

# Outline of Mondelez's Oral Argument

## 1. Features of paid personal/carer's leave

- 1.1. Part of the NES (Part 2-2 of the FW Act).
- 1.2. One of 12 forms of leave under the NES (Divs 5-9).
- 1.3. Key features — paid; accrues progressively; accumulates from year to year; may be cashed out (if industrial instrument permits).

## 2. Average Day Construction and Majority (Working Day) Construction<sup>1</sup>

- 2.1. Two competing constructions of s 96.
- 2.2. The Minister's construction arrives at the same outcome as Mondelez's.
- 10 2.3. Down from four constructions.
- 2.4. Effect of the two constructions:
  - 2.4.1. Payment:
    - 2.4.1.1 The same on both constructions.
  - 2.4.2. Accrual:
    - 2.4.2.1 Compressed hours.
    - 2.4.2.2 Part-time employees.
    - 2.4.2.3 Unit of measurement.

## 3. Both constructions are open<sup>2</sup>

- 3.1. Multiple ordinary meanings of the word "day".
- 20 3.2. Section 106E.
- 3.3. The real issue — what *kind* of working day?
- 3.4. Section 96(2).

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<sup>1</sup> Mondelez's Submission (31 Jan 2020) (**Mondelez's Submission**) [6]-[9], [11]-[18].

<sup>2</sup> Mondelez's Submission [19]-[30].

- 3.5. Standard five-day working week.
- 3.6. Notes in the WR Act that use “day” as a shorthand.<sup>3</sup>

#### 4. Purpose of the entitlement<sup>4</sup>

- 4.1. Limited insurance against loss of wages in the event of inability to work due to illness, injury or caring responsibilities.
- 4.2. Parliament would have intended fair and rational allocation of cover.
- 4.3. Level of protection under competing constructions — assuming no “sickies”:
  - 4.3.1. Two weeks’ incapacity per year on the Average Day Construction.
  - 4.3.2. Roster-dependent on the Majority Construction.
- 10 4.4. “Insured sum” (value of accrued leave) under competing constructions:
  - 4.4.1. Two weeks’ pay per year on the Average Day Construction.
  - 4.4.2. Roster-dependent on the Majority Construction.

#### 5. Explanatory Memorandum<sup>5</sup>

- 5.1. FW Act not intended to change the quantum of entitlement.<sup>6</sup>
- 5.2. Ordinary hours of work are central.
- 5.3. General principles:
  - 5.3.1. Employees accrue the equivalent of two weeks’ leave per year.
  - 5.3.2. Based on the standard 5-day working week and roster-independent.
  - 5.3.3. Example of equity between a 5-day and a 4-day worker.
- 20 5.4. Named examples:
  - 5.4.1. Tulah.

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<sup>3</sup> Appellant’s Submissions in M165/2020 (31 Jan 2020) (**Minister’s Submission**) [56]–[59]; Mondelez’s Reply to the AMWU Parties’ Submission Dated 28 February 2020 (20 Mar 2020) [8].

<sup>4</sup> Mondelez’s Submission [41]–[47].

<sup>5</sup> Mondelez’s Submission [31]–[40].

<sup>6</sup> See also Minister’s Submission [52]–[60].

5.4.2. Brendan.

5.4.3. Sudhakar.

5.5. Accrued leave preserved when switching to part-time.

**6. Cashing out — s 101<sup>7</sup>**

6.1. Requires conversion to dollars and hours.

6.2. Easy for the Average Day Construction.

6.3. Problematic for the Majority Construction:

6.3.1. Value of accrued leave volatile and roster-dependent.

6.3.2. Unworkable for employees working different hours on different days:

10 6.3.2.1 No ascertainable hourly equivalent and dollar value.

6.3.2.2 Proposed solutions unpersuasive:

6.3.2.2.1. Employees cannot cash out.

6.3.2.2.2. Employees must be paid on an arbitrary basis.

**7. Other anomalies and inequities of the Majority Construction<sup>8</sup>**

7.1. Effect on part-time employees with multiple jobs.

7.2. Effect on absences of less than a whole shift.

**8. History / why this problem did not arise before the NES**

8.1. Before Work Choices, sick leave largely regulated by awards.

8.2. Early 20<sup>th</sup> century — awards introduce sick leave terms as a cap.

20 8.3. Awards were able to tailor expression of entitlement to roster types.

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<sup>7</sup> Mondelez's Submission [48]–[57].

<sup>8</sup> Mondelez's Submission [60].