HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: **WORKPAC PTY LTD (ACN: 111 076 012)**
Appellant

- and -

ROBERT ROSSATO
First Respondent

MINISTER FOR JOBS AND INDUSTRIAL RELATIONS
Second Respondent

CONSTRUCTION, FORESTRY, MARITIME, MINING & ENERGY UNION
Third Respondent

MATTHEW PETERSEN
Fourth Respondent

Form 27D

THE FIRST RESPONDENT'S SUBMISSIONS

Part I: Publication on the internet

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

[2] The First Respondent (**Mr Rossato**) adopts the defined terms from the Appellant's (**WorkPac's**) submissions, except as expressly defined within these submissions. Mr Rossato also relies on WorkPac's Book of Further Materials (**AFM**) and his own Book of Further Materials (**RFM**).

Part II: Concise statement of the issues

[3] Mr Rossato adopts the Statement of Issues in WorkPac's Submissions at [2] to [4].

Part III: No s 78B notice is required

[4] No notice is required to be given under s 78B of the *Judiciary Act 1903* (Cth).

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Part IV: Statement of material facts

[5] Mr Rossato contests the following of WorkPac's Statement of Facts (at [7]-[8]).

[6] At [7], WorkPac lists the documents which comprised Mr Rossato's contracts. Mr Rossato says further that the contracts consisted of additional terms, including Mr Rossato's rosters or prescribed shifts.[1] Similarly, Mr Rossato says the contracts were not wholly written.[2]

[7] At [8], Mr Rossato says that the FW Act prescribes no form of payment for casual employees. In this case, WorkPac contractually paid to Mr Rossato a flat rate (**Contract Rates**).[3] The Contract Rates were more than the rate required under the Enterprise Agreement for both Casual and Permanent FTMs and, despite bearing the evidential burden, WorkPac called no evidence as to how the Contract Rates were determined or that a casual loading (of any percentage) was an integer in the Contract Rates.[4] WorkPac employed no employees that it designated as "permanent"[5] that could be utilised as a comparator to Mr Rossato, and WorkPac called no evidence as to what it would have paid (or could have paid to attract) a skilled production worker such as Mr Rossato as a "permanent" employee. The only permanent employees who were engaged on the same hours, in the same crews doing the same work as Mr Rossato were Glencore employees who were paid approximately $40,000 a year more than Mr Rossato plus they received paid annual leave, personal leave, notice and redundancy entitlements.[6]

Part V: Mr Rossato's arguments in response to the appeal

Ground 1 –Mr Rossato's status for the purposes of the FW Act

[8] WorkPac's submission in [14] that the FW Act explicitly excludes taking into account the criteria of long term, "regular and systematic" employment in assessing casual employment is wrong. Rather:

(a) Sections 65(2)(b), 67(2) and 384(2)(a) each provide that in specific circumstances a genuine or true casual employee whose history of casual employment meets the tests

[1] Decision at CAB 54 [103]-[104], 61-62 [134] (Bromberg J); CAB 156 [513], 168-172 [561]-[580]. RFM 8 [8(c)], 25-27 [47]-[54], 41-42 [105]-[111], 47-48 [132]-[133].

[2] RFM 8 [8(c)], 25-27 [47]-[54], 33 [75], 41-42 [105]-[111], 47-48 [132]-[133].

[3] AFM 232-236 [First NOCE], 276-280 [Second NOCE], 294-299 [Third NOCE], 302-306 [SOAF-16: Fourth NOCE], 328-332 [Fifth NOCE] and 336-340 [Sixth NOCE].

[4] Decision at CAB 210 [754], 214 [772] (White J).

[5] Decision at CAB 114 [335] (White J); AFM 6 [3.2].

[6] RFM 12-13 [21]-[22]; AFM 36-37 [6.123]-[6.124].

prescribed obtains the benefits related to those provisions. They do not define who is a casual.

(b) These provisions are not inconsistent with the identification of a casual employee as a person who is not subject to a "firm advance commitment" of the type referred to in [15] of WorkPac's submissions.

(c) Each of the exclusions referred to in ss.65(2)(b), 67(2) and 384(2)(a) are applied retrospectively, as explained in *Hamzy v Tricon International Restaurants* at [38] and [41].

(d) The authorities cited in support by WorkPac are unhelpful to resolving the current controversy. *Bluesuits* and *Nightingale* are both unfair dismissal cases, and these cases centred on an assessment at the time of the termination to determine whether the statutory protection from unfair dismissal was enlivened. Similarly, *Telum* was found to *"flawed"* by the Full Court in *Skene* at [118], [130]-[155].

(e) It follows that the reasoning of the Fair Work Commission and its predecessor referred to in [14] of WorkPac's submissions ought not to be preferred.[7]

[9] As explained by Bromberg J[8] and set out in *Skene*,[9] the term "casual employee" has a general law meaning, and the FW Act uses the phrase with that general law meaning.

[10] Both the general law and FW Act contemplates that casual employment is a different type of employment from full-time and part-time employment. The FW Act's rationale for the exclusion of various entitlements to paid leave is that the very nature of true casual employment (being without any firm advance commitment to rostered days and hours) makes those benefits unnecessary or inappropriate.[10] As will be seen, Mr Rossato's employment was the converse of this situation.

[11] For over 3.5 years (from 28 July 2014 until 9 April 2018), Mr Rossato was employed by WorkPac to work a "standard work week"[11] at two Bowen Basin Coal Mines owned by Glencore. Glencore has enterprise agreements that provided very beneficial terms and

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[7] See further on this point, *WorkPac Pty Ltd v Skene* (2018) 264 FCR 536 at [114] to [155] (hereafter ***Skene***).

[8] Decision at CAB 33-35 [31]-[37] (Bromberg J).

[9] *Skene* [154]-[155].

[10] Decision at CAB 41 [57] (Bromberg J); 150 [479]-[481] (White J).

[11] Decision at CAB 55-57 [109]-[115] (Bromberg J); AFM 71 (Enterprise Agreement cl 14.2) and 232 (NOCE 1 under "Daily Working Hours").

conditions.[12] Glencore did not directly employ all the production operators it needed to operate its mines. Rather it sourced an appreciable component of its ongoing operations labour force through (lower cost) labour hire employees supplied through WorkPac.[13] Contrary to the assertion by WorkPac that Glencore "was a stranger" to the contracts between it and Mr Rossato, those contracts nominate a Glencore Manager as Mr Rossato's supervisor and required Mr Rossato to carry out his work assignments under the direction of Glencore.[14] Under Glencore's workforce structure, the available work that Mr Rossato was employed to perform was ongoing and indefinite and WorkPac's need for Mr Rossato to continue to perform this work was stable and predictable.[15]

[12] WorkPac provided Mr Rossato with his roster which accompanied his First NOCE when he was initially employed at Collinsville Mine in July 2014.[16] That roster provided his future hours (on "A Crew") on the 7-on/7-off pattern until 31 December 2014, when it was replaced by a new roster continuing the pattern for all of 2015 (and which listed Mr Rossato as one of the 33 operators on A Crew[17]). These rosters, and their later replacements provided for full-time hours working everyday alongside the Glencore full-time employees.[18] Mr Rossato was required to attend on a drive-in/drive-out basis and his accommodation was arranged by WorkPac in advance.

[13] In reality, there was very little difference between Mr Rossato and any other full-time employee. WorkPac points to the provision of the General Conditions that that Mr Rossato could accept an assignment and WorkPac was not obliged to offer an assignment. This though is merely a result of the umbrella nature of the General Conditions and says nothing about the nature of the contract formed when an assignment was accepted.[19] When that occurred and the employment relationship commenced (thereby attracting the operation of the Enterprise Agreement) the resultant combination of the contract and Enterprise Agreement terms provided:

(a) By way of the Enterprise Agreement, that the hours of work provisions for Casual

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[12] AFM 36-37 [6.123]-[6.124]; RFM 12-13 [21]-[22].

[13] Decision at CAB 32 [22] (Bromberg J); AFM 18 [6.25], 36 [6.120]; RFM 12-13 [20]-[22].

[14] AFM 37 [6.126], 50 (Enterprise Agreement cl 6.2.1), 132-134 (Terms and Conditions cll 2, 5.6, 5.7, 6.3, 6.6).

[15] Decision at CAB 176 [598], 178 [609], 191 [670] (White J).

[16] AFM 223-227.

[17] AFM 238-239. See also AFM 17-18 [6.20B].

[18] AFM 18 [6.25], 21 [6.45], 27 [6.73]-[6.74], 29 [6.83], 30 [6.90(b)], 31 [6.96A], 36-37 [6.123]-[6.1124].

[19] Decision at CAB 31 [20] (Bromberg J); 122 [357] (White J).

Flat Rate FTMs is exactly the same as for permanent Flat Rate FTMs. The hours of work provisions do not provide for engagement for casuals "by the hour", but rather provide that the *"...ordinary hours of work for flat rate FTMs shall be a standard work week"*: cl 14.2. The Enterprise Agreement did not permit Mr Rossato to refuse any rostered hours or even to refuse overtime hours. To the contrary, clause 6.6.1 had the effect that if Mr Rossato absented himself from work for two consecutive days without WorkPac's consent or notification that would be *prima facie* evidence that he abandoned his employment; and clauses 14.2 and 14.3 provided that FTMs like Mr Rossato *"will be required to work reasonable additional hours prescribed in Schedules 3, 4, 5, 6 and 7"* (which stretch up to an average of 70 hours a week) and *"work hours as rostered by the Company to meet business operational needs"*.[20]

(b) By way of the General Conditions, by virtue of clauses 5.4, 6.15 and 7.4, once Mr Rossato accepts an assignment, he "*agrees to complete"* it (clause 5.4); agrees to *"work exclusively for WorkPac"* during it (clause 6.15); and was *"required to work shifts and or rosters as prescribed in the Notice of Offer of Employment"* (including additional or replacement rosters) (clause 7.4).[21]

(c) By way of the NOCEs, Mr Rossato was provided with ongoing employment (subject to notice of termination), a start time and day, notice of daily working hours and told that he would be working *"alternating shifts"*. Mr Rossato had a firm advance commitment to his working hours, such that neither he nor WorkPac ever had to confirm or query whether he was required for work or would attend work on a particular day, because these matters were already agreed via the roster.[22]

[14] WorkPac points to the fact that the NOCEs identified Mr Rossato as casual and provided only a short period of notice as important factors. All of the judges considered these factors not to be significant or not determinative.[23] WorkPac, at the relevant time, was operating on the assumption that its employees would be casual, as long as WorkPac designated them as such - this being apparent from the way WorkPac's defence in *Skene* was conducted.[24] If in doing so, WorkPac mischaracterised the employment relationship,

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[20] AFM 54 (cl 6.6 "Abandonment of Employment"), 71-72 (cl 14 "Hours of Work – Flat Rate FTM").

[21] AFM 133-134 (cll 5.4, 6.15), 136 (cl 7.4).

[22] See footnotes 3 and 17 above.

[23] Decision at CAB 60-61 [127]-[133] (Bromberg J); CAB 166 [551], 174 [590] (White J). See also *Personnel Contracting Pty Ltd* [2020] FCAFC 122 [35]-[37] (Allsop CJ) (hereafter ***Personnel***). (Note: Special leave was granted to appeal *Personnel*).

[24] Decision at CAB 208 [743]-[744] (White J).

then that mischaracterisation would follow through in the terminology of its paperwork and its non-provision of the NES statutory notice on termination of employment.

[15] At [21] of its submissions WorkPac, to aid its argument that Mr Rossato was a casual, seeks to place significance on Mr Rossato's post-contractual conduct, being the one occasion (in over three and a half years) where Mr Rossato did not attend to work without first seeking permission to do so. This example is both wrong (he did seek permission) but is also an example of Mr Rossato's circumstances being the same as a full-time employee. The agreed facts (at AFM 34-35 [6.111]) are that Mr Rossato, after his shift, whilst still in camp, received a telephone call informing him that his partner was very ill and had been airlifted to hospital. He sought out his nominated supervisor for permission but he was not in camp, and he could not find his step-up supervisor. He approached the Open Cut Examiner (a senior position in a black coal mine – who was a WorkPac employee), told him what had happened and that he had to leave urgently, and asked him to pass the message on to his step-up supervisor. He also asked the Open Cut Examiner to fix his timesheet so that his rostered shifts (which were pre-populated on timesheets by WorkPac) were not recorded as worked. WorkPac appears to suggest that a full-time employee would (after hours, in the absence of a manager being present) not have rushed to their partner's side until they had first located and obtained a formal authorisation to do so and that Mr Rossato's ability (or decision) to urgently leave camp to care for his hospitalised partner distinguishes his employment as casual. The suggestion is unconvincing. Mr Rossato's conduct in seeking out permission from multiple supervisors and attending to his pre-populated timesheets actually demonstrates the converse point that there was an ongoing firm advance commitment for Mr Rossato to attend his rostered shifts.

[16] Whilst Mr Rossato contended (and still contends) that his contracts were not wholly in writing,[25] and that post-contractual conduct can be taken into account in characterising his specie of employment, all three judges found Mr Rossato to be other than casual taking WorkPac's case at its highest – that is, by looking only at each of 6 NOCEs as wholly written contractual documents and without taking any post-contractual conduct into account. Contrary to WorkPac's criticism of White J's judgment, all three judges applied conventional reasoning and principle in their consideration of the written documents.[26] In doing so the Full Court found that Mr Rossato was provided a firm advance commitment

[25] RFM 8 [8(c)], 25-27 [47]-[54], 33 [75], 41-42 [105]-[111], 47-48 [132]-[133].

[26] Decision at CAB 46-52 [76]-[97], 80 [211]-[212] (Bromberg J); CAB 156-160 [513]-[529], 170 [573], 174-175 [592] (White J); 259 [952] (Wheelahan J).

by WorkPac to ongoing and regular work and was not a "casual". None of the judges relied on any "*unspoken mutual undertaking"* outside of the written contract.

Contention 2 – Totality of the relationship between WorkPac and Mr Rossato

[17] While the Court below did not have to have to go beyond the written contractual terms to determine that Mr Rossato was other than a casual employee for the purposes of the FW Act, Mr Rossato relies on his submissions made before the Full Court for his Contention 2[27] that it was open to the Court to have regard to the totality of the relationship between himself and WorkPac, such that the Court would not have been prevented from considering post-contractual conduct. Mr Rossato agrees with the reasons provided by Bromberg J in the Decision and the Full Court's reasoning in *Skene*.[28]

Ground 2 – Mr Rossato's status for the purposes of the Enterprise Agreement

[18] White J's reasons at CAB 184-192 [637]-[675], as adopted by Bromberg J at CAB 80-81 [213]-[215] and by Wheelahan J at CAB 259 [952], correctly analyse Mr Rossato's status under the Enterprise Agreement as being not a casual FTM.

[19] The Enterprise Agreement was made under the FW Act. Enterprise agreements may include terms that are ancillary or incidental to an employee's entitlement under the NES or that supplement the NES, but can only contain such terms provided they do not detrimentally affect the employee compared with the NES.[29] It is appropriate to presume that the Enterprise Agreement was intended to operate harmoniously with the FW Act and apply the same meaning to "casual employee" as applicable under the FW Act.[30] The Enterprise Agreement seeks to replicate, as between casuals and non-casuals, the eligibility for entitlements as contained in the NES.[31] Its annual leave provisions, for example, adopts the entitlement as provided in the NES (clause 19.1) and then excludes casual employees from accruing annual leave (clause 19.3), just as the NES does. The absence of notice and severance pay for casual FTMs (clauses 6.5.1 and 12.4); personal leave (clauses 19.7); and the denial of payments for public holidays rostered but not worked (clause 20.3) similarly reflect the scheme of the NES.[32]

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[27] RFM 7 [3], 8 [8], 9-11 [11]-[16], 27-29 [55]-[62].

[28] Decision at CAB 36-42 [41]-[60], 80 [211] (Bromberg J); *Skene* [180] and the cases cited therein.

[29] *Mondelez Australia Pty Ltd v AMWU* (2020) 94 ALJR 818 [16] (hereafter ***Mondelez***); *Skene* [87], [124], [197].

[30] *Skene* [214].

[31] AFM 51-52 (cl 6.5.1), 69-70 (cl 12.4), 78-80 (cl 19.1, 19.3, 19.7), 82 (cl 20.3).

[32] See *Fair Work Act 2009* (Cth) ss 86, 95, 116, 123(1)(c).

[20] Given the joint operation of sections 55, 56 and 186(2)(c) of the FW Act, it is unsurprising that the Enterprise Agreement used the term casual employee in the same manner as the term is used in the FW Act, because the Fair Work Commission is prohibited (by s 186(2)(c)) from approving enterprise agreements that contains terms that exclude any provision of the NES. (Section 56 provides an additional safeguard that a provision in an approved enterprise agreement is void to the extent that it contravenes the NES.) Due to the operation of these provisions, the task of drafting an agreement that creates a new species of casual employee (who is casual for the purposes of the Enterprise Agreement but not for the FW Act) would require the most meticulously clear drafting to find harmony with section 55 of the FW Act. Nothing in the text of the Enterprise Agreement comes close to this.

[21] To the contrary of WorkPac's submission at [30], an agreed categorisation of employment which incorrectly characterises a recognised legal relationship cannot have effect or it will subvert the protections and beneficial nature of the FW Act[33] and true permanent employees will lose their right to guaranteed safety net of fair, relevant, and enforceable minimum terms and conditions through the NES. As observed by Allsop CJ in *Personnel*[34]:

> *Importantly also, the question of employment arises in the context of a statute of social, economic or industrial regulation with the consequences referred to by Bray CJ in R v Allan; Ex parte Australian Mutual Provident Society…. This assists in reinforcing the caution with which one must approach self-categorising or self-characterising terms of a contract which seek to determine contractually the nature of the relationship.* (Citations omitted.)

[22] Further, in [30] and throughout its submissions, WorkPac seeks to characterise the contracts it made with Mr Rossato as the product of considered choice of negotiating parties of equal bargaining power. They are in truth, though, contracts of adhesion,[35] drawn up as templates by WorkPac or their lawyers and presented on a take-it-or-leave-it basis, to

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[33] Decision at CAB 41-42 [58] (Bromberg J); *Personnel* [31], [36] (Allsop CJ); [99]-[100] (Lee J).

[34] *Personnel* [7].

[35] *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (2015) 228 FCR 346, 377-380 [140]-[150] (North and Bromberg JJ); *Autoclenz Limited v Belcher and Ors* [2011] 4 All ER 745, 753-756 [22], [25]-[26], [29]–[32] (Lord Clarke SCJ, with whom Lord Hope DP, Lord Walker, Lord Collins and Lord Wilson SCJJ agreed).

workers who are not even required to sign and return them.[36] Classical notions of freedom of contract do not seamlessly apply in employment contexts,[37] particularly in this case where it was an agreed fact that Mr Rossato was unaware of the legal test for what a casual employee is and relied on WorkPac's offer of employment as being in accordance with the existing laws.[38]

Ground 3 – Set-off, restitution and reg 2.03A

[23] Ground 3 of WorkPac's Notice of Appeal provides that it should be able to able to apply or appropriate certain amounts paid to Mr Rossato against the unpaid entitlements claimed by Mr Rossato by either restitution, set-off or reg 2.03A of the FW Regs.

[24] Doing so would arrive at the same outcome, albeit retroactively, as something that the FW Act expressly prohibits, which is to effect the cashing out of statutory entitlements to paid annual leave and paid personal leave in advance.[39]

[25] The Explanatory Memorandum to the Fair Work Bill 2008 recognised that the non-cashing out prohibitions operated to reflect the "*importance of employees taking leave for the purposes of rest and relaxation*" and to "*ensure that employees retained access to paid leave in the event of injury and illness*".[40] The temporal dimension to the compound entitlements is driven by an employee's needs or convenience.[41]

[26] The significance of the FW Act providing the compound entitlement of *both* an approved absence from work and a right to be paid during that absence would be subverted if an employer could substitute the compound entitlement for a mere monetary entitlements and thereby discharge their liability for not providing paid annual and personal leave.[42] In effect, WorkPac would achieve a result it could never have lawfully contracted for,[43] and

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[36] Decision at CAB 117 [347], 160 [531] (White J). See also AFM 234 for the First NOCE at "Acceptance of Offer".

[37] *Jamsek v ZG Operations Australia Pty Ltd* [2020] FCAFC 119 [248] (Anderson J) (Special leave to appeal granted).

[38] AFM 806-807 [7.6(b)-(c)].

[39] *Fair Work Act 2009* (Cth) ss 92, 100.

[40] Explanatory Memorandum, Fair Work Bill 2008, 61 [378], 65 [398].

[41] Decision at CAB 84 [228] (Bromberg J).

[42] Decision at CAB 84-85 [229] (Bromberg J).

[43] Decision at CAB 219 [794], 251-252 [916] (White J). See also *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 513 (French CJ, Crennan and Kiefel JJ) (hereafter ***Equuscorp***); *Warren v Secretary, Attorney-General's Department* [2021] FCA 89 [95], [110]-[111], [117] (Wheelahan J) (hereafter ***Warren***); *Fair Work Act 2009* (Cth) ss 44, 45, 61(1).

that it could never have made a valid enterprise agreement to implement.[44] Mr Rossato further relies on his submissions made before the Full Court for his Contention 4 (at RFM 73-80 [241]-[260], 85-86 [270]-[276]) that WorkPac should be prevented from subverting the purposes of the FW Act by being allowed to cash-out paid leave entitlements in advance.

Industrial set-off and the general law

[27] Before the Full Court, WorkPac raised submissions on the general law regarding set-off as it has been applied in an Australian industrial context.[45] Mr Rossato dealt with each of the set-off issues raised[46] and agrees with the Decision reached by the Full Court.[47]

[28] WorkPac contends that it can either set-off (a) the difference between the Contract Rates against what would have been paid to a Permanent FTM[48]; or alternatively, (b) the casual loading against unpaid leave entitlements.

[29] WorkPac's contention that it can set-off the difference of the Contract Rates to the Permanent Flat Rate FTM hourly rates should not be accepted because WorkPac's reliance on its cited case authorities is misplaced. The majority of the Full Court expressly found this to be the case because:

(a) In *James Turner Roofing*, Anderson J (with whom Scott and Parker JJ agreed) expressed doubts about whether the "all-in" rate in that case could be used to set-off against entitlements which *"cannot be discharged by the payment of money… no matter how much it may exceed the rates set forth in the award."*.[49] An example of long service leave was given, and Anderson J doubted there would have been a *"close correlation"* in the payments made to be able to allow a set-off (at [48]).

(b) Contrary to the position taken by WorkPac in seeking to rely on the *obiter* in *Linkhill*, Mr Rossato and WorkPac did succeed in making the intended employment

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[44] *Jeld-Wen Glass Australia Pty Ltd* (2012) 213 FCR 549 [19]-[21].

[45] AFM 847-855 [163]-[196].

[46] RFM 84-97 [267]-[307].

[47] Decision at CAB 81-91 [216]-[263] (Bromberg J); 224-255 [818]-[937] (White J); 270-285 [983]-[1021] (Wheelahan J).

[48] WorkPac relies on the following case authorities: *James Turner Roofing Pty Ltd v Peters* (2003) 132 IR 122 at [29] (hereafter ***James Turner Roofing***); *Linkhill Pty Ltd v Director, Officer of the Fair Work Building Industry Inspectorate* (2015) 240 FCR 578 at [99] (hereafter ***Linkhill***); *Fair Work Ombudsman v Transpetrol TM AS* [2019] FCA 400 at [113] (hereafter ***Transpetrol***).

[49] *James Turner Roofing Pty Ltd* [48]. See also the Decision at CAB 243 [880] (White J); 82-83 [223], 276 [999] (Bromberg and Wheelahan JJ agreeing).

relationship – being a relationship with a firm advance commitment as to the duration of employment and the days and hours Mr Rossato would work. That distinguishes it from cases where parties thought they were creating a relationship of a different kind.[50] In addition, unlike in *Linkhill*, WorkPac and Mr Rossato expressly averted to entitlements in the FW Act and the Enterprise Agreement in their contractual bargain.[51] WorkPac, though, having adverted to the entitlements, sought to provide them in a way which was not permitted.

(c) If WorkPac's position was adopted, then in any case where a party did not create the contractual relationship it subjectively intended to make, the employer could set-off any payment against any award or enterprise agreement entitlement irrespective of the reason for which that payment was made or the designation given to it.[52] Such an approach is unsound as it diverts attention from the matters which the parties did agree, the purpose of the payments and the designation given to them.[53]

(d) There have been other case authorities where the industrial set-off principles were applied even in circumstances where (on WorkPac's approach) the parties did not succeed in establishing the kind of relationship they subjectively intended to make, such as *TransAdelaide*, *Discount Lounge Centre* and *Williams v Macmahon Mining (No 2)*.[54]

[30] Any reliance by WorkPac on *TransPetrol* insofar as Rares J looked behind the express designation of payments by the employer to ascribe a "true character" (at [114]-[115]) should be rejected because its application of the principles of set-off is inconsistent with Full Court authority.[55] In any event, *TransPetrol* is distinguishable on the facts because WorkPac knew that the Enterprise Agreement and FW Act applied to Mr Rossato's employment at all material times,[56] and it voluntarily elected to pay Mr Rossato more than was required under the Enterprise Agreement.

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[50] Decision at CAB 243 [881] (White J); 82-83 [223] (Bromberg J agreeing).

[51] Decision at CAB 244 [883] (White J); 82-83 [223] (Bromberg J agreeing).

[52] Decision at CAB 244 [882] (White J); 82-83 [223] (Bromberg J agreeing).

[53] Decision at CAB 244 [885] (White J); 82-83 [223] (Bromberg J agreeing).

[54] Decision at CAB 244 [884] (White J); 82 [223], 280 [1008] (Bromberg and Wheelahan JJ agreeing); *TransAdelaide v Leddy (No 2)* (1998) 71 SASR 413; *Discount Lounge Centre v Wakefield* [2007] SAIRC 15; *Williams v MacMahon Mining Services Pty Ltd (No 2)* (2009) 187 IR 426.

[55] Decision at CAB 234 [849] (White J).

[56] AFM 5 [2.1(b)], 7 [5.2], 806 [7.3].

[31] WorkPac's contention that it can set-off the casual loading should also be rejected, because the Full Court was correct to hold that any casual loading paid (if it can be identified) did not have the requisite *close correlation* or designation to be amenable to set-off against the entitlement to paid leave.[57] Paid leave is not just money – it is a composite entitlement.[58] Annual leave gives valuable rest and recreation that is far more than just a payment.[59] Personal leave (had Mr Rossato been provided it) would have allowed Mr Rossato to take time off on multiple occasions to care for his partner when she was ill, and ultimately, rather than retiring, take personal/carer's leave to care for her.[60] No payment of money now will allow Mr Rossato to go back in time and take that leave, and provide that care.

[32] Finally, at [40] of WorkPac's submission, it appears to contend that a Court could, at its discretion, reduce any compensation payable to Mr Rossato by an Order made pursuant to section 545 of the FW Act with regard to 'analogous' concepts of set-off. Section 545 was not enlivened in these proceedings, being proceedings for a declaration, and this argument was not pursued before the Full Court. No argument was made before the Full Court based on a discretional ability to reduce compensation, and the agreed facts were not compiled in the context of any argument being made about the existence or operation of section 545 of the FW Act. Therefore, WorkPac ought not to be allowed to pursue this argument on appeal.[61]

Restitution (Total failure of consideration)

[33] Before the Full Court, WorkPac's arguments in respect of restitution were framed on two grounds, being (1) the doctrine of mistake and (2) that there was a failure of consideration of a distinct and severable part of Mr Rossato's remuneration. Only failure of consideration is relied on in this appeal, but part of the reasons for why restitution based on mistake failed are illustrative of why restitution for a failure of consideration must also fail.

[34] WorkPac did not establish that any mistake was causative of the Contract Rates it paid to Mr Rossato (which were higher than the Enterprise Agreement rates). It could not

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[57] Decision at CAB 83-86 [225]-[232], 90-92 [254]-[260] (Bromberg J); 252 [917] (White J); 284 [1020] (Wheelahan J).

[58] *Warren* [95], [121] (Wheelahan J).

[59] *Warren* [95] (Wheelahan J).

[60] AFM 809 [7.16(c)-(d)]-[7.17].

[61] *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481, 483 (Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ); *Coulton v Holcombe* (1986) 162 CLR 1, 7-8 (Gibbs CJ, Wilson, Brennan and Dawson JJ).

therefore make out any operative mistake giving it a right to restitution. Rather the "strong impression" from the evidence is that the Contract Rates were paid so to secure Mr Rossato's services by offering a "market" or prevailing rate.[62] (For example, an agreed fact is that Mr Rossato was at all times classified as a level 3 Mineworker. Under his First NOCE, he was paid $49/hour, which is over 15% higher than the Enterprise Agreement's Casual Flat FTM rate at that time).

[35] At [46] of its submission WorkPac makes a similar assertion, not supported by any agreed fact, that it paid Mr Rossato more than permanent employees performing the same work so to derive a benefit over and above the bare performance of work. WorkPac then asserts (at [49]) that restitution would have the effect that Mr Rossato was ultimately remunerated on the basis that he was a permanent employee. There is though no evidence that permanent employees were paid (or would have been paid) less than Mr Rossato's Contract Rates, and no evidence that, viewed objectively, Mr Rossato accepted the Contract Rates on the basis of some particular portion being payable as a "casual loading".

[36] For the reasons set out in the judgment of White J at CAB 213-219 [765]-[794] and Wheelahan J at CAB 264-269 [967]-[981], WorkPac's claim fails at the threshold point of there being no failure of a distinct and severable part of Mr Rossato's remuneration. No part of Mr Rossato's Contract Rates remotely represents the externally imposed, separately identifiable "licence fee" in *Roxborough*.[63] Rather, he was paid flat rates of pay that are indivisible sums as consideration for each hour worked. Other than White J, the Full Court did not find that any of the Contract Rates paid to Mr Rossato even included an identifiable casual loading of 25%.[64]

[37] There is an evident risk in going too far in seeking to infer or construe some particular proportion of the Contract Rates as severable or divisible, despite the parties themselves not having done so in a clear manner. The requirement that restitution is only available when there has been total failure of all, or of a severable part of, the consideration has been maintained.[65] An expansion of the types of case where a Court will imply that part of the consideration is severable or divisible to overcome the requirement that a failure be total will, to that extent, erode the requirement that a failure of consideration be "total".

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[62] Decision at CAB 211-213 [758]-[764] (White J).

[63] *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 (hereafter ***Roxborough***).

[64] Decision at CAB 82-91 [220]-[254] (Bromberg J in respect of all NOCEs); 203 [722]-[723] (White J for the Fourth, Fifth and Sixth NOCEs); 284 [1020] (Wheelahan J).

[65] *Mann v Paterson Constructions Pty Ltd* (2019) 93 ALJR 1164, 1202 at [168] and cases there cited.

[38] Even were it accepted that there was an ascertainable casual loading that comprised a distinct and severable part of Mr Rossato's remuneration, the consideration or basis for that entitlement has not wholly failed and/or the defence of good consideration is made out because Mr Rossato never declined a shift and because Mr Rossato did not take leave when he otherwise could have and the agreed fact is that this benefited WorkPac. Specifically:

(a) Mr Rossato performed his role diligently and for long hours; worked in accordance with the rosters provided to him throughout his employment; and did not, except on one occasion when his partner was hospitalised, make himself unavailable for a shift or seek to take paid or unpaid leave.[66]

(b) Mr Rossato did not take leave when he otherwise wanted to, including to attend a funeral; take holidays for rest and recreation and to catch up with family and friends; attend sporting events; and attend on multiple occasions to provide care and support for his partner who has a chronic, long term lung disease.[67]

(c) Mr Rossato chose to resign when he formed a view that he needed to permanently care for his partner due to her illness, in circumstances where, had he access to paid personal leave at that time, he would have taken some or all of that leave and contemplated further his working career whilst caring for his partner.[68]

(d) Because Mr Rossato did not take annual leave or personal leave, WorkPac did not ever have to find replacement labour for Mr Rossato until the extreme event of Mr Rossato's partner being airlifted to hospital; and was able to meet its obligations to its client Glencore to provide an employee of whom Glencore approved and who Glencore considered a good worker.[69]

[39] Mr Rossato over the 3.5 years he was employed gave up actual leave and the caring and family and rest and relaxation opportunities that leave created. The parties can no longer be put back in the position they were.

[40] Despite WorkPac (but not Mr Rossato) knowing that its characterisation of casual employees was under challenge (and from 24 November 2016[70] found by a court to be wrong), WorkPac drafted its contracts so that they took the contractual risk of that being

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[66] AFM 807-808 [7.13(a), (e) and (f)].

[67] AFM 808-809 [7.16].

[68] AFM 809 [7.17].

[69] AFM 808 [7.14].

[70] Decision at CAB 208 [743]-[744] (White J); AFM 806 [7.5].

the case.[71] Ordering restitution in this case would subvert both the contractual allocation of risk, and the statutory scheme under which Mr Rossato's paid leave entitlements arise. As explained in *Equuscorp*, courts must ensure that neither the grant nor denial of restitution for unjust enrichment stultify an overriding policy or prohibition in the law.[72] WorkPac should not be allowed, by restitution, to achieve in the outcome something it could not lawfully achieve via its contract having regard to the statutory protections and prohibitions in the FW Act. This would be a legally incoherent result.[73]

Regulation 2.03A of the FW Regulations

[41] Before the Full Court, Mr Rossato submitted that reg 2.03A was merely declaratory of the existing law and did not create any new rights having regard to the accompanying Explanatory Note.[74] The Minister accepted then (and now) it was not intended to alter the existing law.[75] Wheelahan J, with whom Bromberg J agreed, accordingly found that reg 2.03A was not "applicable" to the determination of the offset issues because it did not alter or affect the substantive law in determining the demand made by Mr Rossato.[76] A provision in a legislative instrument can be construed as being merely informative and not operative.[77]

[42] White J, with whom Wheelahan and Bromberg JJ also agreed, found that reg 2.03A(1)(d) was not engaged because Mr Rossato had not claimed amounts 'in lieu of' a NES entitlement; instead, Mr Rossato had claimed payment ***for*** entitlements conferred by the NES (and the Enterprise Agreement).[78] Mr Rossato also contends that regulation 2.03A(1)(b) is not engaged as there is no "clearly identifiable" casual loading amount in evidence.

[43] For those reasons, any reliance by WorkPac on reg 2.03A must fail as it confers no new source of legislative offsetting, and it was not otherwise engaged on the facts of this

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[71] Decision at CAB 218-219 [793]-[794], 269 [980]-[981] (White J).

[72] *Equuscorp* [45] (French CJ, Crennan and Keifell JJ), [109]-[111] (Gummow and Bell JJ).

[73] *Warren* [93], [103]-[104], [111], [117].

[74] RFM 97 [308]-[311]; *Legislation Act 2003* (Cth) ss 15J, 39; Explanatory Statement, Fair Work Amendment (Casual Loading Offset) Regulations 2018 (Cth).

[75] Refer to [55] of the Second Respondent's submissions.

[76] Decision at CAB 284-285 [1022]-[1024] (Wheelahan J), 92 [262] (Bromberg J agreeing).

[77] For example, in *Secretary, Department of Education and Training v Simpson Networks Pty Ltd t/as Melbourne School Holiday Club* [2019] FCAFC 239 a legislative instrument was construed as acting as "no more than a reminder" as to the requirements of an Act (at [60]).

[78] Decision at CAB 255-257 [938]-[946] (White J), 92 [262] (Bromberg J agreeing). See also AFM 799-801.

case.

Part VI: Mr Rossato's arguments in support of the Notice of Contention

Contention 1 – No identifiable casual loading or higher rates of pay

Enterprise Agreement not incorporated into the NOCEs or General Conditions

[44] As there is no expressly designated casual loading in any of the NOCEs, WorkPac submitted to the Court below that each of the Contract Rates incorporated the casual loading from the Enterprise Agreement. Mr Rossato submitted that the Enterprise Agreement was not incorporated into any contract of employment with WorkPac through the terms of the NOCEs or the General Conditions.[79] However, White J found that the First, Second and Third NOCEs did incorporate the Enterprise Agreement's casual loading,[80] in substance because these NOCEs *"required reference to the 2012 EA for… the percentage figure of the casual loading… and the [casual loading] rate"* (at [388]). Mr Rossato's position is that Bromberg J at CAB 88-91 ([244]-[254]) correctly confronts the issue that the flat rates at cl 9.1.1(b) of the Enterprise Agreement do not specify any amounts or component for any casual loading to be paid, such that the proposition that any of the Contract Rates include a casual loading cannot be established.

[45] The fact that some of the NOCEs simply refer to a casual loading in the Enterprise Agreement does not mean it should be incorporated in the absence of any reason to view the parties as objectively intending to incorporate terms of the Enterprise Agreement as contractual terms. The parties provided for, in the written NOCEs, the specified Contract Rates in fixed amounts without any reference to rates specified in the Enterprise Agreement or suggestion they might be worked out or broken up according to the Enterprise Agreement. The Enterprise Agreements rates have independent statutory force without needing to become contractual terms, and there is no reason to construe the various NOCEs as demonstrating an intention to adopt statutory rights as contractual ones.[81] In terms of objective background facts, it is an agreed fact that Mr Rossato never knew what amount was paid as a casual loading under his higher Contract Rates,[82] and there is no

[79] RFM 90 [282]-[283], relying on *Byrne v Australia Airlines Limited* (1995) 185 CLR 410.

[80] Decision at CAB 123-129 [361]-[397] (White J), particularly [389]-[390] and [396]. *Cf.* Decision at CAB 86 [235], 88-91 [244]-[254] (Bromberg J); 284 [1020] (Wheelahan J).

[81] *Australian Workers Union v BHP Iron-Ore Pty Ltd* (2001) 106 FCR 482, 552 (Kenny J).

[82] AFM 807 [7.9].

evidence that Mr Rossato knew or familiarised himself with the Enterprise Agreement.[83] For those reasons, the Enterprise Agreement clauses ought not be incorporated into the contracts of employment, and the reasons of Bromberg J should be preferred (at CAB 88-91 [244]-[254]).

No evidence of any identifiable "casual loading" in the Enterprise Agreement Flat Rates

[46] In respect of the Enterprise Agreement, White J's analysis was to the effect that a casual loading can be disaggregated and deconstructed in the Enterprise Agreement's scheduled rates for the Casual Flat Rate FTMs, and that the 25% loading specified in clause 6.4.5(a) was calculated on the applicable Base Rate FTM rate and applied to every hour worked.[84]

[47] On that analysis, the Casual Flat Rate FTM hourly rates should be higher than the Permanent Flat Rate FTM rates by *at least* the casual loading figure paid to the Base Rate FTMs.

[48] Mr Rossato was a level 3 Mineworker at all times,[85] and a "Flat Rate FTM".[86] For most of Mr Rossato's employment, the relevant scheduled rates that most often applied to him was Schedule 7 (1 July 2015 Flat Rates) for "Afternoon & Nights" shifts. In that period, the relevant rates under the Enterprise Agreement for the Base Rate FTMs were:

Schedule 2 – Ordinary Hourly Rate – Base Rate FTMs (AFM 88)			
Mineworker Level 3 (from 1 July 2015 onwards)	Base Rate	Casual Rate	Casual Loading:
	$25.29	$31.62	**+25%** (+$6.33)

[49] For WorkPac's submission to hold true that the Casual Flat Rate FTMs received a casual loading for every hour worked, the actual difference between the Permanent Flat Rates and Casual Flat Rates in the Enterprise Agreement should be *at least* $6.33. This is because any overtime or shift penalties would have been applied to both Permanent and Casual Flat Rate FTMs. However, in the Schedule 7 (Level 3) flat rates (see AFM 104), all patterns of employment have a dollar difference between the permanent and casual flat

[83] *Cf. Goldman Sachs JBWere Services Pty Ltd* [2007] FCAFC 120 [120], [127], [208]-[209]. Note: Some paragraphs, such as [120], are not reproduced in the FCR version.

[84] Decision at CAB 198-204 [704], [724], [753] (White J). *Cf.* CAB 86-91 [235]-[254], 284 [1020] (Bromberg and Wheelahan JJ).

[85] AFM 17 [6.20A].

[86] AFM 9 [5.5]; 845 [148].

rates less than $6.33. On Mr Rossato's calculations the difference between the permanent and casual Schedule 7 (Level 3) Flat Rate FTMs ranges from $4.92 to $3.16. For example, a 45-hour week, >5 Days (Mon-Sun) level 3 Casual Flat Rate FTM mineworker would have been paid $4.92 more than the same Permanent Flat Rate FTM on the same roster (being the difference between the respective $44.72 and $39.80 flat hourly rates). This analysis shows that the Enterprise Agreement does not provide a casual loading of 25% of the Base Rate FTM rates on every hour worked.

[50] Due to the evidentiary gaps and the inconsistencies noted above, the submission of WorkPac that Mr Rossato was paid a casual loading for each hour worked under the applicable Enterprise Agreement (much less under the Contract Rates) is incorrect.

Other contentions

[51] Mr Rossato addressed Contentions 1,[87] 2[88] and 4[89] above.

[52] Mr Rossato otherwise relies on his submissions made before the Full Court for Contentions 3[90] and 5.[91]

Part VII: Estimate of time required for oral argument

[53] Mr Rossato estimates that he will require 3-4 hours to present his oral argument.

Dated 18 February 2021

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[87] See [7], [34], [44]-[50] of these submissions.

[88] See [17], [21]-[22] of these submissions.

[89] See [24]-[26], [40] of these submissions.

[90] RFM 9 [9], 43-52 [112]-[153].

[91] RFM 69-70 [226]-[229], 80-83 [261]-[266].

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: **WORKPAC PTY LTD (ACN: 111 076 012)**
Appellant

- and -

ROBERT ROSSATO
First Respondent

MINISTER FOR JOBS AND INDUSTRIAL RELATIONS
Second Respondent

CONSTRUCTION, FORESTRY, MARITIME, MINING & ENERGY UNION
Third Respondent

10 **MATTHEW PETERSEN**
Fourth Respondent

ANNEXURE TO THE FIRST RESPONDENT'S SUBMISSIONS

Pursuant to [3] of Practice Direction No.1 of 2019, the First Respondent sets out below a list of the statutes and statutory instrument provisions referred to in the submissions.

No:	Short Title:	Pinpoint(s):	Date In Force:
1.	*Judiciary Act 1903* (Cth)	s 78B	Current
2.	*Fair Work Act 2009* (Cth)	ss 44, 45, 55, 56, 61(1), 65(2)(b), 67(2), 86, 92, 95, 100, 116, 123(1)(c), 186(2)(c), 384(2)(a), 545	Current
3.	*Fair Work Regulations 2009* (Cth)	reg 2.03A	Current
4.	*Legislation Act 2003 (Cth)*	ss 15J, 39	Current