

BETWEEN:

MINISTER FOR JOBS AND INDUSTRIAL RELATIONS  
Appellant

- and -

10 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

20 MONDELEZ AUSTRALIA PTY LTD  
Fourth respondent

## Mondelez's Response to the Minister's Submission

### Part I: Publication on the internet

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1. This submission is in a form suitable for publication on the internet.

### Part II: Concise statement of the issue

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2. What is a "day" of leave in s 96(1) of the *Fair Work Act 2009 (FW Act)*?

### Part III: No s 78B notice is required

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3. The fourth respondent (**Mondelez**) considers that no notice under s 78B of the *Judiciary Act 1903* is required.

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Filed on behalf of: Fourth respondent  
Prepared by:  
**Ai Group Workplace Lawyers**  
51 Walker Street, North Sydney NSW 2060

Telephone: (02) 9466 5521  
Facsimile: (02) 9466 5593  
Email: stephen.smith@aigroup.com.au  
DX: N/A  
Contact: Stephen Smith

## Part IV: There are no contested facts

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4. Mondelez agrees with the summary of facts put forward by the appellant (**Minister**) in his submission and chronology dated 31 January 2020.

## Part V: Mondelez's argument

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5. Before the Court are two appeals from the decision below — this appeal (M165 of 2019) and Mondelez's own appeal (M160 of 2019).
6. Both appeals raise the same issue — both Mondelez and the Minister contend, in their respective appeals, that the majority of the Federal Court (Bromberg and Rangiah JJ, O'Callaghan J dissenting) erred in their construction of what constitutes a "day" of personal/carer's leave in s 96(1) of the FW Act.  
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7. Further, both Mondelez and the Minister posit the same construction of s 96(1) as the correct construction, albeit they express that construction in different language:
  - a. The Minister contends that "the expression '10 days' in s 96(1) of the FW Act ... comprehends an amount of [personal/carer's leave] ... equivalent to an employee's usual weekly hours of work over a 2 week (fortnightly) period".<sup>1</sup>
  - b. Mondelez contends that a "day" of personal/carer's leave in s 96(1) "means an *average working day*, that is, the employee's average daily ordinary hours of work based on a standard five-day working week".<sup>2</sup>
  - c. The two formulations above are merely different ways of expressing the same idea. If — as the Minister contends — "10 days" of leave is a number of hours  
20 equal to two weeks' working hours, then a single "day" of leave is a number of hours equal to two weeks' working hours divided by 10, or one weeks' working hours divided by 5 — which is what Mondelez means by an average working day based on a standard five-day working week.
8. Mondelez refers to this construction as the **Average Day Construction**.

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<sup>1</sup> Appellant's Submissions (31 January 2020) (**Minister's Submission**) [69].

<sup>2</sup> Mondelez's Submission (31 January 2020) (**Mondelez's Submission**) [6], [10] (original emphasis).

9. Mondelez thus agrees with the Minister that the Average Day Construction is correct and that Bromberg and Rangiah JJ erred in holding otherwise. Mondelez's arguments in support of the Average Day Construction are set out in Mondelez's Submission filed in Mondelez's own appeal. Mondelez adopts that submission here, in support of the Minister's appeal, and otherwise does not seek to add anything to that submission or to the Minister's Submission.
10. As to orders sought, both Mondelez and the Minister seek that the order below be set aside and substituted with a declaration.<sup>3</sup> The Minister seeks a declaration that effectively states the Average Day Construction. Mondelez seeks a declaration that expresses the particular personal/carer's leave entitlements of the second and third respondents based on the Average Day Construction. The two declarations are equivalent in their practical effect and Mondelez would be content for the Court to make a declaration in either form.

## Part VII: Estimate of time required for oral argument

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11. Mondelez estimates that it will require 2 hours to present its oral argument in support of both appeals.

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Stuart Wood AM QC

Tel: (03) 9225 6719

Fax: (03) 9225 7967

[swood@vicbar.com.au](mailto:swood@vicbar.com.au)

Dimitri Ternovski

Tel: (03) 9225 8958

Fax: (03) 9225 8395

[d@ternovski.com](mailto:d@ternovski.com)

Counsel for Mondelez

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<sup>3</sup> See Mondelez's Submission [63] and Minister's Submission [71].

# Annexure — Relevant Statutory Provisions

This submission adopts Mondelez's Submission filed in M160 of 2019, which in turn annexes a table of relevant statutory provisions. This submission does not refer to any additional statutory provisions.