive light.

(e) Error in the majority's approach to overtime

65. The majority erred in concluding that the Minister's approach did not satisfactorily accommodate the issue of overtime: FC[194] CAB52.15 - FC[197] CAB53.15. An employee's ability to refuse overtime while on PPCL derives from ss 62(2)-(3)(a) and (b) of the FW Act. Section 62(2) permits an employee to refuse to work additional hours if they are unreasonable. Section 63(3) requires the following, amongst other factors, be taken into account in determining whether additional hours are 'reasonable': '(a) any risk to employee health and safety from working the additional hours' and '(b) the employee's personal circumstances, including family responsibilities'. The majority located in s 96 a 'solution' to a problem which simply does not exist on the proper construction of the FW Act.

(f) The majority's reliance upon CFMEU v Glendell Mining Pty Ltd (2017) 249 FCR 495 (Glendell)

66. In *Glendell* a Full Court of the Federal Court, by majority and way of obiter, referred parenthetically (and without the benefit of any apparent in-depth assistance) to *RACV Road Services v AMACSU* [2015] FWFCB 2881 (*RACV*) as being consistent with its

approach in addressing an alternative argument raised by the CFMEU in *Glendell*.[24] In the Court below the majority purportedly followed *Glendell* in noting that the 'ordinary meaning given by the Full Bench [in *RACV*] was expressed in terms not materially different to that accepted as the 'working day' construction': FC[102] CAB28.

67. However, in *RACV* the Full Bench of the Fair Work Commission (**the Commission**) interpreted 'day' to mean a 'calendar day',[25] whereas the majority in the Court below *expressly* rejected a 'calendar day' construction in favour of its own 'working day' construction (FC[5] CAB9, FC[90] CAB25, FC[93] - [95] CAB26). For this reason alone the majority in the Court below was wrong to rely upon *RACV Road Services* and the passing reference to it in *Glendell*.

68. Further, and in any event, there are a number of aspects of the reasoning in *RACV Road Services* which were not examined (let alone approved) in *Glendell* and which, on closer analysis, simply cannot be sustained – and were not adopted by the majority in the Court below in this case. For instance, (i) the Commission's finding at [32]-[35] that NES provisions consistently use the term 'days' to mean calendar days is wrong; and (ii) the Commission's finding at [47]-[48] that the EM is not inconsistent with its 'calendar day' approach is impossible to sustain.

The proper construction of PPCL provisions

69. The Minister submits that the PPCL provisions of the FW Act operate as follows (i) the expression '10 days' in s 96(1) of the FW Act, when read with s 96(2) and other relevant provisions, comprehends an amount of PPCL accruing for every year of service equivalent to an employee's usual weekly hours of work over a 2 week (fortnightly) period; (ii) PPCL is accrued, taken and paid in hours; (iii) PPCL is equitably pro-rated according to ordinary hours of work; (iv) if PPCL is taken, the ordinary hours for which the employee was absent on PPCL are deducted from the employee's PPCL balance; (v) if PPCL is cashed out, the employee must be paid for the hours 'cashed out' as if those hours had been used so the employee's entitlement is certain and precise.

70. This interpretation accords with the legislative purposes of fairness, workability and enforceability for employees working different shift patterns, as well as those working

---

[24] *Glendell* concerned the interpretation of ss 89 and 98 of the FW Act, not s 96. As correctly held by O'Callaghan J, it was unnecessary for the Court below to decide whether *Glendell* was correctly decided given (i) the precise question of the proper construction of s 96 of the FW Act did not arise in *Glendell*, (ii) *Glendell* did not address arguments advance in this case; and (iii) the reasoning in *Glendell* was not seriously considered dicta attracting the comity principle: FC[218] CAB59.

[25] See [79] and [82].

full and part-time. It best accords with the text, purpose, legislative history and extrinsic materials. It also avoids the manifestly illogical and unfair outcomes arising from the majority's construction.

PART VII ORDERS SOUGHT

71. The Appellant seeks the following orders as set out in the Notice of Appeal [CAB68 at 69.06]:

    71.1. The appeal be allowed.

    71.2. Order 1 made on 21 August 2019 be set aside and in lieu thereof the following declaration be made:

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

    71.3. Each party bear their own costs of the High Court appeal.

PART VIII ESTIMATED HOURS

72. It is estimated that 1.5 hours may be required for the presentation of the oral argument of the Appellant.

Dated: 31 January 2020

Tom Howe QC
Australian Government Solicitor
Counsel for the Minister

Irene Sekler
Australian Government Solicitor

ANNEXURE TO APPELLANT'S SUBMISSIONS

LIST OF LEGISLATIVE PROVISIONS

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

Fair Work Act 2009 (Cth): ss 3, 20, 29, 40A, 44, 62, 63, 89, 96, 97, 98, 99, 101, 147, 569

Workplace Relations Act 1996 (Cth) – compilation prepared on 6 January 2009: ss 246, 247, 247A, 249

Workplace Relations Amendment (Work Choices) Act 2005 (Cth) Schedule 1 Division 5 Sub-Division B, ss 93F, 93I

Workplace Relations Legislation Amendment (Independent Contractors) Act 2006 (Cth), s 20

OTHER MATERIALS

Explanatory Memorandum to the Fair Work Bill 2008

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