IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M160 of 2019

BETWEEN: **MONDELEZ AUSTRALIA PTY LTD**

Appellant

and

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

10 First respondent

NATASHA TRIFFITT

Second respondent

BRENDON MCCORMACK

Third respondent

MINISTER FOR JOBS AND INDUSTRIAL RELATIONS

Fourth respondent

No. M165 of 2019

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

20 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

30 **MONDELEZ AUSTRALIA PTY LTD**

Fourth respondent

OUTLINE OF ORAL ARGUMENT OF THE FIRST TO THIRD RESPONDENTS

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Part I: Certification as to suitability for publication

1. This outline of oral argument is in a form suitable for publication on the internet.

Part II: Propositions to be advanced in oral argument

2. ***Starting point – the text (RS[11]-[14]):*** The language in s96(1) should be given its natural and ordinary meaning unless it is plain the Parliament intended some different meaning: see *Masson v Parsons* (2019) 93 ALJR 848 at [26]. That is desirable in a statute that sets out minimum standards applicable to almost all employees in Australia: FW Act (1 JBA p14), ss3, 61. The appellants impermissibly strain the text by positing different complex formulae that they attempt to retrofit to the word "day" (or "10 days" in respect of the Minister).

3. ***Natural and ordinary meaning of a "day" of "leave" (RS[21]-[22]):*** Section 96(1) prescribes the amount of leave to which an employee is "entitled" each year: "10 days". A "day" is ordinarily understood as a unit or period of time spanning 24 hours. "Leave" is only required for time during which an employee would otherwise be required to work. In that context, the plain meaning of a "day" of "leave" within s96(1) is an entitlement to be absent during that 24 hour period for whatever rostered work time falls within it. That period of time was said below to be the "working day". Section 96(1) creates an entitlement to paid time off work for 10 such "working days". See *CFMEU v Glendell* (6 JBA p1560) at [133].

4. ***Coherence with the surrounding text (RS[29]-[42]):*** The natural and ordinary meaning is consistent with the text and structure of Pt 2-2 Div 7 generally. Section 96(1) creates the entitlement and defines its quantum using a standard metric applicable to all employees. The surrounding provisions interact with s 96(1), but do not alter or define that quantum.

5. *Section 96(2)* governs how quickly the 10 day entitlement "accrues": not once a year on an anniversary, but progressively. The rate of that progressive accrual is set by reference to two touchstones: (i) the employee's "ordinary hours of work" (ie not unpaid leave/ overtime); (ii) during the "year of service" (ie not counting time that is not "service" within s 22).

6. *Section 97* sets out the circumstances when leave can be taken. Those circumstances are all directed towards giving employees relief where unexpected occurrences take place.

7. *Section 99* prescribes what an employee is to be paid if he/ she "takes a period of" leave. Only the ordinary hours falling on the "day" are paid, not all hours that would have been worked (ie excluding any overtime). Importantly, the employee is paid for his/ her *actual* hours in the period of leave – not any notional or "average" hours.

8. *Sections 98* ("day" or "part-day" that is a "public holiday"), *102, 103(2)(a), 104,* and *105(2)(a)* ("2 days"), *105(2)(b)* ("1 day") and *106A* ("5 days") each use "day" in the sense

of a period of time spanning 24 hours, and "leave" in the sense of hours of work on that day. These provisions cannot mean some formula of notional or "average" hours. Section 106E does not alter s 96(1) by a side wind. And outside Div 7, see eg ss85, 111, 116.

9. ***The stark contrast with the previous legislation (RS[61]-[67]):*** The predecessor scheme created an entitlement the quantum of which was defined by reference to the "amount" of leave that "accrued", which was a number of "nominal hours": WR Act (4 JBA p1092), ss245(1), 246(2)). Section 249 capped the leave entitlement using a formula of "nominal hours". The FW Act rejected that approach in favour of a leave entitlement quantified in "days". That is significant: *Baini v The Queen* (5 JBA p1196) at [20], [43]. The WR Act entitlement was said in a Note to provide "10 days" (s246(2)); it did not do so for shiftworkers, which may explain the desire to create a "10 day" entitlement for all.

10. ***Purpose (RS[44]-[56]):*** The above interpretation gives effect to the purpose of s96(1): to provide a standard form of limited statutory income protection for employees unable to work due to injury, illness or family responsibilities. The provision does not provide remuneration for work done, but protects employees from a loss of income that they would have otherwise received if they had been able to work on that "day". The construction accepted below means that 2 employees, who work different shift lengths, are both entitled to be off work for illness or to care for a family member for 10 working days a year, without losing income. "10 days" does not in fact mean "6 days for a shiftworker".

11. ***"Anomalies and inequities" (RS[57]-[59]):*** In light of that statutory purpose, there is nothing unjust in giving the expression "day" of "leave" in s96(1) its natural and ordinary meaning. Equity here is creating the same safety net for all employees: regardless of work patterns, an employee may be absent due to illness/ injury for 10 working days and will be paid for the ordinary hours that he/ she would have worked on each such day (s99). The correct comparison is not the number of ordinary hours for which two employees receive pay, nor the comparative dollar value of that pay, but the number of absences from work that they may take without losing income.

12. The appellants' appeal to absurdity also jars with the historical context. Early federal prescriptions limited paid sick leave to a set number of "days" of permitted absence, an approach which continued albeit with different expression across industries but an apparent common intention: see eg *AWU v Bendigo Amalgamated Gold-Fields N/L* (1922) 15 CAR 1166 at 1177-1178; *RACV Road Service v ASU* (6 JBA p1643) at [80]-[81].

13. ***Consistency with s96(2) (RS[36], [60]):*** The Minister's arguments all presume that leave needs to be converted into hours to know how much leave one has accrued. There is

no need to do so, even if workers' shift patterns change over time. There is no difficulty with calculating a leave entitlement in days whilst measuring its progressive accrual according to the ordinary hours the employee has worked. As an employee completes a period of working whatever his/ her ordinary hours happen to be at that time, the employee accrues a fraction of the 10 days (eg 5 days after 26 weeks of working those ordinary hours). As an employee takes a day of leave (however many ordinary hours fell on that day), the employee loses one of the accrued days. It is simple to understand and apply.

14. ***Facilitating authorised absence for overtime hours (RS[32]):*** The respondents' construction fills the gap that would otherwise arise when an employee has rostered overtime on a working day: see ss62 and 96, cf WR Act, ss226, 245, 246, 247A.

15. ***No inconsistency with "cashing out" provisions (RS[37]-[39]):*** The starting point is that cashing out is prohibited (s100, cf WR Act, s245A(2)); and s101 only permits it if done (and capable of being done) in an award or enterprise agreement. The Full Court correctly explained how the "working day" construction can be reconciled with s101 (at [176]-[178]).

16. ***Extrinsic material (RS[69]-[74]):*** The EM (7 JBA p1848) cannot supplant the statutory text: *Alcan (NT) v Territory Revenue* (5 JBA p1172) at [47]; *R v A2* (6 JBA p1756) at [35]; *Baini v The Queen* (5 JBA p1196) at [14]; *Taylor v A-G (Cth)* (2019) 93 ALJR 1044 at [87]; *Re Bolton; ex parte Beane* (1987) 162 CLR 514 at 518; *Saeed v Minister for Immigration and Citizenship* (5 JBA p1130) at [31]-[34]. It is available to ascertain purpose and the "mischief" that the legislation was intended to address (see *A2* at [15]), but not to ascertain meaning, other than pursuant to AIA (4 JBA p1085) s15AB. Before the EM can be used to determine s96(1)'s meaning, the provision must be ambiguous or the ordinary meaning must be manifestly absurd or unreasonable: s15AB(1). Mondelez relies on ambiguity. But ambiguity cannot be manufactured by using extrinsic material to create the doubt and then resolve it. Here, on a proper construction of the text taking into account its context and purpose, there is no ambiguity. AIA s15AB(3)(a) is apposite for a provision that creates a standard minimum condition for all employees.

17. In any event, it cannot be said that the EM clearly advances the appellants' constructions. Some passages support the "working day" construction: see p (i) ("simple and stable safety net" applicable to "all employees"). None of the examples at pp64-65 involve an employee receiving fewer than 10 working days of leave. Where it assumes conversion into hours, the EM paraphrases the statutory language in a manner inconsistent with the Act.