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Media Release

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Government seeks to restore clarity to personal leave entitlements

The Morrison Government will seek leave, in the High Court, to appeal a recent Full Federal Court decision, which has sparked confusion and uncertainty around the way sick and carers leave entitlements should be calculated.

Prior to the decision in *Mondelez v AMWU and Ors*, employers and employees all understood that full-time staff who worked a 38 hour week were entitled to accrue 76 hours of personal leave each year, based on the number of ordinary hours they worked over a normal two-week period.

That had been the situation that existed for decades and it was meant to remain the situation when Labor introduced the Fair Work Act in 2009, which changed the wording of the provisions regarding how leave was to be accrued to "10 days" per year.

Critically, Labor reassured employers when it was drafting the Act that the change was not intended to alter the amount of leave available to employees and that the long-standing status quo would remain in place.[i]

Despite those assurances, the Full Federal Court last month found that Labor's definition had significantly changed the amount of leave that some workers were entitled to, compared to others working the same total hours – in some cases by more than 50 per cent depending on the shift pattern they worked.

The court found that a Mondelez staff member who worked three 12-hour shifts each week accrued 120 hours of leave each year (calculated as 10 days x 12 hours). The court further found that a worker who did the same 36-hour week across five shifts would only accrue 72 hours per year (10 x 7.2 hours).

Attorney-General and Minister for Industrial Relations Christian Porter said the decision needed to be appealed because it had created significant inequities between employees, while also exposing employers to cost increases that they estimate could reach up to $2 billion per year.

“Labor was repeatedly warned by business and industry groups when it drafted the Fair Work Act that the change to its definition might one day be interpreted this way,” Mr Porter said.

“But Labor reassured them that the status quo would be maintained, along with the fair and equitable situation that ensured employees who worked the same total number of hours each week would get the same amount of accrued leave.

“The Government believes that Australian employers and, potentially, Australian taxpayers should not be forced to foot the bill for Labor’s mistake, which is why it is necessary to seek to clarify the situation by mounting an appeal.”

The change to the definition is relevant to every business where shifts are worked.

For example, in a business where two part-time employees both work 20 hours each week, but one chooses to work their hours across five shifts and the other across four shifts, one would be entitled 40 hours personal leave per annum (10x4 hours) and the other 50 hours (10x5 hours).

Similarly, an employee who works just one 7.6 hour shift each week would be entitled to 76 hours leave – 10 x 7.6 hours.

In deciding whether to seek leave to appeal the decision, the Government noted the dissenting opinion of Justice O’Callaghan who agreed with Mondelez that the traditional method of calculating leave should continue to apply as the inequities created were not intended by parliament.

Mondelez has announced it intends to lodge its own appeal.

[i] A submission made by Ai Group during the Mondelez hearing demonstrates that industry concerns were discussed in detail with the former Labor Government at the time the Fair Work Act was drafted. The submission states: “Government representatives were adamant that the reference to 10 days in s96(1) needed to be read in conjunction with s.96(2) and, when the two sections were read together, the result was that an employee working 38 ordinary hours per week was entitled to 76 hours of personal/carers leave regardless of whether the employee’s ordinary hours were structured on the basis of 7.6 hour, 10 hour or 12 hour days/shifts.”