



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

File Number: B73/2020  
File Title: WorkPac Pty Ltd v. Rossato & Ors  
Registry: Brisbane  
Document filed: Form 27F - Outline of oral argument  
Filing party: Respondents  
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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

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**Minister for Jobs and Industrial Relations**  
Second Respondent

**Construction, Forestry, Maritime, Mining and Energy Union**  
Third Respondent

**Matthew Petersen**  
Fourth Respondent

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**SECOND RESPONDENT’S OUTLINE OF ORAL SUBMISSIONS**

**Part I: CERTIFICATION**

1. This outline is in a form suitable for publication on the internet.

**Part II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT**

1. The focus of the Minister’s submissions will be on Ground 3.

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2. **(Nature of the Problem)** The present problem arises in cases where: (a) the parties to an employment relationship have co-existing statutory and contractual obligations; (b) the parties have not correctly characterized their statutory obligations and so produced a misalignment between these two categories of obligation; and (c) the statute does not explicitly identify when misaligned contractual payments can be credited towards statutory payment obligations.

3. **(Principle)** In principle, issues about whether a particular act of performance is sufficient to satisfy a particular obligation are determined primarily by the true construction of that obligation. Principles of general law, including the law of appropriation, assist in providing a legal framework to give effect to that construction.
  
4. **(Substantive Approach)** Historically, the authorities which have considered misalignment cases, arising under various employment statutes, have adopted an approach which focuses on the substance of the payment made and the payment obligation. Contractual payments which, in substance, have satisfied the purpose of statutory payment obligations have been treated as sufficient to satisfy both categories of obligation. This approach is correct in principle. The legislation is intended to be practically workable, in a context where mischaracterization is inevitable. An approach which focuses on substance is necessary to avoid injustice, whilst also properly protecting the guaranteed rights of employees.
  
5. **(Specific Tests)** In applying this approach, the authorities have developed a number of more specific tests to determine whether a particular contractual payment discharges a statutory obligation. These tests are helpful but can be imprecise (eg “close correlation”). Appropriate precision can be achieved if they are applied having regard to the relevant statutory purposes.
  
6. **(Leave Payments)** Obligations with statutory force to make payments to an employee in respect of leave – whether by way of paid leave or by way of casual loadings – have a common purpose. The purpose of the payments is to make it financially viable for employees to take time for recreation or other purposes. Given this common purpose, a substantive approach would suggest that contractual payments in respect of casual loadings should ordinarily be treated as satisfying statutory obligations to make payments in respect of paid leave. In mischaracterization cases there would seem to be no statutory obstacle to treating leave loading payments as being in satisfaction of these statutory monetary obligations.

7. The Minister will otherwise rely on her written submissions.

Dated: 10 May 2021



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**John McKenna QC**  
Level 16 Quay Central  
07 3360 3353  
johnmckenna@qldbar.asn.au



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**Bridget O'Brien**  
North Quarter Lane Chambers  
07 3100 2406  
bobrien@qldbar.asn.au