

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, NETTLE, GORDON AND EDELMAN JJ

Matter No M160/2019

MONDELEZ AUSTRALIA PTY LTD

APPELLANT

AND

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

RESPONDENTS

Matter No M165/2019

MINISTER FOR JOBS AND INDUSTRIAL
RELATIONS

APPELLANT

AND

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

RESPONDENTS

*Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering,
Printing and Kindred Industries Union*
*Minister for Jobs and Industrial Relations v Automotive, Food, Metals,
Engineering, Printing and Kindred Industries Union*

[2020] HCA 29

Date of Hearing: 7 July 2020

Date of Judgment: 13 August 2020

M160/2019 & M165/2019

ORDER

In each matter:

1. *Appeal allowed.*
2. *Set aside order 1 made by the Full Court of the Federal Court of Australia on 21 August 2019 and in its place declare that:*

"The expression '10 days' in s 96(1) of the Fair Work Act 2009 (Cth) means an amount of paid personal/carer's leave accruing for every year of service equivalent to an employee's ordinary hours of work in a week over a two-week (fortnightly) period, or 1/26 of the employee's ordinary hours of work in a year. A 'day' for the purposes of s 96(1) refers to a 'notional day', consisting of one-tenth of the equivalent of an employee's ordinary hours of work in a two-week (fortnightly) period."

On appeal from the Federal Court of Australia

Representation

S J Wood QC with D Ternovski for the appellant in M160/2019 and the fourth respondent in M165/2019 (instructed by Ai Group Workplace Lawyers)

T M Howe QC with I M Sekler for the fourth respondent in M160/2019 and the appellant in M165/2019 (instructed by Australian Government Solicitor)

I Taylor SC with C G Winnett and L Saunders for the first to third respondents in both appeals (instructed by Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (AMWU))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union

Minister for Jobs and Industrial Relations v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union

Industrial law (Cth) – Where *Fair Work Act 2009* (Cth) contains National Employment Standards ("NES") – Where NES are minimum terms and conditions that apply to all national system employees – Where NES address paid personal/carer's leave – Where s 96(1) of *Fair Work Act* provides that employees entitled to "10 days" paid personal/carer's leave per year of service – Where s 96(2) provides that paid personal/carer's leave accrues progressively according to employees' ordinary hours of work – Where s 55(4) provides that enterprise agreement may only include terms not detrimental to employee when compared to NES – Where enterprise agreement provides that ordinary hours of work for employees are 36 hours per week – Where enterprise agreement provides that employees working 12-hour shifts entitled to 96 hours paid personal/carer's leave per annum – Whether "day" in s 96(1) of *Fair Work Act* refers to one-tenth of equivalent of employee's ordinary hours of work in two-week period ("notional day") or portion of 24-hour period otherwise allotted to working ("working day").

Words and phrases – "10 days", "day", "enterprise agreement", "fairness", "income protection", "minimum terms and conditions", "modern award", "National Employment Standards", "notional day", "ordinary hours of work", "paid personal/carer's leave", "working day", "working patterns", "working week".

Fair Work Act 2009 (Cth), ss 3, 55, 85, 87, 96, 97, 99, 100, 101, 102, 104, 106A, 106E, 147, 186, 193.

Workplace Relations Act 1996 (Cth), ss 246, 247, 249.

1 KIEFEL CJ, NETTLE AND GORDON JJ. These appeals are concerned with how the entitlement to paid personal/carer's leave is calculated under s 96(1) of the *Fair Work Act 2009* (Cth). That sub-section provides that "[f]or each year of service with his or her employer, an employee is entitled to 10 days of paid personal/carer's leave". The issue is whether "day" in "10 days" in s 96(1) refers to (i) a "notional day", consisting of one-tenth of the equivalent of an employee's ordinary hours of work in a two-week period, or (ii) a "working day", consisting of the portion of a 24-hour period that would otherwise be allotted to working and thereby authorising an employee to be absent without loss of pay on ten working days per year.

2 For the reasons that follow, the answer is the former. Section 96 confers a progressively accruing entitlement to paid personal/carer's leave equivalent to an employee's ordinary hours of work in a two-week period, for each year of service. "10 days" is two standard five-day working weeks. One "day" refers to a notional day consisting of one-tenth of the equivalent of an employee's ordinary hours of work in a two-week period. To account for the fact that patterns of work or distribution of hours do not always follow two-week cycles, the entitlement can also be calculated as 1/26 of an employee's ordinary hours of work in a year. That construction of s 96 ("the 'notional day' construction") is consistent with the legislative purposes of the *Fair Work Act*, the extrinsic materials and the legislative history.

3 The alternative construction is that the reference to "10 days" entitles every employee, regardless of their pattern of work or distribution of hours, to be absent without loss of pay on ten working days per year ("the 'working day' construction"). That construction is rejected. It would give rise to absurd results and inequitable outcomes, and would be contrary to the legislative purposes of fairness and flexibility in the *Fair Work Act*, the extrinsic materials and the legislative history. The appeals should be allowed.

Facts and background

4 The facts were agreed. Mondelez Australia Pty Ltd ("Mondelez"), a national system employer¹, operates four food manufacturing plants in Australia, including a Cadbury plant at Claremont in Tasmania.

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

1 See *Fair Work Act*, s 14.

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The EBA came into effect on 11 May 2018 and applies to Mondelez, to the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers Union ("the Union"), to Ms Triffitt² and to Mr McCormack³. Ms Triffitt and Mr McCormack are members of the Union and are national system employees⁴ who work full-time at the Claremont plant.

6 Clause 32 of the EBA provides that the ordinary hours of work are 36 hours per week and that shift lengths may be eight or 12 hours. Ms Triffitt and Mr McCormack each work 36 hours per week averaged over a four-week cycle and work these ordinary hours in 12-hour shifts. The appeals proceeded on an assumption that they worked an average of three shifts per week.

7 Clause 24 of the EBA, headed "Personal / Carer's Leave", provides, relevantly, as follows:

"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

2 Ms Triffitt, the second respondent in both appeals, has been an employee at the Claremont plant since 6 August 2007.

3 Mr McCormack, the third respondent in both appeals, has been an employee at the Claremont plant since 11 April 1994.

4 See *Fair Work Act*, s 60, read with ss 13 and 14.

3.

be used for carer's leave. A pro rata adjustment will occur for the period between the introduction of this arrangement and the employees [sic] next anniversary date."

8 In accordance with cl 24.2, 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 takes paid personal/carer's leave for a single 12-hour shift, Mondelez deducts 12 hours from their accrued balance. Thus, 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 eight 12-hour shifts.

9 Mondelez sought the following declarations in the original jurisdiction of the Federal Court of Australia:

- "1. On proper construction of the [EBA]:
 - a. When [Ms Triffitt] 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 [Mr McCormack] 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 [EBA] and of ss 96 and 99 of the *Fair Work Act* ...:
 - a. [Ms Triffitt's] entitlement to paid personal/carer's leave under cl 24 of the [EBA] is more beneficial to her than her entitlement to paid personal/carer's leave under the National Employment Standards.
 - b. [Mr McCormack's] entitlement to paid personal/carer's leave under cl 24 of the [EBA] is more beneficial to him than his entitlement to paid personal/carer's leave under the National Employment Standards."

10 In the Full Court, Mondelez submitted that the word "day" in s 96(1) of the *Fair Work Act* consists of an employee's average daily ordinary hours of work based on an assumed five-day working week – that is, average weekly ordinary

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hours divided by five. The Minister⁵ intervened to support that construction⁶. Mondelez's construction gives the same result as the "notional day" construction described above. An employee's average weekly ordinary hours of work divided by five is the same as one-tenth of the equivalent of an employee's ordinary hours of work in a two-week period. The Union, Ms Triffitt and Mr McCormack ("the Union parties") proposed a different construction. They submitted that a "day" in s 96(1) means a "24 hour period".

11 The majority (Bromberg and Rangiah JJ) refused to make the declarations sought by Mondelez. Their Honours rejected Mondelez's construction and instead held that "day" in s 96(1) refers to "the portion of a 24 hour period that would otherwise be allotted to work". O'Callaghan J dissented. His Honour adopted Mondelez's construction of s 96(1) and would have declared that Ms Triffitt and Mr McCormack's entitlement to paid personal/carer's leave under the EBA is more beneficial than that under the National Employment Standards ("the NES").

12 Mondelez and the Minister both appeal on the ground that the majority erred in construing "day" in s 96(1) as a "working day".

Fair Work Act

13 It is necessary to construe the expression "10 days" in s 96(1) in the context of the *Fair Work Act* as a whole and, in particular, by reference to the provisions described below. It is necessary to construe the expression also in light of the relevant extrinsic materials and the legislative history⁷. Those materials, and that history, show not only continuity between the *Workplace Relations Act 1996* (Cth) and the *Fair Work Act* but also that the provision in issue is to be understood as

5 At the time of the Federal Court proceedings, that was the Minister for Small and Family Business, the Workplace and Deregulation. The appellant in Matter No M165 of 2019 and the fourth respondent in Matter No M160 of 2019 is his successor, the Minister for Jobs and Industrial Relations.

6 See *Fair Work Act*, s 569.

7 *Acts Interpretation Act 1901* (Cth), s 15AB. See also *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69]; *R v A2* (2019) 93 ALJR 1106 at 1117 [33], 1117-1118 [37], 1131 [124]; 373 ALR 214 at 223-224, 224-225, 242-243.

5.

a restatement, in simpler terms⁸, of long-standing provisions of industrial relations law containing minimum employment conditions.

14

It is necessary to start with the statute⁹. The object of the *Fair Work Act* is to "provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians"¹⁰. That object is sought to be achieved, in part, by¹¹:

- "(a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity ...; and
- (b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the [NES], modern awards and national minimum wage orders; and
- ...
- (d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements".

The stated objects show that the Act is intended to provide fairness, flexibility, certainty and stability for employers and their employees¹². "Fairness" necessarily

8 *Acts Interpretation Act*, s 15AC.

9 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 31 [4]; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 265 [34]; *Baini v The Queen* (2012) 246 CLR 469 at 476 [14]; *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1 at 14 [28]; *Thiess v Collector of Customs* (2014) 250 CLR 664 at 671 [22], quoting *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39]; *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 368 [14]; A2 (2019) 93 ALJR 1106 at 1117 [32], 1131 [124], 1136 [152]; 373 ALR 214 at 223, 242-243, 250.

10 *Fair Work Act*, s 3.

11 *Fair Work Act*, s 3.

12 See also Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at i, iv [r 5], v-vi [r 11].

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has a number of aspects: fairness to employees, fairness between employees, fairness to employers, fairness between employers, and fairness between employees and employers.

15 The NES are in Pt 2-2 of the Act. The NES are "minimum terms and conditions that apply to all national system employees"¹³. The NES recognise that employees have different patterns of work¹⁴ and use the concept of "ordinary hours of work"¹⁵, which can readily be applied to different patterns of work, so employees are treated fairly.

16 The terms and conditions of the employment of national system employees may also be governed by a "modern award"¹⁶ or an "enterprise agreement"¹⁷. A modern award or an enterprise agreement may include terms that are ancillary or incidental to an employee's entitlement under the NES or that supplement the NES¹⁸. However, it may contain those terms "only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the [NES]"¹⁹. The Fair Work Commission must approve an enterprise agreement if, among other things, the employee would be "better off overall" if the enterprise agreement applied to the employee than if the relevant modern award applied to the employee²⁰.

13 *Fair Work Act*, s 5(3). See also s 61(1).

14 See, eg, *Fair Work Act*, ss 62(3)(g), 63, 64, 65.

15 *Fair Work Act*, ss 62(1)(b)(ii), 63(1)(b)(ii), 64(1)(b)(ii), 81(3)(a), 81A(2), 87(2), 90(1), 96(2), 99, 106, 106B(1)(c), 111(2), 116, 119(2).

16 *Fair Work Act*, Pt 2-3. A modern award does not apply to an employee when an enterprise agreement applies to the employee in relation to that employment: *Fair Work Act*, s 57.

17 *Fair Work Act*, Pt 2-4.

18 *Fair Work Act*, s 55(4).

19 *Fair Work Act*, s 55(4).

20 *Fair Work Act*, ss 186(1), (2)(c), (2)(d), 193. See also *ALDI Foods Pty Ltd v Shop, Distributive and Allied Employees Association* (2017) 262 CLR 593 at 619 [92].

7.

17 Section 147 provides that a modern award must include terms specifying, or providing for the determination of, an employee's "ordinary hours of work". The note to s 147 provides that "[a]n employee's ordinary hours of work are significant in determining the employee's entitlements under the [NES]"²¹. If there is an enterprise agreement, it is to be expected that it would state an employee's ordinary hours of work. Here, under the EBA, it was agreed that the ordinary hours of work were 36 hours per week.

18 The "ordinary hours of work" for a national system employee to whom neither a modern award nor an enterprise agreement applies²² is addressed in s 20 of the *Fair Work Act*. For these employees, "ordinary hours of work" is defined to mean "the hours agreed by the employee and his or her national system employer as the employee's ordinary hours of work"²³ or, if there is no agreement, 38 hours for a full-time employee or, for an employee who is not full-time, the lesser of 38 hours and the employee's usual weekly hours of work²⁴.

19 One matter addressed by the NES is the entitlement of national system employees to paid personal/carer's leave²⁵. Section 96 establishes the entitlement of these employees to paid personal/carer's leave and the rate at which it accrues. It provides:

"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.

21 The note is not part of the Act, pursuant to the *Acts Interpretation Act* as in force on 25 June 2009: *Fair Work Act*, s 40A; *Acts Interpretation Act*, s 13(3). However, matters not forming part of an Act may be taken into account when interpreting it: see, eg, *Acts Interpretation Act*, s 15AB(2)(a); *X v Australian Prudential Regulation Authority* (2007) 226 CLR 630 at 641 [35]-[38], 663 [114].

22 *Fair Work Act*, s 12 definition of "award/agreement free employee".

23 *Fair Work Act*, s 20(1).

24 *Fair Work Act*, s 20(2).

25 *Fair Work Act*, Pt 2-2, Div 7, Subdiv A.

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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." (emphasis added)

Consistent with the stated objects of the *Fair Work Act*²⁶, s 96(1) (as part of the NES) is intended to provide fair, relevant and enforceable minimum terms and conditions.

20 Payment of the leave is addressed in s 99. It provides:

"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.*" (emphasis added)

That section provides the *rate* at which the leave is paid: it is the employee's *base rate of pay* for their *ordinary hours of work* in the *period*. The term "base rate of pay" is relevantly defined in s 16 to be "the rate of pay payable to the employee for his or her ordinary hours of work". Thus, both ss 96 and 99 compel the conclusion that it is necessary to ascertain an employee's *ordinary hours of work* and the rate of pay payable for that work in order for the employee to be paid for that leave. Moreover, regardless of the period of leave taken – hours or days – employees will be paid at that rate for the *hours* that they are absent from work.

21 Other provisions of the *Fair Work Act* are relevant to the construction of s 96(1). Sections 100 and 101 address "cashing out" paid personal/carer's leave. Section 100 states that "[p]aid 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". Section 101(1) provides that "[a] modern award or enterprise agreement may include terms providing for the cashing out of paid personal/carer's leave by an employee". Section 101(2) sets out the required terms, which relevantly include that:

- "(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."

26 *Fair Work Act*, s 3(b).

9.

Like ss 96 and 99, the "cashing out" provisions convey that it is necessary to ascertain an employee's *ordinary hours of work* and the rate of pay payable for that work.

22 As s 96(2) states, an entitlement to paid personal/carer's leave accrues progressively in the course of a year of service, for all employees, by reference to ordinary hours worked and not by reference to days or working patterns. All employees working the same number of ordinary hours accrue paid personal/carer's leave at the same rate and, after working the same number of ordinary hours, are entitled under s 99 to be paid for the same number of ordinary hours, regardless of whether their ordinary hours over a two-week period are worked across ten, six, or five days in that period. Under ss 96, 97 and 99, the taking of accrued paid personal/carer's leave is calculated in the same manner. For each hour of accrued paid personal/carer's leave which is taken, the accrued entitlement is reduced by the actual number of hours taken, regardless of the employee's pattern of work.

23 Therefore, in s 96(1), read in its statutory context, what is meant by a "day" or "10 days" must be calculated by reference to an employee's ordinary hours of work. However, the text of the *Fair Work Act* does not describe how a "day" or "10 days" is calculated by reference to an employee's ordinary hours of work. In an employment context, it is to be expected that "10 days" might refer to two standard five-day working weeks²⁷. That accommodates, as it must, that employees' working patterns are not uniform. Construing the expression "10 days" as referring to the equivalent of an employee's ordinary hours of work in a two-week period, or 1/26 of their ordinary hours of work in a year, is consistent with the purpose of the paid personal/carer's leave scheme and, in particular, that of s 96, which is aimed at protecting employees against loss of earnings when they are unable to work for one of the reasons set out in s 97. And it is for those reasons that the scheme confers leave entitlements by reference to an employee's ordinary hours of work, rather than the number of days worked by an employee. The purpose of s 96 is to protect employees against loss of earnings, and it does that by reference to their ordinary hours of work. As a result, the amount of leave accrued does not vary according to their pattern of hours of work.

24 The Union parties submitted that the role of "ordinary hours of work" in the paid personal/carer's leave scheme is limited: first, to identifying the type of

27 See, eg, *In the matter of Applications by Organizations of Employees for Awards and Variations of Certain Awards with respect to Rates of Pay for Work Performed on Saturdays and Sundays* (1947) 58 CAR 610 at 623, quoting *Applications by Organizations of Employees for Variation of Awards with respect to a Five-Day Working Week* (1945) 54 CAR 34 at 36.

work by which an employee accrues paid personal/carer's leave under s 96(2), that is, an employee's "ordinary hours of work" as opposed to unpaid leave or overtime; and, second, to explaining how an employee is to be paid for a period of paid personal/carer's leave under s 99. That submission is rejected. The expression "ordinary hours of work" is significant not only in those two respects but also in calculating the amount of an employee's entitlement to paid personal/carer's leave.

25 It is necessary to address other aspects of the *Fair Work Act*. As explained above, its objects include "providing workplace relations laws that are fair to working Australians, [and] are flexible for businesses"²⁸, and "ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the [NES]"²⁹. Neither of those objects detracts from the significance of an employee's ordinary hours of work as the mechanism for determining the loss of earnings that the employee is protected against. The notion of fairness encompasses fair treatment as between employees according to their ordinary hours of work, regardless of the pattern in which those hours are worked. Fairness and enforceability may both be served by employers and employees both being able to know, at any point in time, precisely how much paid personal/carer's leave an employee has accrued.

26 The "notional day" construction also conforms with the *Fair Work Act* more broadly. First, the similarity of language and concepts in the paid personal/carer's leave scheme in Subdiv A of Div 7 of Pt 2-2 and the paid annual leave scheme in Div 6 reflects that "10 days" (in s 96(1) in respect of paid personal/carer's leave) and "4 weeks" or "5 weeks" (in s 87(1) in respect of paid annual leave) progressively accrue according to an employee's "ordinary hours of work"³⁰ and are cashed out in the same way³¹.

27 Second, within Subdiv CA of Div 7 of Pt 2-2, which addresses unpaid family and domestic violence leave, s 106E states that "[w]hat 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". Section 106E recognises that "day" has a different meaning in Subdiv A of Div 7 (which addresses paid personal/carer's leave) from those provisions dealing with

28 *Fair Work Act*, s 3(a).

29 *Fair Work Act*, s 3(b).

30 See *Fair Work Act*, s 87(2) in relation to accrual of paid annual leave.

31 See *Fair Work Act*, ss 92-94 in relation to the cashing out of paid annual leave.

unpaid pre-adoption leave³², unpaid carer's leave³³, compassionate leave³⁴, and unpaid family and domestic violence leave³⁵. In those provisions referred to in s 106E³⁶, a "day" is not calculated according to an employee's ordinary hours of work. Rather, they authorise an absence for the portion of the 24-hour period that would otherwise be allocated to working. That is unsurprising. Unlike paid personal/carer's leave, none of the types of leave mentioned in s 106E accrues according to an employee's ordinary hours of work. And unlike paid personal/carer's leave, none of the types of leave mentioned in s 106E is paid (except compassionate leave).

28 Third, the definition of "working day" in the *Fair Work Act* as "a day that is not a Saturday, a Sunday or a public holiday"³⁷ recognises the weekend, consistent with the concept of a five-day working week, but also reinforces the conclusion that where "day" is used in the Act, it takes its meaning from the context.

29 The "notional day" construction adopted is further reinforced by the Explanatory Memorandum to the *Fair Work Bill 2008* (Cth). After stating that the objectives of the Bill were, among others, to "provide flexibility and stability for employers and their employees" through modern awards³⁸ and to "promote[] productivity and fairness through enterprise agreements that are tailored to suit the needs of businesses and the needs of employees"³⁹, the Explanatory Memorandum addressed paid personal/carer's leave. It stated that under the NES "[t]he minimum entitlement to paid personal/carer's leave is ten days for each year of service";

32 *Fair Work Act*, s 85.

33 *Fair Work Act*, Pt 2-2, Div 7, Subdiv B.

34 *Fair Work Act*, Pt 2-2, Div 7, Subdiv C.

35 *Fair Work Act*, Pt 2-2, Div 7, Subdiv CA.

36 *Fair Work Act*, s 85 and Pt 2-2, Div 7, Subdivs B, C and CA.

37 *Fair Work Act*, s 12. See also ss 414, 427, 428, 430, 441, 443, 454, 536.

38 Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at i. See also at iv [r 5].

39 Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at ii.

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"[l]eave accrues progressively according to an employee's ordinary hours of work and is cumulative"; and in relation to payment, "[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", unless more generous payment terms are agreed⁴⁰.

30 The Explanatory Memorandum described the operation of the scheme in these terms⁴¹:

"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[.]

40 Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at 63.

41 Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at 64.

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)." (emphasis added)

31 That description records that the Bill was to "ensure[] that the amount of leave accrued over a period [was] not affected by differences in the actual spread of an employee's ordinary hours of work in a week"⁴². The three examples set out under the description just quoted "illustrate the intended operation of the accrual and payment provisions", namely⁴³:

- "• 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.*

42 Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at 64.

43 Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at 65.

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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).

If an employee changes the basis of their employment (eg, if the employee changes from a full-time employee to a part-time employee), they would not lose accrued leave, although the future rate of accrual will be different (based on the employee's new ordinary hours of work)." (emphasis added)

32 Each example is consistent with the "notional day" construction: each example explains that the number of ordinary hours an employee works per week determines the amount of paid personal/carer's leave, measured in hours, that the employee accrues over a year of service (regardless of the number of days in a week that the employee works). The third example is consistent with the expression "10 days" reflecting two standard five-day working weeks when it states that for an employee working an average of 152 hours every four weeks, "over a year he accrues ten days (76 hours) of paid personal/carer's leave"⁴⁴. And, as the Union parties properly conceded, the third example in the Explanatory Memorandum cannot be reconciled with the "working day" construction adopted by the majority in the Full Court below and advanced by the Union parties in this Court.

33 The "notional day" construction is also consistent with the legislative history. The *Workplace Relations Act* was the predecessor to the *Fair Work Act*. As the Explanatory Memorandum to the *Fair Work Bill* stated, the operation of the relevant provisions of the *Workplace Relations Act* was as follows⁴⁵:

"*Personal leave (includes sick leave, carer's leave and compassionate leave)*: an employee is entitled to ten days of paid personal leave per annum after 12 months of service for an employee who works 38 hours per week. This entitlement is pro-rated for employees who have not completed 12 months service."

44 Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at 65.

45 Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at ix [r 22].

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34 The proposed changes to personal/carer's leave (as compared to the *Workplace Relations Act*) were limited⁴⁶:

"*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."

35 That statement in the Explanatory Memorandum was accurate. The paid personal/carer's leave provision in the *Workplace Relations Act*, originally enacted as s 93F(2)⁴⁷, provided as follows:

"*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.*" (emphasis added)

36 The Explanatory Memorandum to the Bill that introduced s 93F(2) stated⁴⁸:

"This is equivalent to *two weeks* of personal leave for employees whose hours do not change over the course of a 12 month period – for example, an employee whose nominal hours worked for a 12 month period were

46 Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at xi [r 26].

47 See *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), Sch 1, item 71. The provision was later renumbered as s 246(2): *Workplace Relations Amendment (Work Choices) Act*, Sch 5.

48 Australia, House of Representatives, *Workplace Relations Amendment (Work Choices) Bill 2005*, Explanatory Memorandum at 115 [556].

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38 hours per week would be entitled to 76 hours of personal leave (which is *two weeks* of 38 hours each). However, the formula *also ensures that employees whose hours vary accrue appropriate amounts of personal leave.*" (emphasis added)

37 Similarly, s 93I(2)⁴⁹ set an annual limit on paid carer's leave. It contained the following example:

"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." (emphasis added)

38 Section 247, which addressed payment for the leave, provided as follows:

"If an employee takes paid personal/carer's leave during a period, *the employee must be paid a rate for each hour* (pro-rated for part hours) of paid personal/carer's leave taken that is no less than the rate that, immediately before the period begins, is the employee's basic periodic rate of pay (*expressed as an hourly rate*)." (emphasis added)

39 The Explanatory Memorandum to the *Fair Work Bill* shows the continuity between the *Workplace Relations Act* and the *Fair Work Act*, consistently with a comparison of the two sets of provisions. Under the *Workplace Relations Act*, each year an employee was entitled to paid personal/carer's leave of 1/26 of the number of nominal hours worked over a year, which amounted to "10 days" or "two weeks" of paid personal/carer's leave. Under the *Fair Work Act*, each year an employee is similarly entitled to paid personal/carer's leave equivalent to an employee's ordinary hours of work in "10 days" or "two weeks", being 1/26 of the employee's nominal hours worked over a year. Further, the *Workplace Relations Act* used "10 days" and "two weeks" as a shorthand for the amount of leave an employee accrues over a year, by reference to the nominal hours worked in a period, and that concept is retained in the *Fair Work Act*⁵⁰.

49 The provision was later renumbered as s 249(2): *Workplace Relations Amendment (Work Choices) Act*, Sch 5.

50 *Acts Interpretation Act*, s 15AC.

40

The Union parties submitted that there was one anomalous consequence of the "notional day" construction, namely that an employee who takes paid personal/carer's leave on a particular day may nonetheless be required to work overtime on that day. The anomaly does not arise. Subdivision A of Div 7 of Pt 2-2 is concerned with protecting employees against loss of pay for ordinary hours of work. Section 99, for example, makes clear that pay for ordinary hours of work is protected. On any view, absence for rostered overtime is unpaid. While Subdiv A of Div 7 of Pt 2-2 does not specifically refer to absence from work during overtime hours⁵¹, an employee taking leave under that Subdivision must give notice of taking leave and the period, or expected period, of leave⁵². It cannot be lawful and reasonable⁵³ for an employer to require an employee to attend work for rostered overtime during a period where an employee has given notice of leave for that period, whether under the Act or, here, under cl 24.3 of the EBA, where employees absent from work because of illness or other unplanned reason "are required to notify [Mondelez] of their absence within 24 hours of their shift commencing, and if reasonably practicable, prior to their shift commencement time" by specific times.

Rejection of the "working day" construction

41

The "working day" construction adopted by the majority in the Full Court (and urged by the Union parties in this Court) is not consistent with the purpose of s 96 or the stated objectives of the *Fair Work Act* of fairness, flexibility, certainty and stability. The "working day" construction would lead to inequalities between employees with different work patterns, and so would be unfair. An employee whose hours are spread over fewer days with longer shifts would be entitled to more paid personal/carer's leave than an employee working the same number of hours per week spread over more days. Thus, on the construction adopted by the majority in the Full Court, an employee working 36 ordinary hours in a week in three shifts of 12 hours (as Ms Triffitt and Mr McCormack do) would be entitled to ten 12-hour days of paid personal/carer's leave per annum, or 120 hours, whereas an employee working 36 ordinary hours in a week in five days of 7.2 hours would be entitled to ten 7.2-hour days of paid personal/carer's leave per annum, or 72 hours. And, as Mondelez submitted, it may be expected that the employee working 12-hour shifts three times a week takes fewer days of paid personal/carer's leave given they work on fewer days than the employee working 7.2 hours,

51 cf *Fair Work Act*, s 22.

52 *Fair Work Act*, s 107.

53 See *Fair Work Act*, ss 62, 63.

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five days a week, and is therefore less likely to need to take paid personal/carer's leave on a working day.

42 Similarly, on the "working day" construction, part-time employees would be entitled to the same amount of leave as, or more leave than, full-time employees. For example, a part-time employee working one day per week for 7.6 hours would be entitled to ten days of paid personal/carer's leave per annum (the same as an employee working 7.6 hours five days a week) and would accrue the leave at five times the rate of a full-time employee. And a part-time employee who works 12 ordinary hours per week as a single shift would accrue 120 hours of leave (ten absences of 12 hours) – almost double the 72 hours of leave a full-time employee working 36 ordinary hours per week over five 7.2-hour days would accrue in a year. Additionally, a person who was employed one day per week by a number of employers would be entitled to ten days of paid personal/carer's leave from each employer. Such results would be directly contrary to a stated object of the *Fair Work Act* of "providing workplace relations laws that are fair to working Australians, are flexible for businesses, [and] promote productivity and economic growth"⁵⁴. Moreover, the "working day" construction would not encourage "flexible working arrangements", another object of the *Fair Work Act*⁵⁵. It would discourage an employer from employing anyone other than one person working a five-day working week, rather than employing a number of people over the course of that week, thereby avoiding employing a number of employees each being entitled to ten days of paid personal/carer's leave per annum. And, of course, it would not be consistent with assisting employees to balance their work and family responsibilities if the only working arrangement on offer was a five-day working week⁵⁶.

43 Further, the "working day" construction would create not only unfairness but also uncertainty. For example, if an employee takes a part day of paid personal/carer's leave, then on the "working day" construction, the Union parties submitted that an employee could take two hours' leave which would be measured as a fraction of a day, not necessarily in hours, though it could be measured in hours. The unfairness and uncertainty created would be that employees who take the same number of hours of paid personal/carer's leave, but who are working shifts

54 *Fair Work Act*, s 3(a). See also Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at i, iv [r 5], v-vi [r 11].

55 *Fair Work Act*, ss 3(d), 65. See also s 3(a).

56 *Fair Work Act*, ss 3(d), 65.

of different hours, will have different portions of the day deducted from their accrued leave.

44 For all those reasons, the submission of the Union parties that the *Fair Work Act* effected a change to ensure that each employee could have ten absences from work per year from each employer, regardless of the hours worked, is rejected.

Conclusion

45 The appeals should be allowed. Order 1 made by the Full Court of the Federal Court of Australia should be set aside and in its place it be declared that: "The expression '10 days' in s 96(1) of the *Fair Work Act 2009* (Cth) means an amount of paid personal/carer's leave accruing for every year of service equivalent to an employee's ordinary hours of work in a week over a two-week (fortnightly) period, or 1/26 of the employee's ordinary hours of work in a year. A 'day' for the purposes of s 96(1) refers to a 'notional day', consisting of one-tenth of the equivalent of an employee's ordinary hours of work in a two-week (fortnightly) period." There will be no order as to costs.

46 GAGELER J. Purposive contextual construction of the text of s 96(1) of the *Fair Work Act 2009* (Cth) cannot let me construe "10 days" to mean 10 average working days calculated as "the employee's average daily ordinary hours of work based on a standard five-day working week" (Mondelez's construction) or "an employee's usual weekly hours of work over a 2 week (fortnightly) period" (the Minister's construction) or "equivalent to an employee's ordinary hours of work in a week over a two-week (fortnightly) period, or 1/26 of the employee's ordinary hours of work in a year" (the construction to which the majority is persuaded). "10 days", in my opinion, means 10 periods each of 24 hours.

47 "Leave", in an employment context, means authorised absence from work. A "day" of leave, in the context of the National Employment Standards in Pt 2-2 of the *Fair Work Act*, means an authorised absence from all work that would otherwise be performed in a period of 24 hours. A fraction of a day of leave corresponds to an authorised absence from the same fraction of the work that would otherwise be performed in a period of 24 hours.

48 That is the uncomplicated sense in which Pt 2-2 of the *Fair Work Act* consistently refers to "days" of "leave" in conferring entitlements on a national system employee, other than a casual employee, to "2 days of unpaid pre-adoption leave"⁵⁷, "2 days of unpaid carer's leave"⁵⁸, "2 days of compassionate leave"⁵⁹ and "5 days of unpaid family and domestic violence leave"⁶⁰. Acknowledging that s 106E (enacted during the course of the proceedings giving rise to these appeals) scrupulously avoids foreclosing the possibility that s 96(1) might refer to "days" of "leave" in some other sense in conferring an entitlement on an employee to "10 days of paid personal/carer's leave", I see no justification for construing s 96(1) as uniquely departing from the standard pattern of specifying the number of 24-hour periods in which absence from work is authorised.

49 Construing "10 days" as a shorthand reference to an unspecified number of ordinary hours of work calculated according to an unexpressed mathematical formula overstrains the minimalist statutory text. Conjuring a formula does not advance the purpose of the conferral of the entitlement. Anomalies and inequities conjectured to arise if "10 days" means 10 periods each of 24 hours are not anomalies or inequities when the nature of the entitlement as a form of statutory income protection is properly understood.

57 Section 85 of the *Fair Work Act*.

58 Section 102 of the *Fair Work Act*.

59 Section 104 of the *Fair Work Act*.

60 Section 106A of the *Fair Work Act*.

Legislative history

50 True it is that s 96(1)'s reference to "10 days" was drawn directly from the text of the statutory example enacted to illustrate the operation of s 246(2) of the *Workplace Relations Act 1996* (Cth), inserted as s 93F(2) by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth). Section 246(2) set out a statutory formula expressed to entitle an employee to accrue an amount of paid personal/carer's leave in the amount of 1/26 of the number of nominal hours worked by the employee during a completed four-week period of continuous service. Section 246(4) went on to require an employer to credit the amount accrued according to that formula incrementally each month. Section 246(1) expressed the total amount of paid personal/carer's leave to which an employee was from time to time entitled in terms of the total credited amount.

51 Not true is that the reference to "10 days" appeared in the statutory example as a shorthand expression of the statutory formula expressed in s 246(2) of the *Workplace Relations Act*. The statutory example, which s 15AD(a) of the *Acts Interpretation Act 1901* (Cth) required not to be taken to be exhaustive, was as follows:

"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."

52 Doing the math, the statutory example can be seen to have implicitly assumed that the employee worked the 38 nominal hours each week over the 12-month period at the regular rate of 7.6 hours each day for five days each week. Only on that assumption could the 76 hours of paid personal/carer's leave produced through the application of the statutory formula set out in s 246(2) be said parenthetically to "amount to 10 days of paid personal/carer's leave for that employee". Far from being a shorthand expression of the formula in s 246(2), the "10 days of paid personal/carer's leave for that employee" was presented in the example as another way of expressing the 76 hours of paid personal/carer's leave resulting from the application of the formula in s 246(2) on the assumptions made in the example. The reference to "10 days" in that context was to 10 periods each of 24 hours, in each of which the nominal hours of work of the employee was assumed to be 7.6 hours.

53 The same assumption, that an employee worked at a regular rate of 7.6 hours each day for five days each week, underlay the explanation in the Explanatory Memorandum to the Bill for the *Fair Work Act* that the *Workplace Relations Act* entitled an employee "to ten days of paid personal leave per annum

after 12 months of service for an employee who works 38 hours per week"⁶¹. The same assumption then flowed through to the explanation that the National Employment Standards "will not change the quantum of the entitlement to personal/carer's leave"⁶². For an employee working 38 nominal or ordinary hours each week at the regular rate of 7.6 hours each day for five days of the week, the quantum of the entitlement to paid personal/carer's leave after 12 months of service would remain exactly the same: the annual entitlement to "10 days of paid personal/carer's leave" to be conferred by s 96(1) of the *Fair Work Act* would equate to the entitlement to 76 hours of paid personal/carer's leave to which that employee would have been entitled under s 246(1) of the *Workplace Relations Act* after 12 months of credits under s 246(4) calculated in accordance with the formula set out in s 246(2).

54 The further explanation in the Explanatory Memorandum to the Bill for the *Fair Work Act* that the National Employment Standards "will ... replace complex rules about the accrual and crediting of paid personal/carer's leave with a single, simple rule"⁶³ holds the key to the true import of the legislative change then proposed to be enacted. The single, simple rule proposed to be enacted in s 96 of the *Fair Work Act* was not some variation of the mathematical formula set out in s 246(2) of the *Workplace Relations Act*. The single, simple rule to be enacted was rather the annual entitlement to "10 days", which was the outcome of applying that formula to the paradigm case of a full-time employee whose nominal hours of work were worked at a regular daily rate over five days each week. The standard annual entitlement of an employee to "10 days" of leave was to accrue progressively proportionately to the employee's ordinary hours of work.

55 Under the single, simple rule then proposed to be enacted in s 96 of the *Fair Work Act*, s 96(1) would entitle all employees to "10 days" of leave for each year of service and s 96(2) would go on to provide for that standard entitlement to "10 days" of leave to accrue over the course of a year of service in proportion to an employee's ordinary hours of work for the year to date expressed as a fraction of the employee's projected ordinary hours of work for the year as a whole.

56 Entitlement to paid personal/carer's leave would henceforth be measured in days and fractions of days, not hours and fractions of hours. Accrual of leave in

61 Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at ix.

62 Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at xi.

63 Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at xi.

days and fractions of days would henceforth be determined simply by applying the ratio indicated in s 96(2) to the standard annual entitlement indicated in s 96(1).

57 Importantly, "10 days" in s 96(1) of the *Fair Work Act* would have precisely the same meaning as "10 days" had in the statutory example enacted to illustrate the operation of s 246(2) of the *Workplace Relations Act*. "10 days" would mean nothing more or less than 10 periods, each of 24 hours, in which work would have been performed if leave had not been taken.

58 Because the measure of the entitlement to paid personal/carer's leave would be changed to days, there would be no need for the *Fair Work Act* to contain any provision along the lines of s 247A of the *Workplace Relations Act*, which made elaborate provision for the taking of additional hours of unpaid leave by a full-time employee whose specified hours of work on a particular day exceeded the nominal hours of work for which the employee was entitled to paid personal/carer's leave. By s 247A, the employer was "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".

59 Henceforth, with the enactment of s 96(1) of the *Fair Work Act*, precisely how many hours of work – whether ordinary hours of work or other hours of work – a particular employee would be entitled to be absent from work on a particular day on which leave might be taken would depend simply on how many hours the employee would otherwise have worked on that day. For an employee who always worked 38 hours at a regular daily rate over five days each week, a day of leave would always translate to an authorised absence from 7.6 ordinary hours of work. For part-time employees, and for full-time employees working concentrated or irregular hours, the number of hours of authorised absence from work on a day of leave might be more or less and might vary from day to day.

60 Turning to the detail of how personal/carer's leave would accrue and be paid in accordance with the *Fair Work Act*, the Explanatory Memorandum to the Bill went on to state that "[t]he 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"⁶⁴. In so stating, the Explanatory Memorandum was highlighting the centrality of the concept of an employee's ordinary hours of work to the operation of s 96(2), which expressly ties the rate of accrual of the annual entitlement conferred by s 96(1) to ordinary hours of work, and of s 99, which expressly obliges the employer to pay the employee at the employee's base rate of pay for

64 Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at 64.

the employee's ordinary hours of work for such period of leave as the employee might take.

61 The Explanatory Memorandum contained nothing to suggest that the concept of an employee's ordinary hours of work needed to be deployed to understand the annual entitlement to "10 days" leave conferred by s 96(1), save that it parenthetically referred to "10 days" as "reflecting a 'standard' 5 day work pattern"⁶⁵. To allude in that way to the derivation of the entitlement expressed as "10 days" is a long way from indicating that the expression was a shorthand reference to an unspecified number of ordinary hours of work calculated according to some unspecified adaptation of the mathematical formula set out in s 246(2) of the *Workplace Relations Act*.

62 Where the Explanatory Memorandum might on a close reading be thought to provide traction for the notion that "10 days" in s 96(1) of the *Fair Work Act* imports some adaptation of the mathematical formula set out in s 246(2) of the *Workplace Relations Act* is in some details of the explanation it went on to give of the outworking of ss 96 and 99. The Explanatory Memorandum stated that "a full-time employee who works 38 hours a week over five days" and "a full-time employee who works 38 ordinary hours over four days per week" would both accrue "76 hours of paid personal/carer's leave" over a year of service⁶⁶. The Explanatory Memorandum then gave three "examples [to] illustrate the intended operation of the accrual and payment provisions", two of which were expressed in relevantly neutral terms but in the third of which the "10 days" of personal/carer's leave accrued over a year of service by a full-time employee named Sudhakar who worked variable hours was parenthetically equated to "76 hours"⁶⁷.

63 If, on the one hand, those details of the explanation of the outworking of ss 96 and 99 were meant to provide a precise and comprehensive explanation of the outworking of s 96(1) as well as of ss 96(2) and 99, the two references to "76 hours" are problematic in that they cannot be reconciled with "10 days" in s 96(1) meaning 10 periods each of 24 hours. The correct explanation would have been that the full-time employee who worked 38 hours over five days each week and the full-time employee who worked 38 ordinary hours over four days each week would both accrue 10 days of leave. The 10 days would translate to a leave

65 Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at 64.

66 Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at 64.

67 Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at 65.

entitlement equivalent to 76 ordinary hours of work in the case of the employee who worked five days a week and to 95 ordinary hours of work in the case of the employee who worked four days a week. In the third illustrative example, the length of Sudhakar's authorised absences from work over 10 days of leave would have depended on how many hours he would otherwise have worked on the days which he took as leave. The annual total might translate to 76 hours or to more or less than 76 hours.

64 If, on the other hand, those details of the explanation of the outworking of ss 96 and 99 were focused on explaining the outworking of s 96(2) and s 99, the two references to "76 hours" appear less problematic. The particular point of comparing the two full-time employees working 38 hours each week, in the language of the Explanatory Memorandum itself, was to emphasise that, "[a]lthough [the entitlement in s 96(1)] 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, [s 96(2)] 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"⁶⁸. The point was not to translate the standard entitlement of "10 days" in s 96(1) into an entitlement expressed in a standard number of hours. The particular point of the third illustrative example was that by operation of s 96(2) Sudhakar would accrue the same standard entitlement of "10 days" over the course of a year notwithstanding that he worked variable hours with overtime with the result that "[i]f he [was] sick and [took] leave for a day, he [would] be entitled [by operation of s 99] 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)"⁶⁹. The point was not that his "10 days" would necessarily translate to an entitlement of 76 hours.

65 What, if anything, should then be made of the Explanatory Memorandum's two references to "76 hours" in considering the meaning of "10 days" in s 96(1) of the *Fair Work Act*? Not nothing, but not much.

66 The pronouncement of five members of the High Court in 2010 that "it is erroneous to look at extrinsic materials before exhausting the application of the ordinary rules of statutory construction"⁷⁰ cannot be understood to have meant

68 Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at 64.

69 Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at 65.

70 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 265 [33]. See also at 264-265 [31].

more than to stress that statements of legislative intention made in extrinsic materials do not "overcome the need to consider the text of a statute to ascertain its meaning"⁷¹. The "modern approach to statutory interpretation", which was well-established before the pronouncement and which has continued in practice afterwards, "(a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which ... one may discern the statute was intended to remedy"⁷².

67 Applying the modern approach to statutory interpretation, consideration of context, including consideration of legislative history and extrinsic materials, "has utility if, and in so far as, it assists in fixing the meaning of the statutory text"⁷³. The quality and extent of the assistance extrinsic materials provide in fixing the meaning of statutory text is not uniform. The quality and extent of the assistance varies in practice in ways unable to be fully appreciated without regard to the provenance and conditions of creation of the extrinsic materials⁷⁴.

68 Explanatory memoranda for all Government Bills other than appropriation and supply Bills introduced into the Commonwealth Parliament have long been required by the practice of the Senate and the standing orders of the House of Representatives⁷⁵. The Department of the Prime Minister and Cabinet has long published a *Legislation Handbook* for the guidance of officers of the Executive Government⁷⁶ the current edition of which describes an explanatory memorandum for a Government Bill as "a companion document to a bill, to assist members of

71 *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at 527 [50].

72 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

73 *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39].

74 See Dharmananda, "Using Parliamentary Materials in Interpretation: Insights from Parliamentary Process" (2018) 41 *University of New South Wales Law Journal* 4.

75 Australia, House of Representatives, *Standing Orders*, standing order 141(b); Elder (ed), *House of Representatives Practice*, 7th ed (2018) at 349-350; Meiklejohn, *Fitting the Bill: A History of Commonwealth Parliamentary Drafting* (2012) at 204-205; Australian Government, Department of the Prime Minister and Cabinet, *Legislation Handbook* (2017) at [13.10].

76 Meiklejohn, *Fitting the Bill: A History of Commonwealth Parliamentary Drafting* (2012) at 204-205.

the Parliament, officials and the public to understand the objectives and detailed operation of the clauses of the bill"⁷⁷. Typically, an explanatory memorandum for a Government Bill is written by officers of the Department whose Minister has portfolio responsibility for the Bill and who have given drafting instructions for the Bill to the Office of Parliamentary Counsel, the principal function of which is "the drafting of proposed laws for introduction into either House of the Parliament"⁷⁸.

69 Explanatory memoranda for Government Bills introduced into the Commonwealth Parliament are written against the background of the Parliament's commitment to the governance of the enacted statutory text accentuated in the constrained language used by the Parliament in s 15AB of the *Acts Interpretation Act* to acknowledge how consideration of an explanatory memorandum or other extrinsic material might be "capable of assisting in the ascertainment of the meaning" of a provision of an Act. Section 15AB acknowledges that consideration of an explanatory memorandum might assist "to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act". Or consideration of the explanatory memorandum might assist "to determine the meaning of the provision" if it "is ambiguous or obscure" or if "the ordinary meaning conveyed by the text of the provision ... is manifestly absurd or is unreasonable".

70 Made clear by omission from s 15AB is that the Commonwealth Parliament does not contemplate that explanatory memoranda might be used by officers of the Executive Government writing them, or by courts considering them, to add to or detract from the text of an enacted provision. Axiomatically, an explanatory memorandum "cannot displace the meaning of the statutory text"⁷⁹ and cannot be "substituted for the text"⁸⁰.

71 Having regard to their provenance and to the circumstances of their creation, explanatory memoranda for Government Bills introduced into the Commonwealth Parliament can ordinarily be taken by courts to be reliable guides to the policy intentions underlying Government sponsored legislation. They can

77 Australian Government, Department of the Prime Minister and Cabinet, *Legislation Handbook* (2017) at [7.1].

78 Section 3(1)(a) of the *Parliamentary Counsel Act 1970* (Cth).

79 *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39].

80 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518.

ordinarily be relied on by courts to explain the overall legislative design and the intended practical operation of provisions and combinations of provisions. Their use of examples of the contemplated operation of provisions can inform in both those respects⁸¹. They can sometimes even yield insight into the precise grammatical sense in which words appear in the texts of provisions⁸².

72 Lacking both the force of law and the precision of parliamentary drafting, however, an explanatory memorandum cannot be taken to be an infallible and exhaustive guide to the legal operation of a provision. Notoriously, explanatory memoranda sometimes get the law wrong⁸³. The potential for error in examples of the contemplated operation of provisions set out in explanatory memoranda is highlighted by the acknowledgement of the Parliament in s 15AD(b) of the *Acts Interpretation Act* that even an enacted example of the operation of a provision might get the legal operation of the provision wrong: "if the example is inconsistent with the provision, the provision prevails".

73 Here, consideration of the Explanatory Memorandum to the Bill for the *Fair Work Act* leads me to conclude that it did not capture with precision the full implications of the single, simple rule of "10 days" proposed to be enacted in s 96(1) in its two obscure references to "76 hours" to which I have drawn attention. The tail would wag the dog were those obscure and debatable references reverse engineered to attribute a complicated and contestable and ungrammatical meaning to the uncomplicated and grammatically meaningful text.

Nature of the entitlement

74 Construing "10 days" to mean 10 periods each of 24 hours is wholly consistent with the nature of the entitlement to paid personal/carer's leave for which s 96(1) of the *Fair Work Act* provides.

81 *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595 at 630-631 [42]-[43].

82 See eg *Mills v Federal Commissioner of Taxation* (2012) 250 CLR 171 at 187-188 [27]-[28], 202-203 [64].

83 eg *Brooks v Commissioner of Taxation* (2000) 100 FCR 117 at 136 [68], referring to *Hepples v Federal Commissioner of Taxation* (1992) 173 CLR 492.

75 Yes, the entitlement accumulates from year to year⁸⁴. Yes, although the entitlement cannot otherwise be cashed out⁸⁵, the terms of a modern award or enterprise agreement can allow for an employee to cash it out⁸⁶ if those terms require that the employee must be paid the "full amount" (an expression I interpret to mean the maximum potential amount) that would have been payable to the employee had he or she taken the leave forgone⁸⁷.

76 But the nature of the entitlement cannot be understood except by reference to the circumstances in which paid personal/carer's leave can be taken and by reference to the quantification of the payment which the employer must make to the employee when it is taken.

77 By operation of s 97(a) of the *Fair Work Act*, paid personal/carer's leave can be taken "because the employee is not fit for work because of a personal illness, or personal injury, affecting the employee". In that respect, paid personal/carer's leave is the modern equivalent of what used to be known as "sick pay" or paid "sick leave": "the right of an employee to receive his ordinary wages in respect of a period during which he is unable, by reason of sickness or accident, to perform his duties"⁸⁸. Sickness being "a misfortune to which all are subject"⁸⁹, sick leave protects employees against the hardship associated with the loss of earnings they would have expected to earn had they been well⁹⁰. By operation of s 97(b), paid personal/carer's leave can only otherwise be taken "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 ... a personal illness, or personal injury ... or ... an unexpected emergency affecting the member". In that

84 Section 96(2) of the *Fair Work Act*.

85 Section 100 of the *Fair Work Act*.

86 Section 101(1) of the *Fair Work Act*.

87 Section 101(2)(c) of the *Fair Work Act*.

88 *Graham v Baker* (1961) 106 CLR 340 at 346.

89 *Australasian Meat Industry Employees Union v Metropolitan and Export Abattoirs Board* (1944) 53 CAR 19 at 21.

90 *Sick Leave Case (Qld)* (1972) 14 AILR 414.

respect, paid personal/carer's leave is an extension of sick leave designed to assist employees in reconciling their employment and family responsibilities⁹¹.

78 Procedural rules safeguard against "sickies". An employee taking paid personal/carer's leave must give the employer notice of the period or the expected period of the leave⁹² and, if required by the employer, must give the employer evidence that would satisfy a reasonable person that the leave is taken for a reason specified in s 97(a) or (b)⁹³.

79 By operation of s 99, "the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work" during whatever period the employee takes paid personal/carer's leave within the scope of the employee's accrued entitlement.

80 The nature of the entitlement that appears when s 96(1) is read in combination with ss 97(a) and (b) and 99 was well-stated by Bromberg and Rangiah JJ in the decision under appeal. They described paid personal/carer's leave as "a statutory form of income protection ... 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"⁹⁴. Illness and injury, it need hardly be said, tend to be random in their occurrence as, by definition, do unexpected emergencies. Effects of those contingencies on fitness for work tend in human experience to be felt more in days or parts of days than in hours or parts of hours. The entitlement to paid personal/carer's leave ensures that, if, when, and for so long as, illness, injury or unexpected emergency results in unfitness of an employee for work, the employee continues to receive the base rate of pay that the employee would have received had the contingency not occurred.

81 Quantification of an entitlement of that nature in "days" not "hours" continues the practice of expressing entitlements to sick leave in terms of a specified number of "sick days" each year established with the first prescription of paid sick leave in an industrial award in 1922⁹⁵. In the century since then, as the

91 *Family Leave Test Case* (1994) 57 IR 121 at 145-147.

92 Section 107(2)(b) of the *Fair Work Act*.

93 Section 107(3)(a) of the *Fair Work Act*.

94 *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2019) 270 FCR 513 at 540 [148] (original emphasis).

95 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1922) 16 CAR 231 at 285.

Full Bench of the Fair Work Commission observed in 2015, expressions of entitlements to sick leave have become "somewhat diverse"⁹⁶.

82 Expressing an entitlement in hours provides greater budgetary certainty for the employer. Budgetary certainty for the employer, however, corresponds to income insecurity for the employee. The choice between the two metrics is one of balance.

83 The *Workplace Relations Act* as amended by the *Workplace Relations Amendment (Work Choices) Act* stated its principal object as being "to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia" by means which included "ensuring compliance with minimum standards ... of ... employee entitlements"⁹⁷. The *Fair Work Act* stated its object as being "to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians" by means which include "ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards"⁹⁸. The difference is significant. The balance shifted.

84 No reason has been shown to suppose that the change in the measure of the entitlement of an employee to paid personal/carer's leave from "hours" to "days" of leave was other than an advertent part of the rebalancing of interests that occurred upon the transition from "work choices" to "fair work". Of the choice between "days" and "hours", "days" fits more comfortably with the entitlement constituting a statutory form of income protection forming part of the "guaranteed safety net" created through the National Employment Standards.

Fairness of the entitlement

85 Recognition that paid personal/carer's leave protects an employee's receipt of a base rate of pay if, when, and for so long as the employee might happen to be unfit for work because of illness, injury or unexpected emergency also provides the answer to the suggestion that construing "10 days" to mean 10 periods each of 24 hours fails to meet the stated statutory objective of the National Employment Standards of ensuring "fair" conditions of employment because it leads to anomalies and inequities between employees.

96 *RACV Road Service Pty Ltd v Australian Municipal, Administrative, Clerical and Services Union* (2015) 249 IR 150 at 179 [81].

97 Section 3(f)(i) of the *Workplace Relations Act*.

98 Section 3(b) of the *Fair Work Act*.

86 The Minister seeks to highlight anomalies and inequities by positing hypothetical examples. Perhaps the most telling is that of a part-time employee who works five 7.6-hour days each week for five different employers. The employee would be able to take up to 76 hours of paid leave from each employer (amounting to 380 hours in aggregate) were the employee to suffer a long-term debilitating illness having worked in that pattern for more than a year. The example shows how an unvarying rule applicable in varying situations can have extreme applications, especially if the rule is stated in one metric and if its applications are measured in another metric. Construction is rarely advanced by reference to "distorting possibilities"⁹⁹.

87 The suggestion of anomalies and inequities is sufficiently illustrated by Mondelez's comparison of one of its actual employees who works 36 ordinary hours each week as five 7.2-hour days with another of its actual employees who works 36 ordinary hours each week compressed into three 12-hour shifts. The first employee's annual entitlement of 10 periods each of 24 hours amounts to 10 authorised absences each of 7.2 hours, equating to a total of 72 hours. The second employee's annual entitlement amounts to 10 authorised absences each of 12 hours, equating to a total of 120 hours. One employer. Two employees. Equal hours of work. Unequal hours of paid leave. What is fair about that?

88 The answer is that to focus on the relative number of hours of paid leave is to miss the point of the entitlement. So is to focus on the relative lengths of the potential authorised absences from work or on the relative dollar values of the potential payments. Each employee has the same entitlement to receive that employee's base rate of pay for all work the employee is unfit to perform over the same number of days because of illness, injury or unexpected emergency. The income of each is equally protected.

Conclusion

89 For these reasons, I would dismiss each appeal.

99 cf *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 43 [32].

EDELMAN J.

Introduction

90 Ms Triffitt and Mr McCormack work for Mondelez Australia Pty Ltd, the appellant in the first mentioned appeal. They each work, on average, 36 hours a week in shifts of 12 hours. In simple terms, they are "shift workers" with their 36 hours of work performed in three shifts over three days. There are also "day workers" at Mondelez. Those day workers also work for 36 hours a week but if their hours are spread over five weekdays they will work for 7.2 hours each weekday.

91 The *Fair Work Act 2009* (Cth) provides that Ms Triffitt and Mr McCormack are entitled to up to two days of unpaid pre-adoption leave¹⁰⁰. It provides that they are entitled to two days of unpaid carer's leave on permissible occasions¹⁰¹. It provides that they are entitled to two days of compassionate leave on permissible occasions¹⁰². It provides that they are entitled to five days of unpaid family and domestic violence leave in a 12 month period¹⁰³. And in the provision with which these appeals are concerned, s 96(1), it provides that they are entitled to "10 days" of paid personal/carer's leave for each year of service with their employer.

92 There was no dispute on these appeals that all of Mondelez's employees are entitled to each of the periods of leave of two days, two days, two days, and five days of work respectively. Mondelez also accepts that day workers with the hours described above are entitled to 10 days of paid personal/carer's leave for each year of service. But Mondelez submits that when the *Fair Work Act* provides for "10 days" of paid personal/carer's leave for shift workers with the hours of Ms Triffitt and Mr McCormack, it has the effect that they have a leave entitlement of the same number of hours as day workers (72 hours) but that given the length of their shifts this equates to a leave entitlement of only six days of work. At first blush, this appears to be a curious effect of the provision in s 96(1) that: "For each year of service with his or her employer, an employee is entitled to 10 days of paid personal/carer's leave."

93 The effect of Mondelez's interpretation is that if a day worker or their child falls ill or needs care on 10 rostered days of work then the day worker is entitled to take paid personal/carer's leave for all of those 10 days. But if a shift worker like Ms Triffitt or Mr McCormack, or one of their children, falls ill or needs care on

100 *Fair Work Act 2009* (Cth), s 85.

101 *Fair Work Act*, s 102.

102 *Fair Work Act*, s 104.

103 *Fair Work Act*, s 106A.

10 rostered days of work then they are entitled to take paid personal/carer's leave only for six of those days of shift work. Given the ordinary meaning of "days" it is unsurprising that the majority of the Full Court of the Federal Court of Australia balked at the submission that "10 days" of leave entitlement for Ms Triffitt and Mr McCormack provided them with, in effect, an entitlement of only six days of leave. Without careful consideration of the operation of the paid personal/carer's leave scheme and without a close examination of the background context to the *Fair Work Act*, such a conclusion might come as a surprise to a reasonable reader of the Act in the position of Ms Triffitt and Mr McCormack or the Union which represents them.

94 The apparent anomaly of Mondelez's interpretation, with 10 days of paid personal/carer's leave for day workers but only six days of paid personal/carer's leave for some shift workers, is lessened once it is appreciated that a shift worker like Ms Triffitt or Mr McCormack, with compressed hours of work and fewer days of work, will be less likely to fall ill and less likely to need to provide care on a day of work, although if they do need to do so then they will need to take more hours of leave on that day of work. Hence a shift worker with the same ordinary hours of work will need fewer days of leave but the same number of hours of leave to ensure the same "safety net" protection of income as a day worker. The anomaly then disappears when the full context of s 96(1) is considered, especially with its different history from the provisions for unpaid pre-adoption leave, unpaid carer's leave, and compassionate leave. When the words of s 96(1) of the *Fair Work Act* are examined in their full context, it becomes apparent that Mondelez's interpretation was that which was intended by Parliament.

The duty of courts in the exercise of statutory interpretation

95 The duty of courts is to give effect to the meaning of statutory words as intended by Parliament. In common with how all speech acts are understood, the meaning is that which a reasonable person would understand to have been intended by the words used in their context. One presumption, or inference based on common experience of legislative acts¹⁰⁴, is that when Parliament uses words with a common or ordinary meaning then the words are intended to bear that ordinary meaning¹⁰⁵. That presumption also reflects the expressed goal of parliamentary

104 *Federal Commissioner of Taxation v Tomaras* (2018) 265 CLR 434 at 466-468 [100]-[102].

105 *Masson v Parsons* (2019) 93 ALJR 848 at 856 [26]; 368 ALR 583 at 591, citing *Cody v J H Nelson Pty Ltd* (1947) 74 CLR 629 at 647, *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 305, 310, 321, 335, *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 31 [4], 46-47 [47], *Esso Australia Pty Ltd v*

drafting for clarity and familiarity in order to ensure the transparency and intelligibility of statute law¹⁰⁶. That presumption can be further reinforced by another presumption, that words repeated in a statute are used with the same meaning¹⁰⁷.

96 Nevertheless, even when Parliament does not provide a specific definition of particular statutory words there are instances where Parliament will be understood not to have intended that those undefined statutory words should bear their ordinary meaning. For instance, the more that the ordinary meaning of the words would impair common law rights, and the more fundamental are those rights, the less likely it is that the words will be understood to have been intended to bear their ordinary meaning and the more unusual the meaning of the words that can be countenanced as having been intended¹⁰⁸. More unusual meanings of words can also be countenanced in a range of more common circumstances, and will be likely to be so countenanced where several of these circumstances exist in combination: where the ordinary meaning of the words is contrary to the scheme of the legislation; where the ordinary meaning of the words runs contrary to the legislative history; and where the ordinary meaning of the words is inconsistent with the expressed understanding of the legislative operation in extrinsic materials. None of these matters of context has any greater a priori weight than any other.

97 Consistently with this approach, courts have sometimes interpreted statutory words in a manner contrary to their ordinary meaning in order to give effect to parliamentary intention. For instance, the Privy Council, dismissing an appeal from this Court, held that the word "arrangement" in the former s 260 of the *Income Tax and Social Services Contribution Assessment Act 1936* (Cth) does

Australian Workers' Union (2017) 263 CLR 551 at 582 [52] and *Maunsell v Olins* [1975] AC 373 at 382.

106 Office of Parliamentary Counsel, *Plain English Manual* (2016) at 17 [66].

107 *Tabcorp Holdings Ltd v Victoria* (2016) 90 ALJR 376 at 387 [65]; 328 ALR 375 at 389, citing *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618, *Kline v Official Secretary to the Governor-General* (2013) 249 CLR 645 at 660 [32] and *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661 at 673 [29].

108 See *Mann v Paterson Constructions Pty Ltd* (2019) 93 ALJR 1164 at 1200 [159]; 373 ALR 1 at 41-42, citing *Bropho v Western Australia* (1990) 171 CLR 1 at 18, *Coco v The Queen* (1994) 179 CLR 427 at 437, *Oates v Attorney-General (Cth)* (2003) 214 CLR 496 at 513 [45], *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 553 [11] and *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 217-218 [29], 310 [313].

not bear the ordinary meaning of an initial plan but includes "all the transactions by which [the plan] is carried into effect"¹⁰⁹. This Court held that the word "interview" in former s 570D of the *Criminal Code* (WA) does not bear the ordinary meaning of a formal or structured meeting¹¹⁰ but means "any conversation between a member of the Police Force and a suspect", including an informal conversation initiated by the suspect¹¹¹. And this Court held that the words "otherwise mutilates" in s 45(1)(a) of the *Crimes Act 1900* (NSW) do not bear the ordinary meaning of injury or damage that is more than superficial¹¹² but instead have an open-textured meaning of engaging, otherwise, in the undefined practice of female genital mutilation¹¹³.

98 The ultimate question in every case is the meaning of the words, in all their context, as they were intended by Parliament. Of course, the prolific references by courts to parliamentary intention are not to a subjective intention of any or all of the members of Parliament. Rather, they are shorthand to describe the same general approach that people take to the understanding of language. Words of a statute are not a secret code for lawyers. They are enacted to be read and understood by reasonable, informed people using their everyday tools of language. This involves considering what was intended by the speaker, here the construct of Parliament. Consideration of a speaker's intention requires the speaker's purpose and the context of the spoken words to be considered at the same time as their "ordinary meaning". So too with the interpretation of words enacted by a Parliament¹¹⁴. Ordinary meaning, and usage of words in the legislation with consistent meaning, are therefore only two indicia, albeit usually very powerful indicia, of the intention of the Parliament.

The interpretation of "10 days" in s 96(1)

99 The approach of the majority of the Full Court of the Federal Court has considerable force because the same word ("days") is used in the *Fair Work Act* in provisions that appear before and after the relevant provision (s 96(1)) with its ordinary meaning. The ordinary meaning of a "day" for a worker is a day of work.

109 *Newton v Federal Commissioner of Taxation* (1958) 98 CLR 1 at 7-8; [1958] AC 450 at 465.

110 *Carr v Western Australia* (2007) 232 CLR 138 at 176 [120]-[121].

111 *Carr v Western Australia* (2007) 232 CLR 138 at 158 [62].

112 *R v A2* (2019) 93 ALJR 1106 at 1130-1131 [123]; 373 ALR 214 at 242, referring to *A2 v The Queen* [2018] NSWCCA 174 at [521].

113 *R v A2* (2019) 93 ALJR 1106 at 1139 [165]; 373 ALR 214 at 254.

114 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

However, the ordinary meaning of "days" for a worker, namely "days of work", even combined with the usage of "days" with its ordinary meaning in other provisions of the *Fair Work Act*, does not reflect the intention of Parliament in its use of "10 days" in s 96(1). Rather, a reasonable reader, informed by the full context and history of s 96(1), would conclude that the expression was intended to have a less ordinary meaning, aligning the meaning of s 96(1) with the meaning of its predecessor provision in s 246 of the *Workplace Relations Act 1996* (Cth).

100 The immediate legislative context of s 96(1) is the first significant indicator that the expression "10 days" does not bear its ordinary meaning. The ordinary meaning of "10 days" in the leave entitlement in s 96(1) is not consistent with the scheme of: (i) the manner in which the entitlement accrues (s 96(2)); (ii) the payment for the entitlement (s 99); and (iii) the cashing out of the entitlement (s 101).

101 The provisions concerning accrual, payment, and cashing out of the leave entitlement are part of the same scheme of implementing the entitlement. They must all have the same operation. Each of these provisions is dependent upon calculations based upon an employee's ordinary hours of work, not upon days of work with potentially variable shift lengths. These provisions could not have a harmonious operation if the overall value of the leave entitlement were dependent upon the length of the shifts on discrete (unknown) days upon which it might be or might have been taken. For instance, s 101(2)(c), which depends upon "leave that the employee has forgone", can only sensibly be calculated by reference to ordinary hours of work for employees with variable shifts. The alternative suggested by the first to third respondents to each appeal, namely that the employee can choose the days of work containing the most hours worked as the days in which leave is to be treated as forgone, has no support in s 101. Indeed, an employer could equally assert that the days of work in which leave is to be treated as forgone are those containing the least hours worked.

102 It is, to say the least, extremely artificial to treat the scheme of Subdiv A of Div 7 of Pt 2-2 as requiring the entitlement to leave to be premised on a different unit of time from the accrual, payment, or cashing out of that leave. This artificiality points to the strong likelihood that Parliament did not intend to depart from the scheme adopted in the predecessor *Workplace Relations Act*, where the entitlement to paid personal/carer's leave was expressly dependent upon calculations based upon leave which accrued and was paid or cashed out according to an employee's ordinary hours of work.

103 The legislative history of, and extrinsic materials to, the *Fair Work Act* make it even clearer that the provision for paid personal/carer's leave in s 96(1) of the *Fair Work Act* was intended to be a simplification of, rather than a substantial departure from the operation of, the predecessor provision in s 246 of the *Workplace Relations Act*. For a start, the high level expression of the objects of each Act is similar. No party to these appeals suggested that the object of the

Workplace Relations Act, including "compliance with minimum standards ... [of] employee entitlements"¹¹⁵, differed in any relevant respect from the object of the *Fair Work Act*, including "ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards"¹¹⁶. Further, the Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) confirmed that the National Employment Standards "will not change the quantum of the entitlement to personal/carer's leave" from that provided in the *Workplace Relations Act*¹¹⁷. This is also reinforced by the statutory illustration of the operation of s 246(2) of the *Workplace Relations Act*: in the example, an employee whose nominal hours are 38 hours per week accrues 76 hours of paid leave annually. The example focuses upon 38 hours worked over a week rather than the spread of those hours on days of the week. The example thus equates "10 days" (being equivalent to an average fortnight) to "76 hours" irrespective of the actual spread of the hours worked by the employee in a week.

104 By contrast, if the words of s 96(1) of the *Fair Work Act* were given their ordinary meaning there would be a substantial change in the operation of the provision according to the spread of hours worked during a week by an employee. This change would include new, increased entitlements to paid personal/carer's leave for employees with multiple employers. Compared with a person who works the same hours for one employer, the part-time worker in the common circumstance of having two employers would now have double the entitlements, or triple the entitlements when working for three employers. The ordinary meaning would also provide new entitlements for employees who work part-time for one day a week to be absent for up to two and a half months annually on paid personal/carer's leave.

105 If the words "[f]or each year of service ... 10 days of paid personal/carer's leave" in s 96(1) are given the same meaning as the predecessor provision, s 246 of the *Workplace Relations Act*, then they mean "[f]or each year of service ... 1/26 of the employee's ordinary hours of work over that year of service as paid personal/carer's leave". The provision for an entitlement of "10 days" with progressive accrual "according to the employee's ordinary hours of work" is merely a simpler way of expressing the effective equivalent in the predecessor provision, 1/26 of a year, which accrued in four week periods in that earlier provision. Although rostered overtime outside an employee's "ordinary hours of

115 *Workplace Relations Act 1996* (Cth), s 3(f)(i).

116 *Fair Work Act*, s 3(b).

117 Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at xi.

work"¹¹⁸ would not be included in paid personal/carer's leave, the employee would usually be able to refuse to work overtime on a day of paid personal/carer's leave, for a reason such as illness, where overtime is scheduled. For instance, s 62(1) prohibits an employer from requiring a full-time employee to work more than 38 hours, with hours of leave counted towards that total¹¹⁹, unless the additional hours are reasonable.

106 The Explanatory Memorandum is also inconsistent with the ordinary meaning of "10 days", which ordinary meaning would result in a different entitlement to paid personal/carer's leave when measured in terms of hours when day workers are compared with shift workers. The Explanatory Memorandum provided that the Act would ensure "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 continued as follows¹²⁰:

"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."

107 In view of the full context of s 96(1), the different meaning of the word "days" in s 96(1) from the provisions in the *Fair Work Act* concerning unpaid pre-adoption leave, unpaid carer's leave, and compassionate leave is readily explicable as a simplification of the formula of 1/26 of the ordinary hours of work over a year. That formula differed in the *Workplace Relations Act* from the use of "days" in the *Workplace Relations Act* in relation to unpaid pre-adoption leave¹²¹, unpaid carer's leave¹²², and compassionate leave¹²³.

108 The only leave provision in Div 7 of Pt 2-2 of the *Fair Work Act* which refers to "days" which was not present in the *Workplace Relations Act* is the

118 As defined in *Fair Work Act*, s 20.

119 *Fair Work Act*, s 62(4).

120 Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at 64.

121 *Workplace Relations Act*, s 299.

122 *Workplace Relations Act*, s 250.

123 *Workplace Relations Act*, s 257.

entitlement to five days of unpaid family and domestic violence leave in a 12 month period¹²⁴. When the entitlement to five "days" of unpaid family and domestic violence leave was introduced into the *Fair Work Act*, subsequent to the existence of s 96(1), s 106E was also inserted¹²⁵ as a provision that "makes clear" that a "day of leave" for the reasons of family or domestic violence "is designed to be the same as what constitutes a day of leave for the purposes of pre-adoption leave (in section 85), unpaid carer's leave (in Subdivision B of Division 7) and compassionate leave (in Subdivision C of Division 7)"¹²⁶. Whilst it is highly unlikely that s 106E could have been intended to have the effect of changing the meaning of "day" in s 96(1), the lack of any suggestion in s 106E that a "day of leave" was the same as that which constituted a day of paid personal/carer's leave militates against any suggestion that a "day" in s 106A was intended to have the same meaning as a "day" in s 96(1).

Conclusion

109 The conclusion, therefore, which appears counter-intuitive from the ordinary meaning and impression that a reasonable reader might reach from first reading the legislation, and which is contrary to my initial view prior to examination of the full context of s 96(1), is that the provision of a "10 day" entitlement for Ms Triffitt and Mr McCormack permits only the same six day entitlement for the shift hours that they work to which they were entitled under the *Workplace Relations Act*. That is the only conclusion that can give effect to the meaning that a reasonable, informed reader would understand Parliament to have intended by the words used in their context.

110 The appeals should be allowed. I would have made orders setting aside order 1 made by the Full Court of the Federal Court of Australia and in its place declaring that: "The expression '10 days' in s 96(1) of the *Fair Work Act 2009* (Cth) means 1/26 of the employee's ordinary hours of work in the year of service with their employer." The effect of this declaration is that for every year of service an employee is entitled to an amount of paid personal/carer's leave equivalent to 1/26 of that employee's ordinary hours of work over the year, which is the same as their ordinary hours of work in an average fortnight or a 10 standard working day period. The focus upon the period of a year in the declared meaning, consistently with the opening words of s 96(1), accommodates employees who have different hours of work from fortnight to fortnight. Since the declaration proposed by Kiefel CJ,

124 *Fair Work Act*, s 106A.

125 By the *Fair Work Amendment (Family and Domestic Violence Leave) Act 2018* (Cth).

126 Australia, House of Representatives, *Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018*, Explanatory Memorandum at 6 [41].

41.

Nettle and Gordon JJ will have the same legal effect in practice, I agree with the orders proposed by their Honours.