

BETWEEN: MONDELEZ AUSTRALIA PTY LTD

Appellant

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: MINISTER FOR JOBS AND INDUSTRIAL
RELATIONS

Fourth Respondent



THE FOURTH RESPONDENT'S SUBMISSIONS

PART I: PUBLICATION

1. The submissions of the Hon Christian Porter, the Minister for Industrial Relations (**the Minister**), 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)), 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 that 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

Filed on behalf of the Fourth Respondent by:

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

Date of this document: 24 February 2020

Contact: Craig Rawson

File ref: 19006661

Telephone: 03 9242 1248

Facsimile: 03 9242 1333

E-mail: craig.rawson@ags.gov.au

Full Court of the Federal Court (Bromberg and Rangiah JJ; O'Callaghan J dissenting) erred in concluding otherwise.

4. The Minister has also appealed from the judgment of the Full Court (**the Minister's Appeal**).¹

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

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

PART IV: FACTS

6. The Minister was a party to the proceeding below, his predecessor, the Minister for Jobs and Industrial Relations, having intervened before the Full Court pursuant to s 569 of the *Fair Work Act 2009* (Cth) (**the FW Act**) to advance the Minister's interpretation of s 96 of the FW Act: namely, that s 96 guarantees national standard employees (other than casuals) a minimum, progressively accruing entitlement to paid personal/carer's leave (**PPCL**) equivalent to an employee's usual weekly hours of work in a 2 week (fortnightly) period.²

7. The relevant facts, agreed by the parties, appear primarily in the majority's reasons for judgment: FC[8] CAB10.15 – FC[19] CAB12.05 and are summarised at [6]-[11] in the Submissions dated 31 January 2020 filed by the Minister in the Minister's Appeal.

8. The Minister does not contest any part of the factual underlay set out by the Appellant concerning the matters which gave rise to the dispute between the Appellant and the First, Second and Third Respondents.

PART V: ARGUMENT

9. The Minister submits the Appellant's appeal from the whole of the judgment of the Full Court of the Federal Court of Australia (Bromberg and Rangiah JJ; O'Callaghan J dissenting) given on 21 August 2019 should be upheld.

Errors of law made by the majority

10. The Minister's submissions as to the errors of law made by the majority are set out in the Minister's Submissions filed in the Minister's Appeal dated 31 January 2020.³
11. The Minister agrees with the Appellant's submissions that the majority erred in:

¹ The Minister's Appeal is proceeding M165 of 2019 and the Notice of Appeal is at CAB68.

² The statement by Mondelez at [6] of its submissions of 31 January 2020 that the Minister intervened to support its construction requires some qualification. The Minister approaches the expression '10 days' as a shorthand reference to the ordinary hours in a fortnight, whereas Mondelez's interpretive prism is the 'average day'. Both interpretive approaches arrive at exactly the same outcome in terms of quantum of PPCL, and contest the correctness of the majority approach below for largely the same reasons.

³ See in particular [23]-[70] read with [12]-[22].

- 11.1. finding that the word ‘day’ in s 96(1) has a plain meaning;⁴
- 11.2. construing s 96 in a manner that cannot be reconciled with (i) the progressive accrual regime in s 96(2) of the FW Act;⁵ and (ii) the ‘cashing out’ provision in s 101 of the FW Act;⁶
- 11.3. construing s 96(1) contrary to Parliament’s intention as revealed in: the text and purpose of other provisions of the FW Act,⁷ legislative purpose of s 96 and of the FW Act more generally,⁸ legislative history,⁹ statements in the *Explanatory Memorandum to the Fair Work Bill 2009* directly on point,¹⁰ and confirmed by many unintended inequities and anomalies arising from the majority’s construction.¹¹

Orders

12. Whether the appeal is dismissed or upheld the Minister does not seek an order for costs: see s 570 of the FW Act.

PART VI: ESTIMATE

13. The Minister estimated that 1.5 hours may be required for presentation of oral argument in support of his appeal. It is not envisaged that any additional time will be required for presentation of oral argument in connection with this appeal.

Dated: 24 February 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

⁴ Mondelez’s Submissions dated 31 January 2020 at [19]-[23].

⁵ Mondelez’s Submissions dated 31 January 2020 at [58]-[59].

⁶ Mondelez’s Submissions dated 31 January 2020 at [48]-[57].

⁷ Mondelez’s Submissions dated 31 January 2020 at [48]-[57] and [58]-[59].

⁸ Mondelez’s Submissions dated 31 January 2020 at [41]-[57].

⁹ Mondelez’s Submissions dated 31 January 2020 at [33].

¹⁰ Mondelez’s Submissions dated 31 January 2020 at [31]-[40].

¹¹ Mondelez’s Submissions dated 31 January 2020 at [60]-[61].