FEDERAL COURT OF AUSTRALIA

Mondelez v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union Known as the Australian Manufacturing Workers Union (AMWU) [2019] FCAFC 138

File number:	VID 731 of 2018
Judges:	**BROMBERG, RANGIAH AND O'CALLAGHAN JJ**
Date of judgment:	21 August 2019
Catchwords:	**INDUSTRIAL LAW** – s 96(1) of the *Fair Work Act 2009* (Cth) – calculation of entitlement to paid personal/carer's leave – meaning of the word "day"
Legislation:	*Federal Court of Australia Act* 1976 (Cth) ss 20(1A) and 21 *Workplace Relations Act 1996* (Cth) ss 241, 245, 246, 247A, 249 *Acts Interpretation Act 1901* (Cth) ss 15AB and 15AC *Fair Work Amendment (Family & Domestic Violence Leave) Act 2018* (Cth) Subdivs A, B, C, CA of Div 7, Pt 2–2 of *Fair Work Act 2009* (Cth) *Fair Work Act 2009* (Cth) ss 3, 15, 20, 55, 56, 60, 61, 62, 79A, 85, 89, 95, 96, 97, 98, 99, 100, 101, 102, 106, 107, 116, 147, 185, 241, 245, 246, 247, 474, 562 Explanatory Memorandum, Fair Work Bill 2008 (Cth) Explanatory Memorandum, Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018 (Cth)
Cases cited:	*AEK15 v Minister for Immigration and Border Protection* (2016) 244 FCR 328 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 *Australian Communication Exchange Ltd v Deputy Commissioner of Taxation* (2003) 201 ALR 271; [2003] HCA 55 *Australian Municipal, Administrative, Clerical and Services Union v Hobson's Bay City Council* [2014] FWCFB 2823 *Australian Rail, Tram and Bus Industry Union v QR Ltd* (2012) 221 IR 132 *Australian Workers' Union v BP Refinery (Bulwer Island) Pty Ltd* (2012) 221 IR 237 *Bluescope Steel (AIS) Pty Ltd v The Australian Workers'*

Union [2019] FCAFC 84

Buresti v Beveridge (1998) 88 FCR 399

CGU Insurance Limited v Blakeley (2016) 259 CLR 339

Commissioner of Stamps v Telegraph Investment Co Pty Ltd (1995) 184 CLR 453

Construction, Forestry, Mining and Energy Union v Anglo Coal (Drayton Management) Pty Ltd (2016) 258 IR 85; [2016] FCA 689

Construction, Forestry, Mining and Energy Union v Glendell Mining Pty Ltd (2017) 249 FCR 495

Cooper Brookes (Wollongong) Pty Ltd v The Commissioner of Taxation (1981) 147 CLR 297

CPB Contractors Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union [2019] FCAFC 70

Cuckson v Stones (1858) 120 ER 902

Director of Public Prosecutions v Patrick Stevedores Holdings Pty Ltd (2012) 41 VR 81

Energy Australia Yallourn Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union [2017] FCA 1245

Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89

Graham v Baker (1961) 106 CLR 340

In re Judiciary and Navigation Acts (1921) 29 CLR 257

Mastronardo v Commonwealth Bank of Australia Ltd [2019] FCAFC 127

Minister for Immigration and Border Protection v BHA17 (2018) 260 FCR 523

Nominal Defendant v GLG Australia Pty Ltd (2006) 228 CLR 529

Palmer v Ayres (2017) 259 CLR 478

Prowse v McIntyre (1961) 111 CLR 264

Quill v Brunton (No 2) [1921] AR (NSW) 44

R v XY (2013) 84 NSWLR 363

RACV Road Service Pty Ltd v Australian Municipal, Administrative, Clerical and Services Union (2015) 249 IR 150

Re Mondelez Australia Pty Ltd [2018] FWC 2140

SZTAL v Minister for Immigration and Border Protection (2017) 262 CLR 362

Taulahi v Minister for Immigration and Border Protection (2016) 246 FCR 146

Taylor v The Owners – Strata Plan No 11564 (2014) 253 CLR 531

	Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees Union [2015] FCA 1033 *Transurban City Link Ltd v Allan* (1999) 95 FCR 553 *Truth About Motorways Pty Limited v Macquarie Infrastructure Investment Management Limited* (2000) 200 CLR 591 *WGC v The Queen* (2007) 233 CLR 66 *Workpac Pty Ltd v Skene* (2018) 362 ALR 311; [2018] FCAFC 131
Date of hearing:	21 February 2019
Date of last submissions:	25 February 2019 (Applicant) 5 March 2019 (Second and Third Respondent)
Registry:	Victoria
Division:	Fair Work Division
National Practice Area:	Employment & Industrial Relations
Category:	Catchwords
Number of paragraphs:	219
Counsel for the Applicant:	Mr SJ Wood AM QC with Mr D Ternovski
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Counsel for the Intervener:	Mr T Howe QC with Ms I Sekler
Solicitor for the Intervener:	Australian Government Solicitor

ORDERS

VID 731 of 2018

BETWEEN:	**MONDELEZ AUSTRALIA PTY LTD** Applicant
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
	MINISTER FOR JOBS AND INDUSTRIAL RELATIONS Intervener
JUDGES:	**BROMBERG, RANGIAH AND O'CALLAGHAN JJ**
DATE OF ORDER:	**21 AUGUST 2019**

THE COURT ORDERS THAT:

1. The applicant's originating application be dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BROMBERG AND RANGIAH JJ:

TABLE OF CONTENTS

1 The applicant (**Mondelez**) has filed an originating application seeking declaratory relief in the original jurisdiction of the Court. Pursuant to s 20(1A) of the *Federal Court of Australia Act 1976* (Cth), the Chief Justice has directed that the jurisdiction of the Court be exercised by a Full Court on the basis that the matter is of sufficient importance to justify that course.

2 The proceeding is concerned with how the entitlement to paid personal/carer's leave is quantified under s 96(1) of the *Fair Work Act 2009* (Cth) (**the FW Act**). Section 96(1) provides that, "for each year of service with his or her employer, an employee is entitled to 10 days of paid personal/carer's leave". For a provision expressed so simply, its interpretation is surprisingly complex.

3 Mondelez contends that the entitlement to "10 days of paid personal/carer's leave" in s 96(1) of the FW Act must be construed according to the "industrial meaning" of the word "day". That meaning is said to be a "notional day", consisting of an employee's average daily ordinary hours based on an assumed five-day working week—that is, average weekly ordinary hours divided by five. For example, an employee who works 36 ordinary hours per week works an average of 7.2 hours per day over an assumed five-day working week. The "notional day" is 7.2 hours and the employee is entitled to 10 such days, or 72 hours, of paid personal/carer's leave for each year of service. If the employee takes a day of personal/carer's leave, the employee is paid 7.2 hours' wages, and 7.2 hours is deducted from the employee's accrued leave balance. On this basis, all employees who work the same average weekly ordinary hours are entitled to receive the same number of hours of paid personal/carer's leave. It is convenient to describe Mondelez' construction as the **"notional day"** construction.

4 The Minister for Small and Family Business, the Workplace and Deregulation (**the Minister**) has been granted leave to intervene in the proceeding. The Minister supports Mondelez' construction of s 96(1) of the FW Act.

5 The respondents oppose the declarations. They submit that "day" in s 96(1) of the FW Act has its ordinary meaning of a "calendar day", or a 24 hour period, and that it allows every employee to be absent from work without loss of pay on 10 calendar days per year.

6 The different constructions may produce different practical outcomes between, on the one hand, employees who work the same number of hours each day over a five-day week, and, on the other hand, employees who work shifts that compress their weekly hours into a shorter number of days, or who work different hours on different days of the week. That can be

demonstrated by reference to the facts of this case. Mondelez' employees each work 36 ordinary hours per week. Some work 7.2 hours per day, five days per week. Others work 12 hours per day, three days per week. On Mondelez' "notional day" construction, under s 96(1) of the Act, each employee is entitled to accrue 72 hours of paid personal/carer's leave over a year; but a 7.2-hour employee's entitlement will be used up over ten calendar days, whereas a 12-hour employee's entitlement will be used up over six calendar days. On Mondelez' construction, a 12-hour employee who is unable to work after the sixth day would lose income, whereas a 7.2-hour employee would not. In contrast, on the respondents' construction, the 12-hour employee is entitled to more hours of paid personal/carer's leave than the 7.2-hour employee, but neither would lose income over a period of ten calendar days.

7 The competing constructions of s 96(1) of the FW Act and their consequences will be explained more fully in the course of these reasons.

THE FACTS

8 The facts of the case are agreed. Mondelez operates four food manufacturing plants in Australia, including a Cadbury plant at Claremont in Tasmania. Mondelez is a national system employer.

9 Mondelez is a party to the *Mondelez Australia Pty Ltd, Claremont Operations (Confectioners & Stores) Enterprise Bargaining Agreement 2017* (**the Enterprise Agreement**).

10 The first respondent (**the Union**) is entitled to represent the industrial interests of employees at the Claremont plant who are, or are eligible to become, its members.

11 The second and third respondents (respectively, **Ms Triffitt** and **Mr McCormack**) are members of the Union and employees of Mondelez at the Claremont plant. Mondelez has employed Ms Triffitt since 6 August 2007 and Mr McCormack since 11 April 1994. They are national system employees.

12 The Enterprise Agreement was approved by the Fair Work Commission on 4 May 2018 and came into effect on 11 May 2018. It covers and applies to each of Mondelez, the Union, Ms Triffitt and Mr McCormack.

13 Ms Triffitt and Mr McCormack are full–time employees. They are employed in the classification of "Confectioner Grade 1" under the Enterprise Agreement.

14 Clause 32 of the Enterprise Agreement describes the ordinary hours of work and how they are to be arranged for day workers, continuous shift workers and non–continuous shift workers. It provides that the ordinary hours of work are 36 hours per week. Clause 32 provides that shift lengths may be eight hours or twelve hours.

15 Ms Triffitt and Mr McCormack each work 36 hours per week, averaged over a four week cycle. They work their ordinary hours in 12-hour shifts. Presumably, they work an average of three shifts per week.

16 The proceeding is principally concerned with cl 24 of the Enterprise Agreement. That clause provides, relevantly:

> **24 Personal/Carer's Leave**
>
> …
>
> 24.1 Employees (other than employees on 12 hour shifts)
>
> Personal/Carer's Leave including sick leave consists of 80 hours of paid personal leave per annum. This will be available to the employee on their anniversary date. Unused leave is cumulative (with no cap). Accrued leave can be used for carer's leave.
>
> …
>
> 24.2 Employees working on 12 hour shifts
>
> …
>
> On the introduction of the new payroll system in 2011 the entitlement to Personal/Carer's Leave (including sick leave) for employees working on 12 hour shifts will be 96 hours of paid personal leave per annum. This will be available to the employee on their anniversary date and any unused leave is cumulative (with no cap). Accrued leave can be used for carer's leave. A pro rata adjustment will occur for the period between the introduction of this arrangement and the employee's next anniversary date.
>
> …

17 Clause 25 of the Enterprise Agreement provides that an employee who resigns their employment after ten years of continuous service will receive payment of 20% of their unused paid personal/carer's leave entitlement and that an employee employed for a minimum of ten years who retires will receive 50% of their unused entitlement.

18 In accordance with cl 24.2 of the Enterprise Agreement, Mondelez credits Ms Triffitt and Mr McCormack with 96 hours of paid personal/carer's leave per year of service. When Ms Triffitt or Mr McCormack take paid personal/carer's leave for a single 12-hour shift, Mondelez deducts 12 hours from their accrued paid personal/carer's leave balance. On this approach, over the course of one year of service, Ms Triffitt and Mr McCormack accrue a

quantum of paid personal/carer's leave that is sufficient to cover absence for eight, 12-hour shifts.

19 The dispute between the parties is whether the method of accounting of the personal/carer's leave described above is inconsistent with s 96(1) of the FW Act. The dispute encompasses whether Ms Triffitt and Mr McCormack are entitled to accrue ten 12-hour shifts of paid personal/carer's leave per year of service.

THE LEGISLATION

20 The National Employment Standards (**NES**) are set out in Part 2–2 of the FW Act. Amongst other things, the NES deal with the entitlement of employees to personal/carer's leave.

21 Section 96 of the FW Act establishes the entitlement of employees to paid personal/carer's leave and sets out the rate of accrual of such leave:

> **96 Entitlement to paid personal/carer's leave**
>
> *Amount of leave*
>
> (1) For each year of service with his or her employer, an employee is entitled to 10 days of paid personal/carer's leave.
>
> *Accrual of leave*
>
> (2) An employee's entitlement to paid personal/carer's leave accrues progressively during a year of service according to the employee's ordinary hours of work, and accumulates from year to year.

22 Section 97 sets out the circumstances in which paid personal/carer's leave may be taken:

> **97 Taking paid personal/carer's leave**
>
> An employee may take paid personal/carer's leave if the leave is taken:
>
> (a) because the employee is not fit for work because of a personal illness, or personal injury, affecting the employee; or
>
> (b) to provide care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because of:
>
> (i) a personal illness, or personal injury, affecting the member; or
>
> (ii) an unexpected emergency affecting the member.

23 Section 99 prescribes the rate of payment for paid personal/carer's leave:

> **99 Payment for paid personal/carer's leave**
>
> If, in accordance with this Subdivision, an employee takes a period of paid personal/carer's leave, the employer must pay the employee at the employee's base

rate of pay for the employee's ordinary hours of work in the period.

24 Section 100 and 101 deal with "cashing out" of paid personal/carer's leave, as follows:

> **100 Paid personal/carer's leave must not be cashed out except in accordance with permitted cashing out terms**
>
> Paid personal/carer's leave must not be cashed out, except in accordance with cashing out terms included in a modern award or enterprise agreement under section 101.
>
> **101 Modern awards and enterprise agreements may include terms relating to cashing out paid personal/carer's leave**
>
> (1) A modern award or enterprise agreement may include terms providing for the cashing out of paid personal/carer's leave by an employee.
>
> (2) The terms must require that:
>
> (a) paid personal/carer's leave must not be cashed out if the cashing out would result in the employee's remaining accrued entitlement to paid personal/carer's leave being less than 15 days; and
>
> (b) each cashing out of a particular amount of paid personal/carer's leave must be by a separate agreement in writing between the employer and the employee; and
>
> (c) the employee must be paid at least the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone.

25 Section 107 requires notice to be given to the employer of the taking of paid personal/carer's leave and also deals with the provision of evidence to satisfy the employer that the leave is being taken for a reason set out in s 97.

THE SUBMISSIONS

Mondelez' submissions

26 Mondelez submits that s 96(1) does not refer to a calendar day, but to its "industrial meaning" of a "notional day". It submits that "day" is used as a shorthand reference to the employee's average daily ordinary hours based on an assumed five-day working week—that is, average weekly ordinary hours divided by five.

27 Mondelez submits that the word "day" has a number of different meanings. It submits that in the context of industrial relations, the word "day" can mean a notional working day—a number of working hours equivalent to an average day

28 Mondelez submits that the Explanatory Memorandum for the Fair Work Bill 2008 (Cth) makes it clear that Parliament intended s 96(1) to have the notional day construction. The Explanatory Memorandum states that, "the NES will not change the quantum of the entitlement to

personal/carer's leave and compassionate leave", but rather will "replace complex rules about the accrual and crediting of personal/carer's leave with a single simple rule". The previous entitlement to personal/carer's leave was under s 246(2) of the *Workplace Relations Act 1996* (Cth) (**the WR Act**). Under that provision, the personal/carer's leave entitlement was expressed in hours—not days—and calculated, effectively, as two weeks of average ordinary hours.

29 Mondelez relies upon the statement in the Explanatory Memorandum that under the NES, "an employee will accrue the equivalent of two weeks' paid personal/carer's leave over the course of a year of service". Further, the Explanatory Memorandum states that s 96 reflects a "standard" five day work pattern, and, by relying on an employee's ordinary hours of work, ensures that the leave accrued is not affected by differences in the actual spread of an employee's ordinary hours of work in a week. It then gives the example of two full–time employees who work 38 hours per week, with one working five days per week and the other working four days per week. The Explanatory Memorandum states that "over a year of service, both employees would accrue 76 hours of paid personal/carer's leave". Mondelez also relies upon other examples given in the Explanatory Memorandum.

30 Mondelez submits that the respondents' "calendar day" construction leads to serious anomalies and unreasonable results that Parliament could not have intended. Firstly, Mondelez submits that on the calendar construction, an employee who works longer shifts effectively gets more personal/carer's leave than an employee who works a standard five-day week, even if the two employees work the same hours on average.

31 Secondly, on the "calendar day" construction, the monetary value of a unit of personal/carer's leave depends upon *when* leave is taken. An employee who takes a "day" of leave on a day when rostered for nine hours will be paid for nine hours and have "one day" deducted from their leave balance; but if the leave happens to fall on a day when the employee is only rostered for three hours, the employee will be paid for three hours and still have a day's leave deducted. Mondelez submits that this is inequitable. It also makes it difficult for employers to make financial provision for accrued leave.

32 Thirdly, Mondelez submits that the "calendar day construction" leads to even greater anomalies for part–time employees.

33 Fourthly, Mondelez submits that the "calendar day" construction leads to anomalies when accounting for part-days of personal/carer's leave.

34 Mondelez submits that the "calendar day" construction is inconsistent with NES provisions for cashing out personal/carer's leave. One of those conditions, under s 101(2)(c) of the FW Act, requires that the quantum of accrued leave to be cashed out must have an ascertainable monetary value at the time when it is cashed out. Mondelez submits that under the "calendar day" construction, the value of leave would depend upon when it would have been taken and, for employees who do not have the same number of ordinary hours each day, that cannot be determined. Mondelez submits that the "calendar day construction" is therefore inconsistent with the NES scheme for cashing out of personal/carer's leave.

The Union's submissions

35 It is convenient to simply refer to the respondents' submissions as the Union's submissions. The Union submits that "day" in s 96 of the FW Act has its ordinary meaning of a "calendar day", which is "a 24 hour period".

36 The Union submits that the effect of s 96(1) is to entitle each employee to be absent from work without loss of pay on ten calendar days per year when ill or caring for a relative. It submits that an entitlement to be paid for a "day" is an entitlement to be paid for the hours that would have been worked on that day but for the illness or responsibility as a carer.

37 The Union submits that there is no warrant for the "industrial meaning" of "notional day" that Mondelez contends for. It submits that the decisions of the Fair Work Commission that Mondelez relies upon are based on differently drafted legislation and cannot be applied to the present circumstances.

38 The Union submits that its contention that "day" is to be given its ordinary meaning finds textual support within the broader context of the FW Act. Firstly, the absence of any definition of "day" supports the view that it was intended that the ordinary meaning was used. Secondly, wherever the word "day" is otherwise used in the FW Act, it is used to refer to a calendar day. For example, s 79A(2), which provides an entitlement to a "keeping in touch day" describes it as "a day on which the employee performs work". Thirdly, where the legislature intended that an entitlement in the FW Act be calculated by reference to "hours", it does so expressly, such as in s 474 (relating to payment for periods of industrial action), s 116 (payment for absence and public holidays), s 106 (payment for compassionate leave) and, notably, s 99 (payment for personal leave).

39 The Union contrasts s 96 of the FW Act with s 245 of the WR Act, under which "nominal hours" was a specific statutory concept. That concept is not replicated within the FW Act. The Union submits that while there is a reference to "hours" in s 96(2), this is concerned with the rate of accrual and the end result that must be achieved by this process remains "10 days".

40 The Union submits that personal/carer's leave provides a protection, rather than directly bestowing a financial benefit on an employee. In effect, it acts as an insurance against loss of income as the result of personal or familial illness. The Union submits an interpretation which provides a standard number of permitted absences, rather than focussing upon a monetary quantum, serves this purpose.

41 The Union submits that recourse may not be had to the Explanatory Memorandum because the requirements of s 15AB of the *Acts Interpretation Act 1901* (Cth) are not satisfied. The Union submits that even if it is permissible to use the Explanatory Memorandum as an aid to discern legislative intention, it does not weigh strongly in favour of Mondelez' construction. The Union further submits that even if Mondelez is correct as to the meaning of the Explanatory Memorandum, it is inconsistent with the text of the FW Act, and the text of the FW Act must prevail.

42 The Union submits that its construction is consistent with two judgments of the Court that have considered the issue, namely, *Construction, Forestry, Mining and Energy Union v Anglo Coal (Drayton Management) Pty Ltd* (2016) 258 IR 85; [2016] FCA 689 and *Construction, Forestry, Mining and Energy Union v Glendell Mining Pty Ltd* (2017) 249 FCR 495, and a decision of the Full Bench of the Fair Work Commission.

The Minister's submissions

43 The Minister submits that the expression "10 days" in s 96(1) of the FW Act, when read with the accrual provision in s 96(2), should be understood as a reference to an entitlement to take a particular number of *hours* of personal/carer's leave for every year of service. The Minister submits that this is because under s 96(2) the number of personal/carer's leave hours progressively accrued must be ascertainable at any point in time for every employee. Unless the s 96(1) entitlement is capable of quantification in hours per annum, the progressive accrual regime in s 96(2) cannot be implemented as intended.

44 The Minister submits that the expression "10 days" cannot simply mean "10 calendar days", "10 working days" or "10 ordinary working days", as the actual number of "ordinary hours"

can vary considerably from day to day for many employees, making it impossible to identify the hours in a working day or usual working day. The Minister submits that in such cases, calculation of the overall hourly entitlement per annum under s 96(1), which must be undertaken for the purpose of working out the accrued entitlement of every employee at any point in time under s 96(2), would be impossible.

45 The Minister submits that because the expression "10 days" in s 96(1) of the FW Act cannot bear its ordinary meaning, it is necessary to search for its statutory meaning by reference to context and purpose. The Minister submits that s 96(2) makes it clear that "an employee's ordinary hours of work" is the lynchpin for calculating the employee's progressively accrued entitlement. He submits that in the absence of an award or agreement to the contrary effect, the default "ordinary hours of work" of an employee draws attention to the number of *hours* usually worked in a *weekly* period excluding overtime.

46 The Minister submits that as ss 96(1) and (2) must be interpreted in a way that permits those provisions to interact cohesively and produce workable and sensible results. The "ordinary hours of work" in a week comprehended by s 96(2) must inform the meaning of the references to "10 days" for "each year of service" in s 96(1). That is, the days in a year amount deployed in s 96(1) must draw meaning from, and be calculable by reference to, the ordinary (non–overtime) hours worked in a week. The Minister submits that this is because the scheme requires calculation of two vital components: first, the upfront overall entitlement to personal/carer's leave per annum under s 96(1); and second, how much of that overall entitlement each employee has progressively accrued at any point in time under s 96(2). The Minister submits that the second component demands that the first component be capable of conversion (ie expressed as) an overall number of hours per annum. Unless that figure is certain and known up front, a progressive accrual calculation referable to that figure simply cannot be undertaken.

47 The Minister submits that the expression "ten days" in s 96 comprehends an amount of personal/carer's leave equivalent to an employee's ordinary hours of work (excluding overtime) in a two–week (fortnightly) period. He submits that interpretation brings the regime under s 96 into broad alignment with that which existed under the WR Act, which turned upon the concept of $^{1}/_{26\text{th}}$ of nominal hours worked in a year (being two weeks of personal/carer's leave per annum).

48 The Minister submits that his interpretation is supported by the text of s 96(2) when read with ss 20 and 99 and the note to s 147. The Minister submits that it is supported by the object and purpose of the FW Act contained in s 3. The Minister submits it is also supported by the purpose and nature of the NES, which is directed at achieving workable and fair outcomes as between employees working the same weekly hours but different work patterns and between full–time and part–time employees. The Minister submits that this construction would avoid anomalous outcomes and achieve practicable and workable outcomes. Further, the Minister also relies upon the Explanatory Memorandum.

49 There is a substantial overlap between the Minister's submissions and those made by Mondelez. In the consideration of the submissions that follows, it is convenient to refer only to Mondelez' submissions except where it becomes necessary to refer specifically to the Minister's submissions.

CONSIDERATION

50 The issues that arise for determination are:

(1) Whether the Court has jurisdiction to hear and determine the application for declaratory orders.

(2) The proper construction of s 96(1) of the FW Act.

(3) Whether the declaratory orders sought should be made.

Jurisdiction

51 The parties have not addressed the question of whether the Court has jurisdiction to hear and determine Mondelez' application for declarations. However, it is an issue that must be considered.

52 Section 21(1) of the Federal Court of Australia Act provides:

> The Court may, in civil proceedings in relation to a matter in which it has original jurisdiction, make binding declarations of right, whether or not any consequential relief is or could be claimed.

53 Section 562 of the FW Act provides:

> Jurisdiction is conferred on the Federal Court in relation to any matter (whether civil or criminal) arising under this Act.

54 For the Court to make declarations, it must have "jurisdiction"; and for the Court to have jurisdiction there must be a "matter". The matter must be one "arising under this Act".

55 The interpretation of an enterprise agreement that confers rights or imposes obligations is a "matter" that may properly be said to arise under the FW Act: *Energy Australia Yallourn Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2017] FCA 1245 at [57]; *Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees Union* [2015] FCA 1033 at [19].

56 A "matter" is "the subject matter for determination in a legal proceeding": *Palmer v Ayres* (2017) 259 CLR 478 at [26]. For there to be a "matter", there must be "some immediate right, duty or liability to be established by the determination of the Court": *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265; *Truth About Motorways Pty Limited v Macquarie Infrastructure Investment Management Limited* (2000) 200 CLR 591 at [48]. The controversy the Court is asked to determine must be genuine, and not merely an advisory opinion divorced from a controversy: *Palmer v Ayres* at [27]; *CGU Insurance Limited v Blakeley* (2016) 259 CLR 339 at [26].

57 On 16 October 2017, Mondelez made an application to the Fair Work Commission pursuant to s 185 of the FW Act for approval of the Enterprise Agreement. The nature of the present dispute is informed by a passage from the decision of Vice President Hatcher in *Re Mondelez Australia Pty Ltd* [2018] FWC 2140:

> [1] …[T]he Commission raised a concern that clause 24 of the Agreement provided for a personal/carer's leave entitlement of 80 hours per annum, rather than 10 days per annum as provided for under the National Employment Standards (NES) in s 96 of the FW Act. The Commission expressed concern that employees covered by the proposed agreement working 12 hour days would not be entitled to their full 10 day NES entitlement (contrary to the requirement in s 55(1) of the FW Act that an enterprise agreement not exclude the NES or any provision of it), and requested an undertaking to be provided to address this issue. Mondelez declined to provide any such undertaking and made extensive written submissions (dated 4 December 2017) to the effect that there was no inconsistency between the entitlement in clause 24 of the Agreement and that in s 96 of the FW Act.

58 Mondelez sought a referral of the issue to the Full Bench of the Fair Work Commission on the basis that the authorities are divided upon the proper construction of s 96(1) of the FW Act, but the Vice President declined to make that referral, ruling that there was no such division. The Vice President considered that the Enterprise Agreement did not purport to exclude the NES in respect of personal/carer's leave and provided for any shortfall to be "topped up", so that the issue raised did not provide an impediment to approval of the Enterprise Agreement. The Vice President referred the matter to a Commissioner for final determination of the approval

application. The Enterprise Agreement was subsequently approved, apparently with an amendment to cl 24 to provide for 96 hours personal/carer's leave for the employees working 12-hour shifts.

59 However, it is apparent that the underlying dispute remains as to whether the entitlement of those employees of Mondelez who work 12-hour shifts under cl 24 of the Enterprise Agreement to paid personal/carer's leave is less than their entitlement under s 96(1) of the FW Act. Ms Triffitt and Mr McCormack, who work such 12-hour shifts, claim that the Enterprise Agreement deprives them of their full entitlement.

60 In these circumstances, there is a justiciable controversy between the parties, and the Court has jurisdiction in relation to the matter.

The proper construction of s 96(1) of the FW Act

The principles of construction

61 Section 96(1) of the FW Act must be construed in order to determine how the "10 days entitlement to paid personal/carer's leave" is measured. The Union submits that the word "days" in s 96(1) has its grammatical, or natural and ordinary, meaning. Mondelez and the Minister submit that, construed in light of the context and purpose of the provision, "days" has a different meaning—its "industrial meaning".

62 In *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531, Gageler and Keane JJ discussed the relationship between grammatical meaning, context and purpose at [65]:

> [65] Statutory construction involves attribution of legal meaning to statutory text, read in context. "Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning … But not always". Context sometimes favours an ungrammatical legal meaning. Ungrammatical legal meaning sometimes involves reading statutory text as containing implicit words. Implicit words are sometimes words of limitation. They are sometimes words of extension. But they are always words of explanation. The constructional task remains throughout to expound the meaning of the statutory text, not to divine unexpressed legislative intention or to remedy perceived legislative inattention. Construction is not speculation, and it is not repair.
>
> [66] Context more often reveals statutory text to be capable of a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural. The choice between alternative meanings then turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies.

63 In *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, Kiefel CJ, Nettle and Gordon JJ emphasised that text, context and purpose must be construed together, saying at [14] :

> The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

64 The importance of considering text, context and purpose together is emphasised where the focus is upon the meaning of an ordinary word, capable of bearing different meanings in different statutory settings.

Section 96(1) and its broader statutory context

65 The NES are set out in Part 2–2 of the FW Act. Section 61(1) provides that the NES are, "minimum standards that apply to the employment of employees which cannot be displaced". Section 55(1) provides that a modern award or enterprise agreement, "must not exclude the National Employment Standards or any provision of the National Employment Standards". Section 56 provides that, "a term of a modern award or enterprise agreement has no effect to the extent that it contravenes s 55". Accordingly, in *Workpac Pty Ltd v Skene* (2018) 362 ALR 311; [2018] FCAFC 131 at [87], the Full Court described the NES as being at the pinnacle of the hierarchy of terms and conditions of employment, and as having primacy over terms and conditions of employment provided by all other industrial instruments.

66 The NES relate to ten matters, six of which are categories of leave. Division 7 of Part 2–2 (ss 95-107) deals with personal/carer's leave, compassionate leave and unpaid family and domestic violence leave. Subdivision A deals with paid personal/carer's leave.

67 Section 60 of the FW Act provides, for Part 2–2, that an "employee" is a national system employee, and an "employer" is a national system employer. Since the NES establish minimum standards, the standards are uniform for all national system employees, except where specified: for example, casual employees are excluded from some of the leave provisions and some shiftworkers are entitled to an additional period of paid annual leave. Unless specified, for example in s 62(3)(g), no distinction is made between employees on the basis of their work patterns. Thus, the period or rate of accrual or basis for each category of leave is usually

standard for every eligible employee. It follows that any exercise in construing the NES must necessarily consider the consequences of the competing constructions across the diverse work patterns of the broad range of employees covered.

68 Under s 95 of the FW Act, the paid personal/carer's leave provisions apply to all employees other than casual employees.

69 Section 96(1) provides that, "for each year of service with his or her employer, an employee is entitled to 10 days of paid personal/carer's leave". The work done by s 96(1) is: firstly, to establish a statutory entitlement for employees to paid personal/carer's leave; and, secondly, to quantify the rate of accrual of the entitlement and, by doing so, to allow the accumulated entitlement for each employee to be quantified.

70 Section 96(2) deals with how paid personal/carer's leave accrues. The section provides that: firstly, the leave accrues progressively; secondly, it accrues according to the employee's ordinary hours of work; and, thirdly, it accrues from year to year. The first matter demonstrates that there is no entitlement at the commencement of service, but that the entitlement accrues over time. The purpose of the second matter will be considered later in these reasons. The third matter means that the entitlement is not reset at the end of each year of employment, but accumulates over the whole length of the employee's service. At any point in time, the accumulated entitlement of any particular employee may be less or more than ten days.

71 Section 97 sets out the circumstances in which paid personal/carer's leave may be taken. In summary, the leave can be taken because the employee is not fit for work because of personal illness or injury; or to provide care or support to a member of the employee's immediate family or household who requires it because of personal illness or injury or unexpected emergency.

72 It may be observed that the entitlement under s 96(1) of the FW Act is an entitlement *to* paid personal/carer's leave; not an entitlement *to take* paid personal/carer's leave. The leave can only be *taken* in the circumstances set out in s 97.

73 It may also be observed that there is no express statement that an employee's paid personal/carer's leave balance is reduced when leave is taken. However, that is implied from the limited entitlement created under s 96(1). There is also an implication that the employee and employer will be able to determine the balance of the entitlement available at the point in time when leave is taken.

74 Section 99 of the FW Act creates an entitlement for an employee who takes a period of paid personal/carer's leave to be paid, and imposes a corresponding liability on the employer to pay the employee. The entitlement and the liability is limited to the employee's base rate of pay for the employee's "ordinary hours of work" in the period. The provision draws a distinction between ordinary hours of work and overtime: cf *Australian Communication Exchange Ltd v Deputy Commissioner of Taxation* (2003) 201 ALR 271; [2003] HCA 55 at [43]; *Bluescope Steel (AIS) Pty Ltd v The Australian Workers' Union* [2019] FCAFC 84 at [38].

75 Section 100 of the FW Act provides that paid personal/carer's leave must not be cashed out, except in accordance with the terms of a modern award or enterprise agreement under s 101. Section 101(1) provides that a modern award or enterprise agreement may include terms providing for cashing out, but s 101(2) sets out three requirements that such terms must include. The third—that the employee must be paid at least the full amount that would have been payable had the employee taken the leave that the employee has foregone—is relevant to the arguments advanced by the parties.

The consequences of the competing constructions

76 It is necessary to consider the consequences of the competing constructions. In *Cooper Brookes (Wollongong) Pty Ltd v The Commissioner of Taxation* (1981) 147 CLR 297, Mason and Wilson JJ said at 321:

> If the choice is between two strongly competing interpretations, as we have said, the advantage may lie with that which produces the fairer and more convenient operation so long as it conforms to the legislative intention. If, however, one interpretation has a powerful advantage in ordinary meaning and grammatical sense, it will only be displaced if its operation is perceived to be unintended.

77 As has already been mentioned, the competing constructions produce differing consequences as between, on the one hand, employees who work the same number of ordinary hours each day over a five-day week and, on the other hand, employees whose ordinary hours are compressed into a period shorter than five days, or who work different ordinary hours on different days.

78 The differing consequences may be demonstrated in more depth by again taking the example of employees who work 36 ordinary hours per week. On Mondelez' construction, a "notional day" for *every* such employee is 7.2 hours, consisting of the 36 hours averaged over five standard days of work. The entitlement to ten days paid personal/carer's leave accrued under s 96(1) of the FW Act then amounts to 72 hours for each year of service. If any employee takes

a day of personal/carer's leave, the employee will be paid for 7.2 hours at their base rate of pay, and will have 7.2 hours deducted from their accrued paid personal/carer's leave balance.

79 For an employee who works the same number of ordinary hours each day over a five-day week, the employee's 72 hours of paid personal/carer's leave entitlement would be used up by taking leave for ten shifts of 7.2 hours over ten separate calendar days.

80 Some employees do not work their 36 hours per week spread evenly over five standard days, but may work, for example, a 12-hour shift on three days per week. On Mondelez' "notional day" construction, these employees will also have 72 hours paid personal/carer's leave per annum. For each shift that the employee takes paid personal/carer's leave, the employee is paid for 12 hours and will have 12 hours deducted from their accumulated leave balance. The whole of the employee's annual accrual of 72 hours would be depleted by taking leave for six 12-hour shifts on six calendar days.

81 Some employees may work their 36 hours per week in a pattern, for example, of four days of eight hours and one day of four hours. On Mondelez' construction, if such an employee happens to fall ill on a day when rostered for four hours, the employee is paid for four hours and four hours leave is deducted from their balance. In this way, the employee may use up their 72 hour annual accrual by taking paid personal/carer's leave for up to 18 shifts on 18 separate calendar days.

82 However, the Union contends that the entitlement to ten days paid personal/carer's leave allows employees to be absent from work on ten calendar days, or ten periods of 24 hours. That would mean that the employee working 12-hour shifts on three calendar days per week is entitled to leave from a 12-hour shift on ten separate calendar days. Further, regardless of whether an employee works, for example, ordinary hours of 7.2 hours per day or 12 hours per day, the employer is only entitled to deduct one day for each calendar day of leave taken.

83 On the Union's construction, the entitlement of the 12-hour employee to take ten days paid personal/carer's leave could amount to up to 120 hours. On the other hand, the entitlement of the 7.2-hour employee to take ten days paid personal/carer's leave could only be up to 72 hours. For the employee who happens to fall ill only on the days when rostered to work four hours, the entitlement could amount to 40 hours.

84 The fundamental differences produced by the parties' constructions may be illustrated by assuming there is a group of employees who work the same number of average ordinary weekly

hours, have the same base rate of pay, have the same quantum of paid personal/carer's leave entitlements accrued and are unable to work because of illness on the same days. However, it may also be assumed that the employees' shift patterns vary such that they have different numbers of ordinary hours each day. Under Mondelez' construction, all the employees would be entitled to take up to the same number of hours of paid personal/carer's leave, but some could lose earnings, depending upon their shift patterns, whereas others would not. Under the Union's construction, some employees could be entitled to take more hours of paid personal/carer's leave than others, but no employee would lose earnings for the ordinary hours that the employee was unable to work.

85 It is impossible to avoid unequal outcomes between employees on either construction. To say that outcomes are unequal is not, however, to say that such outcomes are necessarily inequitable or unintended.

The natural and ordinary meaning of s 96(1) of the FW Act

86 An important starting point for the construction of s 96(1) of the FW Act is its grammatical, or natural and ordinary, meaning.

87 Section 96(1) of the FW Act provides that, "for each year of service with his or her employer, an employee is entitled to 10 days of paid personal/carer's leave". While the parties focussed upon the meaning of the word "day", it is necessary to understand that word as part of the whole provision and to construe the provision as a whole.

88 Section 96(1) of the FW Act establishes a statutory entitlement for employees to paid personal/carer's leave. The *Macquarie Dictionary* defines "leave", relevantly, as "permission to be absent, as from duty". In s 96(1), "paid personal/carer's leave" refers to a permitted or authorised absence from work for a reason set out in s 97, for which an employee is entitled to payment under s 99.

89 The entitlement under s 96(1) is to periods of paid personal/carer's leave. The periods are described as "days". The rate of accrual of those periods is prescribed at ten days for each year of service.

90 The word "day" is not defined in the FW Act. The Union submits that in s 96(1), the expression should be construed according to its natural and ordinary meaning; and that meaning is a "calendar day", or a 24 hour period.

91 The *Macquarie Dictionary* defines "day", relevantly, as follows:

> …
>
> **3.** Astronomy
>
> **a.** the period during which the earth (or a heavenly body) makes one revolution on its axis.
>
> **b.** the average length of this interval, on earth the mean solar day of 24 hours.
>
> **…**
>
> **4.** the portion of a day allotted to working: an eight-hour day.
>
> **5.** a day as a point or unit of time, or on which something occurs.
>
> …

92 In s 96(1) of the FW Act, the expression "day" is used as a measurement of a period of time. When used in that way, a "day" generally refers to an indivisible unit of time consisting of the period of the earth's axial rotation: see *Prowse v McIntyre* (1961) 111 CLR 264 at 273, 276, 277, 280. In that sense, a "day" may be described as a 24 hour period: *WGC v The Queen* (2007) 233 CLR 66 at [8]; *Buresti v Beveridge* (1998) 88 FCR 399 at 401, 403.

93 However, in s 96(1) of the FW Act, "day" is used in the specific context of an authorised absence from work. In that context, its natural and ordinary meaning is not a bare 24 hour period, but the portion of a 24 hour period that would otherwise be allotted to working. A "day" consisting of the portion of a 24 hour period that would otherwise be allotted to working may conveniently be described as a "**working day**". The natural and ordinary meaning of "10 days of paid personal/carer's leave" in s 96(1) is authorised absence from work for ten such "working days" for a reason set out in s 97.

94 Mondelez and the Minister criticise the Union's construction of "day" as a period of 24 hours as problematic in its practical operation if the 24 hour period is from midnight to midnight; and as otherwise failing to provide any indication of when the 24 hour period would begin and end. However, a "working day" would start when the employee taking personal/carer's leave would otherwise have commenced his or her hours of work.

95 While we have not accepted the Union's submission that the natural and ordinary meaning of a "day" in s 96(1) of the FW Act is a "calendar day", or 24 hour period, the "working day" construction does not affect the parties' arguments as to whether the "notional day" construction should be accepted. In the discussion of the arguments that follows it is convenient

to substitute the "working day" construction for the parties' references to the "calendar day" construction.

Mondelez' proposed "industrial" construction

96 The construction of s 96(1) of the FW Act contended for by Mondelez—entitling an employee to ten "notional days" leave, each "notional day" consisting of the employee's average daily ordinary hours based on five-day week—relies upon the implication of an unexpressed method of measurement. That method involves the conversion of the ten days' entitlement into a number of hours, where the conversion is based upon an assumption of a standard five-day week, and averaging the weekly hours of employees over the five days. This is not a natural and ordinary construction of the provision. However, that is not fatal if Mondelez' construction is sufficiently supported by the context and statutory purpose of s 96(1).

97 Mondelez submits that its construction of "day" in s 96(1) of the FW Act reflects its "industrial meaning". Mondelez has not explained precisely what it means by "industrial meaning", but may be understood as submitting that the expression has a uniformly understood, specialised meaning in the field of industrial relations: cf *Skene* at [142]. In support of its submission that the "industrial meaning" of "day" is a "notional day" consisting of a number of hours equivalent to an average day of work, Mondelez relies upon *Australian Workers' Union v BP Refinery (Bulwer Island) Pty Ltd* (2012) 221 IR 237. In that case, Commissioner Asbury stated that, "There is nothing novel or unfair about accruals of leave being calculated on the basis of a notional day". However, a different view was subsequently taken by the Full Bench in *RACV Road Service Pty Ltd v Australian Municipal, Administrative, Clerical and Services Union* (2015) 249 IR 150.

98 Mondelez also relies upon *Australian Municipal, Administrative, Clerical and Services Union v Hobson's Bay City Council* [2014] FWCFB 2823, but that case turned upon the words of the particular enterprise agreement under consideration. It may be observed that there, the Full Bench agreed with the following passage from the decision of Commissioner Lee in *Australian Rail, Tram and Bus Industry Union v QR Ltd* (2012) 221 IR 132 at [86], which supports the "working day" construction:

> A day is a day and a week is a week and they should be given their ordinary meaning. An employee, even if they are a shift worker that "crams" their ordinary hours into less than five days in a week, is still entitled in accordance with the NES to be able to take a five week holiday or access 10 days of carer's leave.

99 Therefore, *Hobson's Bay City Council* is inconsistent with the "notional day" meaning, and supports the proposition that "day" in s 96(1) of the FW Act has its natural and ordinary meaning.

100 It cannot be accepted that the "notional day" construction is uniformly accepted in the field of industrial relations. The submission that the "notional day" construction is the "industrial meaning" of "day" must be rejected. However, that is not the end of Mondelez' argument.

Authorities that have construed s 96(1) of the FW Act as having its natural and ordinary meaning

101 There are two judgments of this Court and a decision of the Full Bench of the Commission that directly support the Union's submission that s 96(1) of the FW Act is to be construed according to its natural and ordinary meaning.

102 In *RACV Road Service*, where employees worked 38 ordinary weekly hours, the employer had adopted a practice of deducting from the leave balance a notional day's personal/carer's leave of 7.6 hours for each day of leave taken, regardless of how many hours the employee had been rostered to work on the day. The dispute was whether the actual number of hours the employee was rostered for on the day should instead be deducted. The Full Bench held that the word "day" in s 96(1) has its ordinary meaning. The ordinary meaning given by the Full Bench was expressed in terms not materially different to that accepted as the "working day" construction earlier in these reasons. The Full Bench considered that if a day of personal/carer's leave were taken, the accrued entitlement should be reduced by such a day.

103 The Full Bench observed that under the NES, there had been a distinct change from the expression of the entitlement in terms of hours under s 246 of the WR Act. The Full Bench rejected a submission that the Explanatory Memorandum demonstrated that it was not intended that s 96(1) of the FW Act should effect any relevant change. The Full Bench also concluded that the history of paid personal/carer's leave entitlements in awards provided no support for the proposition that a leave entitlement expressed in days was to be understood as bearing a special meaning, namely a given number of working hours.

104 In *Drayton Management* Buchanan J considered ss 99, 100 and 101 of the FW Act, in the context of dealing with "cashing out" of personal/carer's leave. His Honour said:

> 10 The period of "paid personal/carer's leave" referred to in s 99, for which an employee must be paid at the base rate of pay for ordinary hours, must necessarily be one or more of the "days" (or part of a day) of leave referred to

> in s 96. The number of hours normally worked by, for example, an 8-hour day worker and a 12-hour shift worker on a normal or rostered day of work are self-evidently different, by a margin of 50%. Nevertheless, the entitlement to paid leave is not referable to an hourly equivalent; it is expressed in days, and it necessarily follows, I think, that the possibility exists that the statutory entitlement to 10 days leave (and pay) may result in a greater hourly entitlement (and overall pay) in some cases than in others. That, it appears to me, is the effect of the statutory arrangements, whatever position might arise under the specific provisions of particular enterprise agreements.

105 Justice Buchanan added at [35], "the entitlement to paid leave is based on days of paid leave without reduction of pay, regardless of the shift length, rather than an overall entitlement expressed in hours." His Honour's judgment is consistent with "days" in s 96(1) of the FW Act having its ordinary meaning.

106 Mondelez argues that in *Drayton Management*, no submissions were made upon the construction of s 96(1) of the FW Act and Buchanan J did not consider the Explanatory Memorandum. It is not clear whether submissions were made upon the issue, but the reasons do not refer to Explanatory Memorandum, suggesting that it was not drawn to his Honour's attention.

107 In *Glendell Mining*, a Full Court considered s 98 of the FW Act, which provides that if the period during which the employee takes personal/carer's leave includes a day or part-day that is a public holiday, the employee is taken not to be on paid personal/carer's leave on that holiday. The Full Court also considered s 89 which deals with annual leave, but is otherwise relevantly indistinguishable from s 98. The issue was whether ss 89 and 98 apply to the whole of an employee's entitlements to annual leave and personal carer's leave under an Enterprise Agreement, or only to the extent that those entitlements do not exceed the NES minima. In the course of rejecting the former construction, White and Bromwich JJ approved the approach of the Full Bench in *RACV Road Service* and, in particular, the conclusion that a "day" of leave "is an authorised absence from the working time in a 24 hour period".

108 Mondelez accepts that it must demonstrate that the conclusion of White and Bromwich JJ in *Glendell Mining* that a "day" of leave in s 96(1) of the FW Act has its ordinary meaning, is plainly wrong. The Minister submits that it is unnecessary that their Honour's conclusion be plainly wrong as it was *obiter dicta* which fails to answer the description of "seriously considered *dicta*". However, that conclusion was a central part of their Honour's reasoning for rejecting one of the two alternative arguments put. In our view, that conclusion was part of the *ratio decidendi* of the case. In *Transurban City Link Ltd v Allan* (1999) 95 FCR 553 at [27], a

Full Court of this Court observed that a Full Court would only decline to follow the decision of another Full Court if it concluded that the previous decision was plainly wrong: see also *AEK15 v Minister for Immigration and Border Protection* (2016) 244 FCR 328 at [27]; *Taulahi v Minister for Immigration and Border Protection* (2016) 246 FCR 146 at [173]; *Minister for Immigration and Border Protection v BHA17* (2018) 260 FCR 523 at [85]; *Mastronardo v Commonwealth Bank of Australia Ltd* [2019] FCAFC 127 at [7]. Even if it were assumed that the conclusion reached by White and Bromwich JJ was *dicta*, it was seriously considered *dicta*, and we would not lightly decline to follow it: cf. *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [134], [158] and [178]; *Director of Public Prosecutions v Patrick Stevedores Holdings Pty Ltd* (2012) 41 VR 81 at [127]–[128]; *R v XY* (2013) 84 NSWLR 363 at [38]. In any event, for reasons that will be explained, we concur with their Honour's conclusion.

109 Mondelez submits that *Glendell Mining* is plainly wrong, and that the "notional day" construction is correct. Mondelez relies upon five bases for that submission. They are:

(1) In *Glendell Mining*, the Explanatory Memorandum was not considered, and the construction of s 96(1) of the FW Act was not argued.

(2) The Explanatory Memorandum supports the "notional day" construction.

(3) The "working day" construction leads to anomalies, inequities and unreasonable results.

(4) The "working day" construction is inconsistent with the NES provisions for the "cashing out" of personal/carer's leave.

(5) Section 106E of the FW Act supports the "notional day" construction.

110 Each of these bases will be considered in turn.

The first basis: whether the construction of s 96(1) was argued and the Explanatory Memorandum considered in Glendell Mining

111 The first basis for Mondelez' submission that *Glendell Mining* is plainly wrong is that White and Bromwich JJ did not consider the Explanatory Memorandum and no party disputed the construction of s 96(1) of the FW Act favoured by their Honours. However, their Honours expressly considered and approved *RACV Road Services*, which specifically dealt with the Explanatory Memorandum. Their Honours must therefore have considered the Explanatory

Memorandum. Further, it is far from apparent from the reasons that the construction of s 96(1) was not argued. Therefore, the first of Mondelez' submissions cannot be accepted.

The second basis: whether the Explanatory Memorandum supports the "notional day" construction

112 The second basis for Mondelez' submission that *Glendell Mining* is plainly wrong and that the "notional day" construction is correct, relies upon the Explanatory Memorandum.

113 Mondelez submits that the Explanatory Memorandum makes it expressly clear that the FW Act was not intended to bring about any change to the quantum of personal/carer's leave, and, therefore, was not intended to change the "notional day" method of calculation that had existed under the WR Act. Mondelez submits that under the "notional day" construction of s 96(1) of the FW Act, the quantum would not change, whereas under the Union's construction, employees whose ordinary hours are compressed into less than five days per week would be entitled to a greater number of hours of paid personal/carer's leave than under the WR Act. Mondelez also submits that the Explanatory Memorandum demonstrates that the change of wording in the FW Act was merely intended to simplify the complex rules that had existed under the WR Act, rather than to change the method of calculation.

114 These submissions call for consideration of three issues, namely: whether recourse can be had to the Explanatory Memorandum in the construction of s 96(1) of the FW Act; the content of the Explanatory Memorandum; and the method of calculation of the personal/carer's leave entitlement under the WR Act.

115 In *CPB Contractors Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union* [2019] FCAFC 70, O'Callaghan and Wheelahan JJ held at [60] that it is permissible to have regard to extrinsic materials in order to identify the context and purpose of a statutory provision, including the identification of any mischief to which a legislative amendment was directed. Their Honours rejected a submission that the use of extrinsic materials is solely governed by s 15AB(1) of the Acts Interpretation Act and that recourse to extrinsic materials is not permitted unless there is ambiguity or obscurity in the provision being construed. Their Honours held at [61]:

> However, the *Acts Interpretation Act* is not the sole source of principles of statutory construction. For the reasons we have given above, the common law principles of construction require that regard is to be had to the context of legislation at the first stage of the process of construction. That context may include extrinsic material that identifies legislative background, and the mischief which the legislation seeks to

> address. It is not necessary that an ambiguity be identified before that context can be considered. This is not to say that the ordinary meaning of words or phrases should yield to conform to the terms of extrinsic materials. But the process of construction of a provision in a statute often requires the identification of statutory purpose and context so as to determine the legal effect of the text used in the provision.

116 On this approach, the Explanatory Memorandum may be considered in order to ascertain the purpose of s 96(1) of the FW Act.

117 Mondelez' submission that the changes in wording under the FW Act were not intended to change the quantum of the entitlement but to merely simplify the complex rules under the WR Act, begins with following passage from the Explanatory Memorandum:

> *Personal/carer's leave and compassionate leave*: the NES will not change the quantum of the entitlement to personal/carer's leave and compassionate leave but will extend unpaid compassionate leave to casual employees. In addition, the number of paid carer's leave days which can be used is no longer capped at 10 days per year. The NES will also replace complex rules about the accrual and crediting of paid personal/carer's leave with a single, simple rule that consolidates notice and evidence rules for taking leave.

118 Mondelez also relies upon the following passages from the Explanatory Memorandum, concerning the clause that became s 99 of the FW Act:

> The concept of an employee's ordinary hours of work is central to the paid personal/carer's leave entitlement as it determines the rate at which the entitlement accrues and also the entitlement to payment when leave is taken
>
> **General principles**
>
> Leave accrues according to an employee's ordinary hours of work (which may be set out in a modern award or enterprise agreement, or are calculated in the manner set out in clause 20). Such hours are often expressed as a number of hours per week. In effect, therefore, the Bill ensures an employee will accrue the equivalent of two weeks' paid personal/carer's leave over the course of a year of service.
>
> Although this is expressed as an entitlement to 10 days (reflecting a 'standard' 5 day work pattern), by relying on an employee's ordinary hours of work, the Bill ensures that the amount of leave accrued over a period is not affected by differences in the actual spread of an employee's ordinary hours of work in a week.
>
> Therefore, a full-time employee who works 38 hours a week over five days (Monday to Friday) will accrue the same amount of leave as a full-time employee who works 38 ordinary hours over four days per week. Over a year of service both employees would accrue 76 hours of paid personal/carer's leave
>
> Similarly, the requirement to pay an employee for their absence on the basis of their ordinary hours of work for the period of the absence means that the employee is entitled to be paid for his or her ordinary hours of work on the days in the week they would have worked but for being absent from work on paid personal/carer's leave (ie., excluding overtime).

119 Mondelez also relies upon the examples of entitlements to payment for paid personal/carer's leave given in the Explanatory Memorandum. It is unnecessary to set them out here.

120 The Minister also relies upon the Explanatory Memorandum. The Minister submits that the Explanatory Memorandum demonstrates that "10 days" in s 96(1) of the FW Act refers to an amount of paid personal/carer's leave equivalent to an employee's ordinary hours of work in a two week period. In this way, the regime is brought into broad alignment with that which existed under the WR Act, which turned upon the concept of $^{1}/_{26th}$ of nominal hours worked in a year (being two weeks' paid personal/carer's leave per annum). The argument is consistent with Mondelez' "notional day" construction.

121 The submission that s 96(1) of the FW Act was not intended to change the quantum of the paid personal/carer's leave entitlement that existed under the WR Act requires consideration of the relevant provisions of the WR Act.

122 Section 246 of the WR Act provided:

> **246 Paid personal/carer's leave—accrual, crediting and accumulation rules**
>
> *Entitlement to take credited leave*
>
> (1) Subject to this Subdivision, an employee is entitled to take an amount of paid personal/carer's leave if, under this section, that amount of leave is credited to the employee.
>
> *Accrual*
>
> (2) An employee is entitled to accrue an amount of paid personal/carer's leave, for each completed 4 week period of continuous service with an employer, of $^{1}/_{26}$ of the number of nominal hours worked by the employee for the employer during that 4 week period.
>
> Example: An employee whose nominal hours worked for an employer each week over a 12 month period are 38 hours would be entitled to accrue 76 hours paid personal/carer's leave (which would amount to 10 days of paid personal/carer's leave for that employee) over the period.
>
> (3) Paid personal/carer's leave accrues on a pro-rata basis.

Crediting

(4) Each month, an employer must credit to an employee of the employer the amount (if any) of paid personal/carer's leave accrued by the employee since the employer last credited to the employee an amount of paid personal/carer's leave accrued under this section.

Accumulation

(5) Paid personal/carer's leave is cumulative.

123 Under s 246(2) of the WR Act, the accrual of paid personal/carer's leave depended upon "the number of nominal hours worked". That expression was defined in s 241(1) to mean, in substance, the specified number of hours an employee was employed by an employer to work per week (less some deductions), but capped at 38 hours per week.

124 It is relevant to note s 247A(1) of the WR Act which provided:

247A Entitlement to leave for all nominal hours in a day also extends to other hours on that day

(1) If:

(a) an employee to whom subparagraph 241(1)(a)(ii) applies is entitled to take paid personal/carer's leave on a particular day; and

(b) the entitlement covers all the hours (or part hours) on that day that would count towards the nominal hours worked by the employee in the week that includes that day;

the employer is taken to have authorised the employee to be absent from work for any other hours (or part hours) on that day that the employee would otherwise have worked.

Example: Tina is employed by Terrific Videos Pty Ltd. She works 8 hours a day for 5 days a week, giving a weekly total of 40 hours per week (consisting of 38 hours plus 2 reasonable additional hours).

Under subsection 246(2), Tina is entitled to accrue paid personal/carer's leave of 1/26 of her nominal hours worked for each completed 4 week period of continuous service with Terrific Videos. Because of subparagraph 241(1)(a)(ii), Tina's nominal hours worked in a week are capped at 38 hours. If Tina works her normal hours for a 12 month period, she will accrue 76 hours of paid personal/carer's leave.

The above subsection ensures that Tina will be able (subject to the requirements of this Division relating to entitlement to paid personal/carer's leave) to be absent from work for 10 full 8 hour days. Tina's absence for the additional 4 hours over those 10 days will not be paid leave, and will not count as service, but it will not break her continuity of service (see subsection (2)).

…

125 It is also relevant to note that s 249 of the WR Act provided, relevantly:

> **249 Paid carer's leave—annual limit**
>
> …
>
> (2) The employee is not entitled to take paid carer's leave from his or her employment with the employer at the time if, during the period of 12 months ending at the time, the employee has already taken a total amount of paid carer's leave from that employment of $^{1}/_{26}$ of the nominal hours worked by the employee for the employer during that period.
>
> Example: An employee whose nominal hours worked for an employer each week were 38 hours during a 12 month period of continuous service with the employer would not be entitled to take any paid carer's leave from his or her employment with the employer if the employee had, during the period, already taken 76 hours paid carer's leave (which amounted to 10 days paid carer's leave for that employee) from that employment.

126 Under s 246(2) of the WR Act, an employee was entitled to accrue an amount of paid personal/carer's leave of $^{1}/_{26th}$ of the number of nominal hours worked by the employee during each 4 week period. The provision did not expressly operate upon the basis that the nominal hours were to be averaged across a five-day working week, but did so implicitly. This was, in part, by requiring that the accrual be "for each completed 4 week period". The implied averaging process may be seen through the example given in s 246(2). For an employee working 38 nominal hours per week, the calculation of the accrual for a four week period was 152 hours divided by 26, giving 5.846 hours. Over a year, the employee would accrue leave of 5.846 hours for 13 four week periods, or 76 hours in total. The 76 hours was described in the example as amounting to "10 days personal/carer's leave". A "day" was therefore regarded in the example as 7.6 hours, being a 38 hour week averaged over five days.

127 Mondelez submits that s 96(1) of the FW Act applies the same method as s 246(2) of the WR Act of averaging employees' ordinary weekly hours of work across five days and calculating the personal/carer's leave entitlement by reference to hours. Mondelez relies partly upon the passage from the Explanatory Memorandum that states, "The NES will not change the quantum of the entitlement to personal/carer's leave".

128 However, that passage is inaccurate because, on any interpretation, the NES changed the quantum of the entitlement to paid personal/carer's leave for at least some employees in two ways.

129 Firstly, under s 241 of the WR Act, the nominal hours worked by an employee had been capped at 38 hours per week, and s 246 then operated to limit the accrual for all employees to a

maximum 76 hours per year. Under s 247A(1) of the WR Act, as the example demonstrates, employees who in fact worked more than 38 hours per week were entitled to unpaid leave in respect of the hours on a particular day that the employee would have worked beyond the nominal 7.6 hours. In contrast, the FW Act does not cap the entitlement. Nor does the FW Act necessarily limit ordinary hours of work to 38 hours: see ss 20, 62. On Mondelez' construction of s 96(1) of the FW Act, an employee whose ordinary hours of work are 40 hours per week would work a "notional day" of eight hours, and would be entitled to 80 hours of paid personal/carer's leave—compared to the maximum of 76 hours under the WR Act. Accordingly, even under Mondelez' construction, the NES effects a change in the quantum of paid personal/carer's leave for some employees.

130 Secondly, s 249 of the WR Act has not been replicated in the FW Act. The effect of s 249 was to cap paid carer's leave that could be taken in a year at $^{1}/_{26th}$ of nominal hours, or ten "nominal days". There is no such cap under the FW Act, as is acknowledged in the Explanatory Memorandum. The expression used in the Explanatory Memorandum "the entitlement to personal/carer's leave", was not used in s 246 of the WR Act. Even on Mondelez' "notional day" construction, the statement in the Explanatory Memorandum that the NES would not change the quantum of the entitlement to personal/carer's leave is inaccurate or, at best, unclear.

131 Mondelez relies upon the passage in the Explanatory Memorandum stating that, "The NES will also replace complex rules about accrual and crediting of paid personal/carer's leave with a single simple rule that consolidates notice and evidence rules for taking leave". Mondelez submits that this shows that the legislative intention was to use simpler words to express the same entitlement as under the WR Act. However, in its terms, the passage is concerned with reducing the *complexity* of the rules, and says nothing about the *entitlement* under those rules. The passage is also inaccurate. Rules about accrual and crediting have not been replaced with a single rule about notice and evidence. Rather, there are separate rules for accrual under the FW Act (s 96 (1) and (2)) and notice and evidence (s 107). Further, there has been no replacement of rules about crediting—the WR Act distinguished between accrual and crediting, whereas the FW Act contains no express rule about crediting.

132 Mondelez relies upon the same passages from the Explanatory Memorandum in support of a submission that 15AC of the Acts Interpretation Act applies to the construction of s 96(1) of the FW Act. Section 15AC provides that where an Act has expressed an idea in a particular

form of words and a later Act appears to have expressed the same idea in a different form of words for the purpose of using a clearer style, the ideas shall not be taken to be different merely because different forms of words were used. However, it is apparent, on any interpretation, that the FW Act effected substantive, and not merely stylistic, changes to the entitlements of employees. It cannot be accepted that the FW Act merely, "appears to have expressed the same idea in a different form of words for the purpose of using a clearer style". Therefore, s 15AC does not apply.

133 However, Mondelez' submission that the legislative intention was not to change the quantum of the entitlement, but merely to use simpler words to express the same entitlement, does find support in passages of the Explanatory Memorandum under the heading "General Principles" in the Explanatory Memorandum. Those passages expressly state that, the entitlement to ten days reflects, "a 'standard" 5 day work pattern". They state that the Bill ensures that the amount of leave accrued over a period is not affected by differences in the, "actual spread of an employee's ordinary hours of work in a week". They give the example that a full-time employee who works 38 hours a week over five days will accrue the same amount of leave as full-time employee who works the same number of hours over four days per week—over a year of service, both employees would accrue 76 hours of paid personal/carer's leave. These passages support Mondelez' submission that s 96(1) of the FW Act is intended to operate upon the averaging of employees' ordinary hours of work over an assumed standard five-day week. The examples of entitlements to payment in the Explanatory Memorandum are also generally consistent with the passages under the heading "General principles" and with Mondelez' construction of s 96(1) of the FW Act.

134 The words of a statute, not non-statutory words seeking to explain them, have paramount significance: *Nominal Defendant v GLG Australia Pty Ltd* (2006) 228 CLR 529 at [22]. Extrinsic material cannot be relied on to replace the clear meaning of the text: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47]. Therefore, if the meaning of "day" in s 96(1) of the FW Act is clear, the Explanatory Memorandum cannot overcome the text. However, Mondelez contends that there are three other factors (the third, fourth and fifth bases discussed below) that also demonstrate that the meaning is not clear.

The third basis for the "notional day" construction: that the natural and ordinary construction leads to unintended results

135 The third basis of the submission that Mondelez' "notional day" construction should be preferred is its contention that the "calendar days" construction leads to serious anomalies, inequities and unreasonable results that cannot have been intended.

136 Firstly, Mondelez submits that on the "working day" construction, an employee who works fewer, longer shifts effectively gets more personal/carer's leave than an employee who works a standard five-day week, even though they work the same weekly hours on average. Mondelez submits that this outcome would be inequitable.

137 Secondly, Mondelez submits that on the "working day" construction, the monetary value of a unit of personal/carer's leave—a day—depends upon the number of ordinary hours for which the employee is rostered when leave is taken. So, for example, if an employee takes ten days of leave when they are rostered for nine hours for each day, the employee's entitlement may be worth 90 hours of ordinary earnings; but if the employee takes ten days of leave for which he or she is rostered for three hours per day, the entitlement is worth only 30 hours of ordinary earnings. Mondelez argues this is inequitable, and also makes it difficult for employers to make financial provision for accrued leave. It submits that a construction that produces such results could not have been intended.

138 Thirdly, Mondelez submits that there are even greater anomalies for part-time employees. Mondelez gives the example of a comparison between a full-time employee working seven hours a day, five days per week, a total of 35 hours per week, and a part-time employee working 8.75 hours a day, two days per week, a total of 17.5 hours per week. On the "notional day" construction, the part-time employee would be entitled to half the number of hours of paid personal/carer's leave as the full-time employee. However, on the "working day" construction, the part-time employee is entitled to 87.5 hours personal/carer's leave, whereas the full-time employee is only entitled to 70 hours leave. Mondelez gives other examples of such discrepancies.

139 Fourthly, Mondelez submits that the "working day" construction leads to anomalies when accounting for part-days of personal/carer's leave. It submits that under that construction, if an employee has accrued a half-day of paid personal/carer's leave, then he or she is entitled to be absent for a whole shift while using only a half-day of leave.

140 It is necessary to consider whether the outcomes that Mondelez points to are truly anomalies, or whether they are natural consequences of a construction that reflects the legislative purpose. The issue requires an understanding of the purpose of the entitlement to paid personal/carer's leave.

141 In *RACV Road Services*, the Full Bench provided a useful summary of the history of the personal/carer's leave entitlement:

> 80 The position with respect to personal/carer's leave (originating from sick leave) is somewhat more complex. Because the common law implied a contractual term for weekly employees that they were entitled to be paid during an absence from work due to illness, award prescriptions for sick leave were initially expressed as limitations on this implied term rather than as entitlements. The first federal prescription, awarded in 1922 in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* provided that "No employee shall be entitled to payment for non-attendance on the ground of personal ill-health for more than six days in each year" (noting that, as earlier observed, the standard working week at this time consisted of 6 days).
>
> 81 Later award provisions began to express sick leave as an entitlement, but the mode of expression of that entitlement has historically been somewhat diverse. The various awards applying to the metal industry have always expressed sick leave, and subsequently "personal leave", in terms of hours rather than days. Other awards, particularly State awards, expressed the entitlement in terms of days. However, generally speaking, even where the entitlement was expressed in hours, the underlying intention appears to have been to guarantee a given number of days off work in the case of illness of the employee (and subsequently of a family member). For example, cl 7.2.2 of the *Re Metal, Engineering and Associated Industries Award 1998 — Part 1* provided that, after the first year of service, an employee was entitled to 60.8 hours of paid personal leave, but in the case of an employee working the 38 hour week on the basis of working days of 8 hours or more with a rostered day(s) off in the work cycle, the equivalent entitlement was 64 hours — apparently in order to ensure that the employee was entitled to 8 actual days of personal leave per year. In the 2005 *Family Provisions Case* the model personal leave award clause approved by the Full Bench expressed the entitlement to use personal leave to care for sick family members in the following way: "An employee is entitled to use *up to 10 days personal leave*, including accrued leave, each year to care for members of their immediate family or household who are sick and require care and support or who require care due to an unexpected emergency, subject to the conditions set out in this clause" (emphasis added). The historical context provides no support for the proposition that a personal/carer's leave or sick leave entitlement expressed in days was to be understood as bearing a special meaning, namely a given number of working hours.
>
> (Citations omitted.)

142 The payment of employees during temporary absences from work because of illness under common law contracts of employment was considered in *Cuckson v Stones* (1858) 120 ER 902, where it was held at 905:

> [W]e think that want of ability to serve for a week would not, of necessity, be an answer to a claim for a week's wages if in truth the plaintiff was ready and willing to serve had he been able to do so, and was only prevented from serving during the week by the visitation of God, the contract to serve never having been determined.

143 *Halsbury's Laws of England* (1st Ed, Vol XX), citing *Cuckson v Stones* and subsequent cases, states at p 84 that:

> A servant is entitled to his wages or salary during absence through temporary illness, provided that the contract of service remains in existence during that time, and he is ready and willing to carry out his duties save for the incapacity produced by the illness.

144 In *Quill v Brunton (No 2)* [1921] AR (NSW) 44, Rolin J, held at 49:

> Of the Common Law there is no doubt that a man employed on a weekly engagement, or any engagement for a period, does not put an end to that engagement by falling ill. His absence from work on account of sickness does not terminate his employment; and further, in the absence of any other agreement expressed or implied, he is entitled to be paid for the time he is away sick, although he is not there to go on with his work. That may be very hard on the employer but that I take to be the law.

145 In *Graham v Baker* (1961) 106 CLR 340 at 346, the High Court referred to a long line of authority commencing with *Cuckson v Stones*, "concerning the right of an employee to receive his ordinary wages in respect of a period during which he is unable, by reasons of sickness or accident, to perform his duties."

146 The paid personal/carer's leave provisions of the FW Act modify the common law contractual entitlement to paid sick leave. Under s 95 of the FW Act, the entitlement applies to all part-time and full-time national system employees. The inclusion of paid personal/carer's leave as part of the NES ensures that, for those employees, there can be no contracting out of the entitlement. The NES provisions otherwise both expand and limit the common law entitlement.

147 The entitlement to paid personal/carer's leave involves two components. The first is that ss 96(1) and 97 authorise the employee to be absent from work when the employee is unable to work because of a relevant illness or injury to the employee, or illness, injury or unexpected emergency affecting a member of the employee's immediate family or household. The second is that s 99 confers an entitlement upon the employee to be paid for such absences. In contrast, while s 352 prohibits dismissal of an employee who is temporarily absent from work because of illness or injury of a kind prescribed by regulation, that provision does not *authorise* the employee's absence, nor does it require that such an employee be *paid*.

148 Section 96(1) of the FW Act must be understood as establishing a statutory form of income protection for all national system employees, other than casual employees. That protection is

provided by *authorising* employees to be absent from work during periods of illness or injury and requiring employers to *pay* employees as if they had not been absent. The legislative purpose is to protect employees against loss of earnings when unable to work due to relevant illness, injury or unexpected emergency.

149 However, there are limits upon the entitlement to paid personal/carer's leave. Section 96(1) itself limits the entitlement in two ways: firstly, it is limited to the number of days of leave that an employee has accrued; and secondly, the rate of accrual is limited to ten days for each year of service. Section 97 limits the purposes for which the leave may be taken. Section 99 limits payment to the base rate for the employee's ordinary hours of work in the period. The exercise of the entitlement is subject to the notice and evidence requirements imposed by s 107.

150 The ordinary, or "working day", construction of s 96(1) of the FW Act, is consistent with the purpose of providing, within the delineated limits, income protection for all part-time and full-time national system employees. Under that construction, all part-time and full-time employees, whatever their pattern of shifts, are entitled to payments reflecting the income they would have earned had they been able to work. To return to the example of employees who work 36 ordinary hours per week, whether an employee works 7.2 hours every day over five days, or 12-hour shifts over three days, under the "working day" construction, both will be paid at their base rate for the ordinary hours they would have worked if not for the illness or injury. Neither will lose that income. Further, the leave balance for each will be debited with one "working day" for each day of leave taken. The effect of this construction is that, subject to the delineated limits, no employee who is unable to work because of illness or injury will lose income.

151 On the other hand, Mondelez' "notional day" construction could mean that while both types of employees would have an entitlement to 72 hours' paid personal/carer's leave for the year, the 12-hour shift employee could suffer a loss of earnings. This would occur, for example, where the employee's accrued leave balance of 72 hours is exhausted after six calendar days, but the employee is unable to work on a seventh, eighth, ninth or tenth day. In contrast, if the 7.2-hour employee were unable to work for ten days, he or she would suffer no loss. Mondelez' construction is inconsistent with the purpose of income protection for all part-time and full-time employees, since some are more likely to lose income than others.

152 The limits upon the entitlement to paid personal/carer's leave are, subject to one exception, carefully and expressly delineated. One of those limits, under s 96(1) of the FW Act, is that the

accrual is limited to ten days for each year of service with an employer. If a further limit were intended such that a "day" be restricted to average weekly hours divided by five, that is likely to have been made expressly clear. It has not.

153 It may be accepted that the FW Act leaves it to be implied that the entitlement to take paid personal/carer's leave is limited to the days of accrued leave that an employee has not already taken. However, that limitation can be regarded as so obvious that it goes without saying. An implication that the accrual is to be limited to ten "notional day" is not in the same category.

154 The language of s 96(1) of the FW Act may be contrasted with that of s 246 of the WR Act and the example given in that provision. That provision made it clear that a "notional day" construction was intended. If the same construction was intended under the FW Act, words such as those used in s 246(2) of the WR Act ("for each completed 4 week period") and the example in that section could have been replicated in s 96(1). That this was not done strongly suggests that s 96(1) was intended to have a different meaning and operation.

155 The recognition of paid personal/carer's leave as a form of income protection against loss of earnings during periods when employees are unable to work because of illness or injury supports the "working day" construction. That purpose demonstrates that the "anomalies" suggested by Mondelez are not unintended outcomes, but predictable consequences of the intended operation of s 96(1) of the FW Act.

156 Mondelez' submission that it is "inequitable" that an employee who works fewer, longer shifts effectively gets more personal/carer's leave than an employee who works a standard five-day week cannot be accepted. If both employees are able to take an equal number of "working days" of paid personal/carer's leave and neither loses income, how can there be inequity or unfairness to one of them? Neither has had to work on the relevant days. Neither has suffered a loss of earnings as a consequence of not working.

157 Mondelez' submission that the "working day" construction makes the treatment of the five standard day employee inequitable may also be tested in another way. Illness and injury generally strike randomly. On that basis, there is a greater chance that an employee who works a standard five-day week will fall ill on a day of work and have to take personal/carer's leave than an employee who works three days of longer shifts. Is it inequitable to the three-day employee that he or she is less likely than the five-day employee to use his or her accrued entitlement to paid personal/carer's leave? Since the leave is intended to act as a form of income

protection during periods of inability to work due to illness or injury, rather than a mere entitlement to paid time off work, there is no inequity.

158 Mondelez' submission that the "working day" construction makes the treatment of the standard five-day employee inequitable is, in part, based upon a misconception of the nature of the entitlement under s 96(1) of the FW Act. Mondelez submits that, "An employee who works longer shifts effectively gets more personal/carer's leave than an employee who works a standard five-day week". The entitlement of employees under s 96(1) is *to* ten days personal/carer's leave for each year of service. It is not an entitlement *to take* ten days paid personal/carer's leave. The entitlement to take the leave arises only if one of the conditions in s 97 arises. Therefore, it cannot be said that any employee will necessarily "get" more personal/carer's leave than others. As we have said, randomness is inherent in the concept of personal/carer's leave. The leave may only be taken if the employee or a member of his or her family or household is ill or injured or there is an unexpected emergency. There may be almost as many variations in the need to take personal/carer's leave as there are employees. Under the "working day" construction of s 96(1), each employee accrues an entitlement to the same number of working days of paid personal/carer's leave for each year of service. That entitlement to leave may or may not eventually be used, and if used, it is uncertain whether it will be used in full or in part, and what part. Therefore, the mere entitlement of some employees to what may amount to a greater number of hours of paid personal/carer's leave than other employees, will not necessarily translate to a difference in the entitlement to take leave. However, each employee will be equally protected against his or her loss of earnings should the need to take leave arise. That does not seem inequitable.

159 Mondelez' argues that the "working day" construction creates inequity because the monetary value of a unit of personal/carer's leave depends upon *when* leave is taken. It is true that where terms for "cashing out" are included in a modern award or enterprise agreement, a part of the accrued entitlement to paid personal/carer's leave may be converted into money. However, Mondelez' argument places too much emphasis upon monetary value of paid personal/carer's leave and pays insufficient attention to the primary purpose of personal/carer's leave as a form of income protection during periods of illness or injury. Under s 100 of the FW Act, paid personal/carer's leave must not be cashed out, except in accordance with cashing out terms included in a modern award or enterprise agreement under s 101. Even though s 101 provides that a modern award or enterprise agreement may include terms providing for cashing out, the employee must be left with accrued entitlements of at least 15 days, again emphasising the

purpose of income protection during periods of illness or injury. The creation of an independent form of income through cashing out is, at best, a secondary purpose. When construing s 96(1), attention should principally be focussed upon its primary protective purpose. More will be said about the cashing out provisions later in these reasons.

160 Mondelez submits that the "working day" construction leads to anomalies when accounting for part-days of paid personal/carer's leave. Mondelez submits that under that construction, if an employee has accrued a half-day of paid personal/carer's leave, then he or she is entitled to be absent for a whole shift while using only a half-day of leave. The basis of this argument is unclear. Under s 247A of the WR Act, an employee who was entitled to only a part-day of leave, was entitled to unpaid leave for the remainder of the day. That provision has not been replicated under the NES. It is unnecessary to consider all the implications of that omission for present purposes. It is sufficient to say that, on a natural construction of ss 96 and 97 of the FW Act, an employee may accrue a part-day of paid personal/carer's leave and take a part-day of paid personal/carer's leave; and if a part-day is taken, a part-day will be deducted from the employee's leave balance.

161 The purpose of paid personal/carer's leave is as a form of income protection during periods when employees are unable to work because of illness or injury. That purpose supports the "working day" construction, and demonstrates that the "anomalies", "inequities" and "unreasonable results" that Mondelez submits are produced by that construction are not only anticipated consequences, but are more apparent than real.

The fourth basis for the "notional day" construction: inconsistency of the "working day" construction with cashing out and other provisions

162 Mondelez submits that the "working day" construction is inconsistent with the NES provisions for cashing out of paid personal/carer's leave.

163 Under s 101(1) of the FW Act, an award or enterprise agreement may contain terms permitting cashing out of personal/carer's leave, subject to conditions including, under s 101(2)(c), that the employee, "must be paid at least the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone". Mondelez submits that this provision requires a monetary value of the accrued leave to be ascertained when it is cashed out. This presents no difficulty on the "notional day" construction since the quantum of leave is measured in hours and has an easily ascertainable value. However, Mondelez submits that the "working day" construction is incompatible with s 101 because a unit of leave—a

day—is not referrable to a fixed number of working hours and its value depends on *when* the leave is taken. This creates difficulties when an employee works a different number of hours on different days. For example, if an employee works four hours on Mondays and eight hours on Tuesdays, the value of the leave depends on when it is taken, and that can only be ascertained when it is taken. Mondelez submits that, for s 101(2)(c), it is not possible to calculate the amount that would have been payable had the employee taken the leave that was foregone.

164 The Minister makes a similar submission, but focuses more upon s 96(2) of the FW Act. The Minister submits that the statutory scheme requires the calculation of two vital components: first, the "up-front overall entitlement" to personal/carer's leave per annum under s 96(1); and second, how much of that overall entitlement each employee has progressively accrued at any point in time under s 96(2). The Minister submits that unless the first component is certain and known up-front, the second component cannot be determined. The Minister submits while the "notional day" method allows the accrued entitlement of employees to be known at any point in time, the Union's construction does not.

165 It is unclear precisely what the Minister means when referring to the "up-front overall entitlement" of an employee. The submission seems to be that the entitlement must be capable of being ascertained at *any point in time in advance* of leave being taken. If so, the submission involves a misunderstanding of the operation of s 96(1) and (2) of the FW Act. Section 96(1) provides for the accrual of paid personal/carer's leave at the rate of ten days for each year of service with an employer, while s 96(2) provides that the accrual is to be progressive. The effect of these provisions is that the quantum of the entitlement is a function of an employee's length of service with an employer. An employee starts with no leave balance but the entitlement to leave accrues progressively over time. The extent of the employee's entitlement to paid personal/carer's leave generally cannot be known substantially in advance of the taking of leave because that would require speculation as to when the illness or injury will occur (usually a random event at a random time) and whether the employee will still be employed by the employer when it occurs. Therefore, the submission that an employee's entitlement must be capable of being ascertained at *any* point in time in advance of leave being taken cannot be accepted.

166 The second aspect of the Minister's argument—that s 96(2) of the FW Act contemplates that the quantum of the *present entitlement* of any employee to paid personal/carer's leave must be ascertainable at any point in time—may be accepted. Both the employer and the employee must

be able to ascertain the extent of the entitlement when the leave is taken. However, as will be discussed, consideration of the statutory provisions demonstrates that under the "working day" construction, the present entitlement is able to be ascertained at any point in time.

167 The Minister submits that the words "according to the employee's ordinary hours of work" in s 96(2) of the FW Act demonstrate that accrual of paid personal/carer's leave is to be on the basis of a number of hours. The Minister relies, in part, upon s 20 and the note to s 147. Section 20 deals with the ordinary hours of work for an "agreement/award free" employee and s 147 provides that modern awards must include terms specifying, or providing for the determination of, ordinary hours of work. The Minister emphasises that the note states, "An employee's ordinary hours of work are significant in determining the employee's entitlements under the National Employment Standards".

168 However, the "working day" construction does not deny the significance of ordinary hours of work in determining an employee's entitlements to paid personal/carer's leave. They are significant in determining the entitlement in respect of part-days under s 96(2), as will be discussed, and the rate of payment under s 99. The note to s 147 does not purport to suggest that all aspects of employees' leave entitlements under the NES are to be determined according to ordinary hours of work. That would be inconsistent with, for example, ss 70 and 87(1), which prescribe the entitlement to parental leave and annual leave respectively by reference to weeks.

169 The words "according to the employee's ordinary hours of work" in s 96(2) do not demonstrate that accrual of paid personal/carer's leave is to be on the basis of a number of hours, rather than days. Under s 96(1), the accrual is expressly based upon time served with the employer and is expressly to be calculated in days. So, for example, every 5.2 weeks, the employee accrues an entitlement to another full day of paid personal/carer's leave. In our view, the purpose served by the reference to "ordinary hours" in s 96(2) is as part of a mechanism that allows an employee's entitlement to paid personal/carer's leave be determined when the entitlement includes a part-day.

170 The legislative intention must be to accommodate the common circumstance of an employee requiring a part-day of paid personal/carer's leave: for example, when an employee has to leave work early because of sudden illness of either the employee or a family member. The language of ss 96, 97 and 99 of the FW Act accommodates, and should be understood as applying to, both part-days and whole days. Section 96(1) encompasses part-days.

171 It is in respect of part-days that the words, "according to the employee's ordinary hours of work" in s 96(2) operate. That provision, together with s 99, should be understood so that for an employee who has accrued a part-day's leave, the entitlement and payment for the part-day are each calculated according to the employee's ordinary hours of work (that is, excluding overtime hours) for the day on which he or she takes the part-day of leave. So, for example, an employee who has been employed for 7.8 weeks has accrued an entitlement to 1½ day's paid personal/carer's leave. If the employee requires paid personal/carer's leave on a day when rostered to work eight ordinary hours and on the following day when rostered to work four ordinary hours, the employee is entitled to take and be paid for a day's (eight hours') leave plus a half-day's (two hours') leave; and his or her leave balance is reduced by 1½ days. Any entitlement in respect of a part-day can be calculated as a fraction of the ordinary hours of work for that day.

172 In this way, under the "working day" construction, the present entitlement of any employee to paid personal/carer's leave is able to be calculated at any point in time. Accordingly, the Minister's submission to the contrary cannot be accepted.

173 There is some merit in Mondelez' submission that under the "working day" construction, "the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone" for the cashing out provision in s 101(2)(c) of the FW Act cannot be calculated for some employees. Mondelez is correct to submit that where an employee has different ordinary hours on different days, the determination of the leave "the employee has forgone" would depend upon which days the employee would have taken the leave, a speculative exercise that may not be able to sensibly be performed.

174 Mondelez' argument exposes some difficulties in the language of s 101(2)(c). The section refers to, "the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone". However, when the cashing out is done, the employee could not have "taken the leave"; there is no leave capable of being "foregone"; and there is no amount that "would have been payable". That is because, as ss 96(1), 97 and 99 make clear, the entitlement *to take* leave and *be paid* for leave taken can only arise if the employee or a member of the employee's immediate family or household is sick or injured or there is a relevant emergency. By cashing out, an employee can only be said to have foregone a part of his or her *potential entitlement* to take, and be paid for, leave in the future, but that is

not the way s 101(2)(c) is expressed. The language of s 101(2)(c) is inconsistent with ss 96(1), 97 and 99.

175 For present purposes, it is unnecessary to consider precisely how s 101(2)(c) is to be construed. That is because there are at least two other answers to Mondelez' submission.

176 The first is that what terms may be included in a modern award or enterprise agreement is determined by the statutory provisions—the terms of a modern award or enterprise agreement cannot control the meaning of a statutory provision. Modern awards and enterprise agreement often contain clauses that distinguish between the entitlements of different categories of employees. If s 101(2)(c) of the FW Act cannot be complied with in relation to some categories of employees, a modern award or enterprise agreement simply cannot include a cashing out provision for those employees. However, for those employees whose ordinary hours are arranged in an even spread, the "leave that the employee has forgone" can be determined, and the provision complied with. It follows that under the "working day" construction, s 101(1) has work to do.

177 The second answer is that even for employees who have different ordinary hours on different days, s 101(2)(c) of the FW Act may be satisfied where, for example, the payment to the employee is calculated upon an assumption that the employee would have taken leave on the days when they had the greatest number of ordinary hours. Section 101(2)(c) uses the words "*at least* the full amount that would have been payable", so it contemplates the possibility of payment of more than the monetary value of the unused paid personal/carer's leave. We would not preclude other possible solutions, but it is unnecessary to go further for present purposes.

178 It is enough to conclude that Mondelez' submission concerning s 101(2)(c) of the FW Act does not provide a sufficient obstacle to acceptance of the "working day" construction in view of the countervailing considerations, including the ordinary meaning of s 96(1) and the purpose of personal/carer's leave.

The fifth basis: s 106E of the FW Act

179 The *Fair Work Amendment (Family & Domestic Violence Leave) Act 2018* (Cth) added a new subdivision CA into Div 7 of Pt 2–2 of the FW Act. Subdivision CA provides for unpaid family and domestic violence leave. The provisions that were added include ss 106A and 106E.

180 Section 106A of the FW Act provides:

> **106A Entitlement to unpaid family and domestic violence leave**
>
> (1) An employee is entitled to 5 days of unpaid family and domestic violence leave in a 12 month period.
>
> (2) Unpaid family and domestic violence leave:
>
> (a) is available in full at the start of each 12 month period of the employee's employment; and
>
> (b) does not accumulate from year to year; and
>
> (c) is available in full to part time and casual employees.
>
> …
>
> (4) The employee may take unpaid family and domestic violence leave as:
>
> (a) a single continuous 5 day period; or
>
> (b) separate periods of one or more days each; or
>
> (c) any separate periods to which the employee and the employer agree, including periods of less than one day.
>
> …

181 Section 106E deals with the meaning of the expression "day of leave":

> **106E Entitlement to days of leave**
>
> What constitutes a day of leave for the purposes of this Subdivision is taken to be the same as what constitutes a day of leave for the purposes of section 85 and Subdivisions B and C.

182 Subdivision A of Div 7 deals with paid personal carer's leave, subdivision B with unpaid carer's leave and subdivision C with paid compassionate leave. Section 85 deals with unpaid pre-adoption leave.

183 Mondelez submits that, while s 106E of the FW Act post–dates the commencement of this proceeding, the Court must consider it as part of the FW Act when construing s 96(1). That submission should be accepted. The proceeding is concerned with the current entitlement of employees, rather than their entitlement at some point in the past. Further, s 11B(1) (formerly s 15) of the Acts Interpretation Act provides:

> Every Act amending another Act shall, unless the contrary intention appears, be construed with such other Act and as part thereof.

184 In *Commissioner of Stamps v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453, the plurality considered s 15 of the Acts Interpretation Act at 463:

> [T]hat section is declaratory and represents the modern approach to the construction of an amended statute. The result is that both the Act which is amended and the Amending Act are to be read together as a combined statement of the will of the legislature. Thus the effect of the Amending Act may be to alter the meaning which the remaining provisions of the amended Act bore before the amendment.

185 It follows that the FW Act should be construed according to its current form.

186 Mondelez submits that s 106E of the FW Act supports the "notional day" construction of s 96(1) as it demonstrates that the word "day" can have, and does have, more than one meaning in the FW Act. Mondelez submits that this has three consequences. First, it discredits the proposition which underpins the Union's argument that the word "day" has some single and simple ordinary meaning which should be presumptively attributed to that word in s 96(1). Second, it rebuts the submission that the word "day" has the same meaning throughout the FW Act. Third, it supports the proposition that the expression "day of leave" is sometimes used as an "actual day" and sometimes as an "average day". Mondelez submits that s 106E thus demonstrates that an "average day" construction of s 96(1) is a legitimate constructional choice that is open on the text of the FW Act. Mondelez also submits that the judicial pronouncements about the meaning of s 96(1) must now be given less weight because they considered the FW Act as it stood before the introduction of s 106E.

187 It can be accepted that s 106E demonstrates that the word "day" may have more than one meaning under the FW Act. The direct effect of s 106E of the FW Act is that what constitutes "a day of leave" is uniform for the purposes of the provisions dealing with unpaid pre–adoption leave, unpaid carer's leave and unpaid family and domestic violence leave. In addition, the omission of paid personal/carer's leave from s 106E may imply that "a day of leave" may have a different meaning under s 96(1).

188 Section 85(1) of the FW Act provides that an employee is entitled to, "up to 2 days of unpaid pre–adoption leave". Section 102 provides that an employee is entitled to, "2 days of unpaid carer's leave". Section 104 provides that an employee is entitled to, "2 days of compassionate leave". Section 106A(1) provides that an employee is entitled to, "5 days of unpaid family and domestic violence leave". It should be accepted that each of these provisions is consistent with authorising absence from work for the portion of a 24 hour period that would otherwise be allotted to work. In other words, each of these provisions refer to what we have described as a

"working day". Therefore, if s 106E implies that a "day" under s 96(1) has a different meaning, s 106E may be inconsistent with s 96(1) also referring to a "working day".

189 However, the purpose of s 106E is not, in our view, to distinguish the meaning of "a day of leave" in the provisions it refers to from the meaning of the phrase in other provisions, such as s 96(1). Section 106E also omits reference to other provisions which establish entitlements to leave expressed in "days", such as s 79A (keeping in touch days), s 111(5) (payment for leave for the first ten days of absence on jury service) and s 114(1) (public holidays). In each of those provisions a "day" must also be understood as consisting of the portion of a 24 hour period that would otherwise be allotted to work. Therefore, the omission of a provision dealing with a day of leave from s 106E does not necessarily mean that the provisions omitted are intended to have a different meaning from the provisions included.

190 The purpose of s 106E of the FW Act should be understood as confirming that what constitutes a day of leave for the purpose of unpaid family and domestic violence leave is the same as for the purposes of unpaid pre–adoption leave, unpaid carer's leave and paid compassionate leave. That is consistent with the Explanatory Memorandum for the Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018 (Cth), which states that s 106E, "makes clear that what constitutes a day of leave for the purposes of the new entitlement to family and domestic violence leave is designed to be the same as what constitutes a day of leave for the purposes of pre-adoption leave (in s 85), unpaid carer's leave (in Subdivision B of Division 7) and compassionate leave (in Subdivision C of Division 7)." A commonality of each of those provisions is that they expressly allow the days of leave to be taken as a single continuous period or any separate periods which the employee and the employer agree, although only s 106A(4)(c) expressly uses the words "including periods of less than one day." The purpose of s 106E may be to confirm that pre-adoption leave, unpaid carer's leave and compassionate leave may also be taken for periods of less than one day if agreed between the employee and the employer.

191 In any event, it cannot be accepted that by adding s 106E to the FW Act, the legislative intention was to affect the meaning of s 96(1) in such an oblique way. If that was intended, it is likely to have been done directly. The Explanatory Memorandum to the Fair Work Amendment (Family and Domestic Violence Leave) Bill does not suggest that there was any intention to change the meaning of s 96(1).

192 For these reasons, Mondelez' submission that the addition of s 106E of the FW Act affects the meaning of s 96(1) cannot be accepted. It also follows that its submission that *Glendell Mining* would have been decided differently if s 106E had then been in force cannot be accepted.

Other arguments

193 Mondelez points to the difficulties that would be caused for employers under the "working day" construction. These include problems for employers in making financial provision for personal/carer's leave when employees working the same number of weekly hours have different entitlements. This argument again proceeds on the misapprehension of the effect of s 96(1) of the FW Act. The provision confers an equal entitlement upon all employees. What is different between employees is the entitlement to *take* paid personal/carer's leave, which only arises in the circumstances set out in s 97. The very nature of paid personal/carer's leave makes planning difficult, except by reference to averages or maxima. While it is true that planning for employers might be somewhat easier under the "notional day" construction, that provides insufficient support for that construction in light of the countervailing factors.

194 Finally, there is another reason why Mondelez' "notional day" construction must be rejected. Before directly addressing that reason, it should be reiterated that the entitlement to payment under s 99 is at the base rate for ordinary (not overtime) hours of work; and under Mondelez' "notional day" construction, the entitlement under s 96(1) is to a particular number of hours of paid personal/carer's leave calculated by reference to ordinary (not overtime) hours of work. A difficulty with the "notional day" construction is that, unlike the "working day" construction, it takes no account of overtime that an employee may otherwise have been required to work.

195 The overtime that an employee may otherwise have been required to work assists to explain why the accrual of paid personal/carer's leave under s 96(1) of the FW Act is expressed in terms of "days" and not "hours". As has been discussed, the entitlement to take such "leave" is an authorisation to be absent from work in the circumstances described in s 97. Since the basis of the entitlement is an inability to work because of illness, injury or unexpected emergency, the legislative intention must be to authorise employees to be absent, not only for their ordinary hours of work, but also any overtime hours they would otherwise have been required to work. That intention is given effect by the expression of the entitlement under s 96(1) in terms of "days". In other words, the employee is authorised to be absent from work for the portion of a 24 hour period that would otherwise be allotted to work – irrespective of whether that work is ordinary time, or overtime.

196 However, on Mondelez' "notional day" construction, the entitlement would be to be absent from work for a certain number of hours, calculated by reference to the employee's ordinary (not overtime) hours of work. That would leave only two possibilities in respect of absence during overtime hours because of illness or injury – either the absence would be authorised under s 96(1), or unauthorised. If absence for overtime hours were unauthorised, there would be the absurdity of an employee too ill to work being authorised to be absent for ordinary hours, but not for overtime hours. If absence for overtime hours were authorised, then either the overtime hours would be a form of unpaid leave, or the hours of absence from overtime would have to be deducted from the employee's accumulated leave balance. The former is unlikely when there is no provision (like s 247A of the WR Act) expressly allowing unpaid leave in such circumstances. The latter is unlikely because the overtime hours would be deducted from the leave balance even though those hours were never included as part of the leave balance and the employee is paid nothing for those hours.

197 Therefore, the "notional day" construction does not account for overtime. On the other hand, the treatment of overtime under the "working day" construction assists to explain why the entitlement is expressed in terms of "days" and not "hours".

Conclusions upon the construction of s 96(1) of the FW Act

198 Mondelez' submission that a "day" in s 96(1) is a "notional day" consisting of an employee's average daily ordinary hours based on an assumed five day working week must be rejected.

199 In rejecting the "notional day" argument, it has been necessary to reach a number of conclusions concerning the construction of the paid personal/carer's leave provisions of the FW Act. The principal conclusions may be summarised as follows:

(1) A "day" in s 96(1) of the FW Act refers to the portion of a 24 hour period that would otherwise be allotted to work (a "working day").

(2) A "day" of "paid personal/carer's leave" under s 96(1) is an authorised absence from work for a working day for a reason set out in s 97.

(3) Under s 96(1), an employee accrues an entitlement to be absent from work for a reason set out in s 97 for ten such working days for each year of service.

(4) The entitlement *to* paid personal/carer's leave under s 96(1) is not an entitlement *to take* such leave, which only arises when one of the conditions in s 97 is satisfied.

(5) For every day of paid personal/carer's leave taken, a day is deducted from the employee's accrued leave balance.

(6) Under s 96(1), the accrual is of part-days of paid personal/carer's leave, not only full days.

(7) An employee may take a part-day of paid personal/carer's leave, and an equivalent part-day is deducted from the employee's leave balance.

(8) The expression "ordinary hours of work" in ss 96(2) and 99 distinguishes ordinary hours from overtime hours.

(9) The expression "ordinary hours of work" is used in s 96(2) to indicate that part-days of paid personal/carer's leave entitlement are calculated on the basis of ordinary hours.

(10) The purpose of paid personal/carer's leave is as a form of income protection for employees during the periods of illness, injury or unexpected emergency described in s 97.

(11) Paid personal/carer's leave accrues over the whole length of employee's employment with a particular employer, to the extent that it is not taken.

(12) The amount of paid personal/carer's leave that may be taken in a year is limited to the amount that has been accrued, but is not otherwise limited.

WHETHER THE DECLARATIONS SOUGHT SHOULD BE MADE

200 In its originating application, Mondelez seeks the following declarations:

> 1. On proper construction of the *Mondelez Australia Pty Ltd, Claremont Operations (Confectioners & Stores) Enterprise Bargaining Agreement 2017*:
>
> a. When the second respondent is absent for a 12-hour shift on paid personal/carer's leave, 12 hours is to be deducted from her accrued paid personal/carer's leave balance.
>
> b. When the third respondent is absent for a 12-hour shift on paid personal/carer's leave, 12 hours is to be deducted from his accrued paid personal/carer's leave balance.
>
> 2. On proper construction of the *Mondelez Australia Pty Ltd, Claremont Operations (Confectioners & Stores) Enterprise Bargaining Agreement 2017* and of ss 96 and 99 of the *Fair Work Act 2009*:
>
> a. The second respondent's entitlement to paid personal/carer's leave under cl 24 of the agreement is more beneficial to her than her entitlement to paid personal/carer's leave under the National Employment Standards.
>
> b. The third respondent's entitlement to paid personal/carer's leave under cl 24 of the agreement is more beneficial to him than his entitlement

to paid personal/carer's leave under the National Employment Standards.

201 The first of the declarations sought assumes that the accrual of paid personal/carer's leave is to be calculated in hours according to the "notional day" construction of s 96(1) of the FW Act. That construction has been rejected. Therefore, the first declaration cannot be made.

202 As to the second of the declarations, cl 24.2 of the Enterprise Agreement provides that Mondelez' employees working 12-hour shifts are entitled to 96 hours of paid personal/carer's leave per annum. Ms Triffitt and Mr McCormack each work 12-hour shifts, totalling 36 ordinary hours per week.

203 Under s 96(1) of the FW Act, Ms Triffitt and Mr McCormack are each entitled to accrue ten days paid personal/carer's leave for each year of service with Mondelez. Their entitlement to a day's paid personal/carer's leave is an entitlement to be absent from work for the portion of a 24 hour period that would otherwise be allotted to work. For each of Ms Triffitt and Mr McCormack, that is 12 hours. They are each entitled under s 96(1) to ten such periods for each year of service. That is equivalent to ten 12-hour shifts.

204 Under the Enterprise Agreement, if Ms Triffitt and Mr McCormack were to take personal/carer's leave, their annual accrual of 96 hours would be exhausted after only eight 12-hour shifts. Therefore, the entitlement of Ms Triffitt and Mr McCormack to paid personal/carer's leave under the Enterprise Agreement is less beneficial to them than their entitlement under s 96(1) of the FW Act. Accordingly, the second declaration sought by Mondelez cannot be made.

205 The originating application must be dismissed.

I certify that the preceding two hundred and five (205) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Bromberg and Rangiah.

Associate: KAnderson

Dated: 21 August 2019

REASONS FOR JUDGMENT

O'CALLAGHAN J:

206 I have read in draft form the joint reasons of Bromberg and Rangiah JJ (the **joint reasons**). I am unable, with respect, to agree with their Honours' conclusions that Ms Triffitt and Mr McCormack are entitled under s 96(1) of the *Fair Work Act 2009* (Cth) to paid personal/carer's leave calculated as ten periods of 12 hours for each year of service (that is, 120 hours) and that the originating application should therefore be dismissed.

207 I would, for the reasons set out below, grant the second declaration sought by the applicant in the originating application, that:

> On proper construction of the *Mondelez Australia Pty Ltd, Claremont Operations (Confectioners & Stores) Enterprise Bargaining Agreement 2017* and of ss 96 and 99 of the *Fair Work Act 2009*:
>
> a. The second respondent's entitlement to paid personal/carer's leave under cl 24 of the agreement is more beneficial to her than her entitlement to paid personal/carer's leave under the National Employment Standards.
>
> b. The third respondent's entitlement to paid personal/carer's leave under cl 24 of the agreement is more beneficial to him than his entitlement to paid personal/carer's leave under the National Employment Standards.

208 These reasons assume familiarity with the joint reasons.

209 It seems to me, with great respect, that the expression "10 days" in s 96 of the Fair Work Act must be read together with, and take its meaning in part from, inextricably related provisions in Division 6, in particular s 96(2) ("[a]n employee's entitlement to paid personal/carer's leave accrues progressively during a year of service according to the employee's ordinary hours of work") and s 99 ("[i]f … an employee takes a period of paid personal/carer's leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period").

210 Once it is apparent that the entitlement to be paid such leave and the relevant rate of pay used to calculate the amount to be paid in respect of it are founded on ordinary **hours** of work, then the entitlement to "10 days" leave for each year of service under s 96 must operate as a unit of time directly referrable to, or expressed as, ordinary hours of work.

211 The Explanatory Memorandum confirms that Parliament intended "[t]he concept of an employee's ordinary hours of work [to be] central to the paid personal/carer's leave entitlement" and that those ordinary hours of work "determine[] the rate at which the

entitlement accrues and also the entitlement to payment when leave is taken". It also confirms not only that "[l]eave accrues according to an employee's ordinary hours of work" and that "[s]uch hours are often expressed as a number of hours per week" but also that the effect of s 96 is "… therefore … [to] ensure[] [that] an employee will accrue the equivalent of two weeks' paid personal/carer's leave over the course of a year of service".

212 As the majority identifies in the joint reasons, there is relevant ambiguity or obscurity about the use of the word "day" in s 96. In such circumstances, resort may be had to the Explanatory Memorandum.

213 The Explanatory Memorandum indicates – in terms – that Parliament did not intend that the spread of an employee's ordinary hours of work should produce the disparate result contended for by the respondents, viz, that Ms Triffitt and Mr McCormack are entitled to ten periods of 12 hours for each year of service, that being equivalent to ten 12-hour shifts (in effect 120 hours), but that other workers, with a five day, eight hour shift week, would only be entitled to the equivalent of 72 hours under the same provision. That result, in my view, is precisely the result that the Explanatory Memorandum says that Parliament sought to avoid, as the following passages from it demonstrate:

(1) "Although [the entitlement to accrue two weeks leave] is expressed as an entitlement to 10 days (reflecting a 'standard' 5 day work pattern), by relying on an employee's ordinary hours of work, **the Bill ensures that the amount of leave accrued over a period is not affected by differences in the actual spread of an employee's ordinary hours of work in a week**"; and

(2) "Therefore, a full-time employee who works 38 hours a week over five days (Monday to Friday) will accrue the same amount of leave as a full-time employee who works 38 ordinary hours over four days per week. Over a year of service both employees would accrue 76 hours of paid personal/carer's leave".

(Emphasis added).

214 As senior counsel for the intervener submitted, if the hourly figures contained in that last quote were changed so that they read "a full-time employee who works ~~38~~ 36 hours a week over five days (Monday to Friday) will accrue the same amount of leave as a full-time employee who works ~~38~~ 36 ordinary hours over ~~four~~ three days per week", that would be to describe two categories of employees employed by the applicant in this case. The latter precisely describes

the shifts worked by Ms Triffitt and Mr McCormack. And as the final sentence of that passage from the Explanatory Memorandum explains, over a year of service, both categories of employees were intended to accrue the same number of hours of paid personal/carer's leave – that is, 76 hours.

215 As a result, in my view, the entitlement of Ms Triffitt and Mr McCormack to paid personal/carer's leave under cl 24 of the *Mondelez Australia Pty Ltd, Claremont Operations (Confectioners & Stores) Enterprise Bargaining Agreement 2017* is more beneficial to them than their entitlement to paid personal/carer's leave under the National Employment Standards because under that agreement they are entitled, as employees working on 12 hour shifts, to 96 hours of personal/carer's leave.

216 The Explanatory Memorandum also goes on to provide "examples [which] illustrate the intended operation of the accrual and payment provisions". The examples are:

> Tulah is a full-time employee whose ordinary hours of work are 38 per week. On average, she also works an additional two hours of overtime per week. Tulah will accrue ten days' personal/carer's leave based on her ordinary hours of work (76 hours) over a year of service. If she takes a week's personal/carer's leave because she is sick or to care for a member of her immediate family who is sick, she will be entitled to be paid for 38 ordinary hours at her base rate of pay.
>
> Brendan is a part-time employee whose ordinary hours of work are 19 per week. He will accrue half the amount of paid personal/carer's leave over a year of service as Tulah (38 hours), reflecting the lower number of ordinary hours that he works. This is also reflected in how much he is entitled to be paid if he takes a week's paid personal/carer's leave. If he takes a week's personal/carer's leave, he will be entitled to be paid for 19 ordinary hours at his base rate of pay.
>
> Sudhakar is a full time employee who has entered into a permissible averaging arrangement under the NES and works an average of 152 hours every four weeks (based on 38 ordinary hours per week). The number of ordinary hours that Sudhakar works on any given day may vary according to the averaging arrangement. However, over a year he accrues ten days (76 hours) of paid personal/carer's leave. If he is sick and takes leave for a day, he will be entitled to be paid for the number of ordinary hours he was rostered to work on that day (but not for any additional overtime hours that he was to work).

217 Those examples, in my respectful view, reinforce the expression of the determination of Parliament that the amount of personal/carer's leave to be accrued is not to be affected by any different spread of an employee's ordinary hours of work in a week, and is designed to achieve what senior counsel for the applicant, correctly in my view, described as "equity as between different classes of employees". In my view, the position advanced by the respondents produces an outcome that creates inequities between different classes of employees that Parliament did not intend.

218 The only other point that I should deal with is whether the outcome which I favour requires me to be satisfied that the decision of the Full Court in *Construction, Forestry, Mining and Energy Union v Glendell Mining Pty Ltd* (2017) 249 FCR 495 is plainly wrong. In my view, no such issue arises. It is apparent that the precise question of the proper construction of s 96 of the Fair Work Act raised in this case, and the significance of the Explanatory Memorandum to it, was not argued, and was certainly not decided, in that case. As counsel for the intervener submitted, the passages relied on by the respondents are not part of the ratio of the decision, and they are not seriously considered dicta of the type that may attract the principle applicable to intermediate courts of appeal, re-iterated in cases like *Farah Constructions Pty v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 150-151 [134], 159 [158].

219 For those reasons, and in circumstances where senior counsel for the applicant, quite properly, conceded that the first declaration in the originating application was not necessary to resolve the matter, I would grant the second declaration, in the terms set out at [207] above.

I certify that the preceding fourteen (14) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice O'Callaghan.

Associate:

Dated: 21 August 2019