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

THE APPELLANT'S REPLY TO THE SUBMISSIONS IN RESPONSE OF THE FIRST TO THIRD RESPONDENT

Filed on behalf of the Appellant by:

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

Date of this document: 18 March 2020
Contact: Craig Rawson
File ref: 20200152
Telephone: 03 9242 1248
Facsimile: 03 9242 1333
E-mail: craig.rawson@ags.gov.au

PART I: PUBLICATION

1. The submissions in reply of the Hon Christian Porter MP, the Minister for Industrial Relations (**the Minister**), to the First, Second and Third Respondents' Submissions in Response (**RS**), are in a form suitable for publication on the internet.

PART II: REPLY

2. Contrary to a recurring refrain in the RS, the interpretation of '10 days' in s 96(1) of the *Fair Work Act 2009* (Cth) (**the FW Act**) adopted by the majority did not involve giving that expression its 'natural and ordinary meaning' (see RS at [7], [8], [9], [21]-[28], [42], [44], [69], and [71]). The majority interpreted '10 days' to mean, in effect, '10 working days, comprising whatever number of hours would otherwise be worked on those days leave is taken'; the majority did not interpret the expression to mean 10 x 24 hour periods (i.e. 240 hours). The majority arrived at a particular *statutory* meaning of '10 days'.
3. That statutory meaning is encapsulated and adopted in the RS at [7] wherein it is stated that the expression '10 days' creates an entitlement 'to paid leave from working *whatever rostered hours fall in that 24 hour period*'.
4. The approach taken by the majority, and in the RS at [7], goes beyond the natural and ordinary meaning of '10 days' to accommodate employees who work different daily hours. For employees who work different daily hours – whether or not in a regular pattern (such as 3 hours on Mondays and Fridays, 10 hours on Tuesdays, Wednesdays, and Thursdays) – a working day varies. On the majority's approach it is therefore necessary, for all such employees, to explicate the meaning of '10 days': unless that is done it is not possible to calculate the service-based *per annum* entitlement to paid personal and carer's leave (**PPCL**) under s 96(1); and even then, it is only possible to state that entitlement as falling *somewhere* within an overall range.
5. The imprecision and uncertainty attending that result is compounded when regard is had to 2 additional features of the majority's approach: first, the 'entitlement range' which must arise under s 96(1) for all employees working different daily hours can be very broad (30-100 hours per annum in the example given); secondly, whenever an amount of PPCL is taken by such an employee, their employer will be required to deduct that number of hours/days from the extant accrued entitlement – which, at that point, can still only be expressed as a range – to arrive at a revised 'entitlement range'.
6. Putting to one side, for the moment, the extraordinariness of that result, what emerges is that the approach of the majority, acknowledged in the RS at [7], involves reading the expression 'is entitled to 10 days of paid personal/carer's leave' in s 96(1) as if it stated

'is entitled to *any* 10 *working* days of paid personal/carer's leave, *comprising whatever number of hours would ordinarily have been worked on the day leave is in fact taken*'.

7. The **first** important point to note for present purposes is that the constant refrain, in the RS, to the avowed safe harbour of a 'natural and ordinary meaning' is quite inapt and unsustainable. The interpretation advanced by the majority and embraced in the RS involves, on proper analysis, considerable supplementation of the statutory language in s 96(1).[1]

8. The **second** point to note is that even though the approach taken in the RS at [7] permits some calculation of the overall service-based *per annum* entitlement to PPCL under s 96(1) – albeit somewhere within an overall range – for all employees working different daily hours it does not permit calculation of the rate of progressive accrual of PPCL for each ordinary hour worked under s 96(2). The RS never grapple with that difficulty, much less present a solution to it.

9. The RS at [36] acknowledge that s 96(2) stipulates 'the *rate* at which PCL accrues up to a *set quantum* over the course of a year' – and it is accepted that the rate was intended to be 'steady' and 'uniform'. But the RS are silent as to the necessary implications of those matters. For instance, what is the accrual rate if the so-called 'set quantum' consists of somewhere/anywhere within an overall range (for instance, between 30 and 100 hours per annum)? For employees working different daily hours the rate will be neither steady nor uniform; and it will vary *ex post facto* according to when PPCL is actually taken.

10. That question is not idle or rhetorical. It demands an answer. None is given.

11. By way of contrast, on the approach taken by the Minister every employee who works 1 ordinary hour of work progressively accrues 1/26th of an hour by way of PPCL. That approach involves 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 of work change: cf RS at [19].

12. The **third** point to note is that the Minister's approach actually aligns with the fact that, to the extent '10 days' or '10 working days' have ordinary or natural meanings in an employment context, they represent a fortnight, or 1/26th of a working year. The RS go

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[1] In the RS at [12] footnote 6 various passages are relied on from *Alcan v Territory* (2009) 239 CLR 27, *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 and *International Finance Trust Company Limited v New South Wales Crime Commission* (2009) 240 CLR 319. Observations in those cases are directed to statutory language which has an ordinary meaning, which is not the case here.

some way down the path illuminated by resort to a 'natural and ordinary meaning', but steadfastly baulk at this very obvious destination.

13. The **fourth** point to note is that, according to the majority and the RS, the figure of '10' in the expression '10 days' is arbitrary and bereft of all and any significance, even though (i) 1/26th was the accrual rate under the predecessor legislation; (ii) the expression '10 days' appeared in the predecessor legislation in contexts which conveyed 2 weeks;[2] (iii) as noted in the preceding paragraph, '10 days' is equivalent to 2 weeks or 1/26th of a working year; (iv) there is no indication in the FW Act, or in any extrinsic materials, of any intention to significantly change the 10 day/2 week PPCL entitlement when the FW Act was introduced; and (v) the EM makes 2 things unmistakeably clear: first, the basic entitlement was, in fact, not intended to change;[3] and secondly, the entitlement under s 96(1) comprises 'the equivalent of two weeks paid personal/carer's leave over the course of a year of service'.[4]

14. The **fifth** point to note is that the RS problematize the Minister's preferred construction in unwarranted and unconvincing ways.

    14.1. At RS [19] a question is posed as to how averaging can occur where 'an employee's ordinary hours under certain roster patterns may vary from fortnight to fortnight (eg 2 weeks on/1 week off)'. However, as elsewhere noted in the RS (at [27]), averaging of ordinary hours of work may occur over any period up to 26 weeks under ss 63-64; and just as such averaging can take place to calculate accrued annual leave, it can take place to calculate accrued PPCL.

    14.2. The suggested problem concerning rostered overtime at RS [32]-[35] is a distracting chimera. As far as the Minister can ascertain, no employer has ever argued that, under the FW Act or predecessor legislation, sick workers who are entitled to access PPCL or who must care for a sick child are nonetheless obliged to perform overtime. Any such argument would encounter obvious difficulty, including the operation of ss 62(2)-(3)(a) and (b) of the FW Act. A direction to work in these circumstances would, in any event, be unreasonable.

15. The **sixth** point to note is that the RS do not properly deal with the problems and inequities which attend the majority's preferred construction.

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2 See the Minister's Submissions of 31 January 2020 at [52]-[59].

3 Explanatory Memorandum, page xi, first dot point.

4 Explanatory Memorandum, page 64, first para under the heading 'General principles'.

15.1. Under s 96(2) the precise amount of accrued PPCL must be calculable at any point in time, including *before* PPCL is taken: employees and employers are entitled to know what their accrued rights and liabilities are at any point in time.[5] The construction advanced by the Minister permits this; the construction adopted by the majority does not. Focussing on 'the time the leave is taken' (see the RS at [60]) ignores the fact that under s 96(2) progressive accrual must be calculable before (and regardless of when) the leave is actually taken.

15.2. The Minister repeats and relies upon the matters stated at [8] and [9] above, which also relate to the operation of s 96(2).

15.3. The range of circumstances in which PPCL may be taken indicate that, very often, such leave will be taken in small amounts – hours or part hours, such as to attend a medical appointment, or leaving work 30 minutes early to collect a sick child. Unless '10 days' in s 96(1) is readily commutable to an hourly entitlement, progressive accrual (including maintenance of an accrued balance) under s 96(2) is confounded. Further, on the majority's approach, depending on which working day an hour of PPCL is taken by employees who work different hours on different days, it could result in a reduction in the balance of accrued leave of, for instance, $1/10^{th}$ of a day or half a day.

15.4. Contrary to the RS at [37], the problems which arise with respect to cashing out under s 101 of the FW Act do not assume that cashing out is inevitable. The fact that cashing out is not mandatory or inevitable is completely beside the point. The point is that s 101 contemplates the availability of cashing out – and that contemplated outcome under s 101 is confounded on the approach taken by the majority. Parliament must have intended that when leave is cashed out, the provisions of ss 96 and 101 would operate cohesively.[6]

15.5. At [57] of the RS it is stated that 'most of' of the examples of inequities, anomalies or perverse results 'rely on highly unlikely work patterns', are simply the natural consequences of the operation of the FW Act, and reflect the legislature's purpose. Notably, in support of the first proposition the RS refer to the example of an employee who works a full day (8 hours), followed by a 'half' day (4 hours) – an arrangement entirely unremarkable for part-time employees. The remaining

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5 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 or cash out PPCL if entitled to do so.

6 See *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 per McHugh, Gummow, Kirby and Hayne JJ at p 381.10-382.3.

propositions are conclusory and do not deal with the Minister's argument: namely, courts should be slow to attribute to the legislature an intention to achieve consequences which are inequitable, anomalous or perverse.

16. The **seventh** point to note is the extraordinary lack of attention given to s 96(2) in the RS. It is the subject of dedicated treatment in only 2 of 75 paragraphs (RS [36-[37]); it is referred to parenthetically, and only occasionally, in the treatment of statutory purpose in RS [44]-[60]. A submission is even advanced at RS [64] that the quantum of entitlement under s 96(1) is not dependent upon accrual under s 96(2). The marginalising of s 96(2) is unsurprising: the operation and effect of s 96(2) is the loose taper which unravels the approach of the majority to s 96(1). Section 96(2) should not be regarded as a parenthetic afterthought.
17. The RS at [23], to the effect that in *Glendell*[7] the majority did not rely on *RACV* alone but 'undertook a detailed examination of the language of s 96', finds scant support in the majority's brief reference to s 96 (at [87]) or the spartan analysis at [137]-[139].
18. In the RS at [43] an attempt is made to marginalise the significance of the Note to s 147.
    18.1. Although Notes do not form part of the FW Act, they may be taken into account when interpreting it. In this regard, the Minister repeats and relies on footnote 8 of his earlier submissions (of 31 January 2020).
    18.2. Further, the suggested vagueness and uncertainties attending the Note do not arise. For instance, the suggestion at RS [43] that the Note may be relevant to the payment of PPCL under s 99, but not to the calculation of PPCL under s 96, is inexplicable and untenable.
19. The principles of statutory construction summarised at [23]-[26] of the Minister's earlier submissions, and the cases referred to in footnotes 2-5 thereof, warrant ready rejection of the argument, advanced in the RS at [69]-[71], that resort to the EM is impermissible and/or contrary to s 15AB of the *Acts Interpretation Act 1901* (Cth).
20. The Minister otherwise relies upon his earlier submissions in answer to the RS.

Dated: 18 March 2020

Tom Howe QC
Australian Government Solicitor
Counsel for the Minister

Irene Sekler
Australian Government Solicitor

Craig Rawson
AGS lawyer
for and on behalf of the Australian Government Solicitor
Solicitor for the Appellant

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7 *CFMEU v Glendell Mining Pty Ltd* (2017) 249 FCR 495.