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 (AMWU)**
First Respondent

AND: **NATASHA TRIFFITT**
Second Respondent

AND: **BRENDON MCCORMACK**
Third Respondent

AND: **MONDELEZ AUSTRALIA PTY LTD**
Fourth Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE MINISTER FOR JOBS AND INDUSTRIAL RELATIONS

A Adoption of following points made by Mondelez

1. The Minister adopts the following points made by Mondelez Australia Pty Ltd (**Mondelez**):

   1.1. the expression '10 days' in s 96(1) of the *Fair Work Act 2009* (**FW Act**) - and the concept of a 'working day' – has no usual or ordinary meaning applicable to all employees (especially employees working different daily hours), such that the search must be for the preferable statutory meaning: see Minister's submissions in chief (**AS**) **at [26], [44]** and in reply **(AR) at [2]-[7], [12]**;

   1.2. the majority below failed to construe s 96(1) in light of the regime of progressive accrual under ss 96(2) and 99: that regime directs attention to ordinary hours of work and requires that the quantum of accrued obligations/entitlements be calculable upfront, and with certainty: **AS[31]-[35], [39]-[43], [47]**; **AR[8]-[11], [15.1], [16]**;

   1.3. the majority below erred in its approach to the purpose of PPCL: the legislature did not intend to maximise, but to qualify, income protection: **AS[48]-[49]**;

   1.4. the approach of the majority below confounds the 'cashing out' provision in s 101 for all employees who work different daily hours: **AS[50]; AR[15.4];**

   1.5. the majority's approach below leads to anomalies and inquities and, contrary to s 99, ascribes a different 'value' to an hour of PPCL depending on which day of the week leave is taken: **AS[51]**; **AR[15.3], [15.5]**;

   1.6. the *Explanatory Memorandum to the Fair Work Bill 2008* (**the EM**) is wholly inconsistent with the construction adopted by the majority below: it makes clear that the expression '10 days' reflects a 'standard' 5 day work pattern in a week – such that '10 days' readily equates to 2 weeks of ordinary hours: **AS[61]-[64]; AR[19]**.

B Matters emphasised by the Minister

2. ***First point (AS[23]-[26]):*** The Minister's interpretation is not only open; it is the construction which best engages with the text, context and purpose of the statute and leads to outcomes which are sensible, fair, equitable, and proportionate.

   2.1. The approach of the majority discourages employer acceptance of flexible work arrangements, contrary to s 3(d); see also ss 65(1) and (5A).

3. ***Second point (AS[40]-[46] AR[8]-[11]):*** Section 96(2) requires that for all employees working the same number of ordinary hours per week, PPCL accrues at the same rate and in the same amount regardless of work pattern. On the Minister's construction every

employee who works 1 ordinary hour of work progressively accrues 1/26th of an hour by way of PPCL under s 96(2).

3.1. This approach provides a single standard which works predictably, cohesively and equitably for all national system employees, regardless of whether they work full-time, part-time, regular or irregular hours, and regardless of whether, and if so when, their patterns of work or ordinary hours change.

4. ***Third point (AS[32]-[47]):*** The text-based significance of s 96(2) is reinforced by ss 16, 97, 99, 147 and the Note appended to s 147, which indicate the centrality of ordinary hours to the accrual and taking of PPCL (noting that ordinary hours of work under the FW Act is a weekly concept: see ss 20 and 62).

5. ***Fourth point (AS[52]-[60]; AR[13]):*** The legislative history, a part of the context, shows s 96(1) continued the use of a pre-existing drafting expression in the *Workplace Relations Act 1996* (Cth) (**WR Act**): ss 246(2), 247A(1)(b), 247 and 249(2); see also the EM to the *Workplace Relations Act (Work Choices) Bill 2005* at [556].

6. It is noteworthy that even before the PPCL provisions were introduced into the WR Act employers and employees agreed upon paid carer's leave entitlements in awards (in conciliated outcomes in the AIRC) expressed as '5 days' or '10 days' of accrued leave per annum, meaning 1 or 2 weeks of hours ordinarily worked in those periods: see *Re Parental Leave Test Case 2005* 143 IR 245 at [45], [47]-[53], [56], [408]-[409], Appendix 2, [1.5] on page 343, Attachment A at [X.4.1] on page 346. It is unsurprising, therefore, that the WR Act described the 1/26th entitlement of an employee working 38 hours per week as '76 hours paid personal/carer's leave (which would amount to 10 days....' per annum. It is also unsurprising that, in the process of legislative simplification introduced by the FW Act, the same basic entitlement came to be expressed in the FW Act as '10 days' per annum.

7. ***Fifth point (AS[61]-[64], AR[13]):*** The EM to the FW Act, which is part of the context, makes clear that s 96 was not intended to address a perceived problem of insufficient PPCL for 12 hour shift workers under the pre-existing WR Act regime. Rather, the same basic entitlement under the WR Act was intended to be preserved.

Date: 7 July 2020

Tom Howe QC **Irene Sekler**