

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON, EDELMAN, STEWARD AND GLEESON JJ

WORKPAC PTY LTD

APPELLANT

AND

ROBERT ROSSATO & ORS

RESPONDENTS

WorkPac Pty Ltd v Rossato
[2021] HCA 23
Date of Hearing: 12 & 13 May 2021
Date of Judgment: 4 August 2021
B73/2020

ORDER

1. *Appeal allowed.*
2. *Set aside the orders made by the Full Court of the Federal Court of Australia on 29 May 2020 and, in their place, declare that:*
 - (a) *Mr Rossato was a casual employee for the purposes of ss 86, 95 and 106 of the Fair Work Act 2009 (Cth) in respect of each of the six assignments with WorkPac Pty Ltd between 28 July 2014 and 9 April 2018; and*
 - (b) *Mr Rossato was a "Casual Field Team Member" for the purposes of the WorkPac Pty Ltd Mining (Coal) Industry Enterprise Agreement 2012.*

On appeal from the Federal Court of Australia

Representation

B W Walker SC with I M Neil SC, D W M Chin SC and C Parkin for the appellant (instructed by Ashurst)

C J Murdoch QC with C G C Curtis for the first respondent (instructed by Franklin Athanasellis Cullen)

J D McKenna QC with B J O'Brien for the second respondent (instructed by MinterEllison)

S Crawshaw SC with R E Reed for the third respondent (instructed by Slater and Gordon Lawyers)

K P Hanscombe QC with J Fetter for the fourth respondent (instructed by Adero Law)

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

CATCHWORDS

WorkPac Pty Ltd v Rossato

Industrial law (Cth) – Contract of employment – Nature of casual employment – Where first respondent employed by appellant labour-hire company under series of six employment contracts or "assignments" – Where first respondent treated as casual employee – Where first respondent not paid entitlements owed by employers to non-casual employees – Where first respondent claimed to have been other than a casual employee – Where first respondent's work pattern followed established shift structure fixed long in advance by roster – Where employment contract provided that employment was on "assignment-by-assignment basis" – Where employment contract provided that appellant under no obligation to offer first respondent further assignments – Whether there existed firm advance commitment as to duration of first respondent's employment or days (or hours) first respondent will work – Whether first respondent employed as casual employee.

Words and phrases – "annual leave", "assignment-by-assignment basis", "binding contractual terms", "casual employee", "compassionate leave", "employment contract wholly in writing", "enterprise agreement", "firm advance commitment", "label", "mere expectation of continuing employment", "National Employment Standards", "nature of the employment relationship", "payment for public holidays", "personal/carer's leave", "post-contractual conduct", "regular and systematic basis", "roster".

Fair Work Act 2009 (Cth), Pt 2-2.

- 1 KIEFEL CJ, KEANE, GORDON, EDELMAN, STEWARD AND GLEESON JJ. The appellant ("WorkPac") is a labour-hire company whose business includes the provision of the services of its employees to firms engaged in the mining of black coal. Among WorkPac's customers is Glencore Australia Pty Ltd and its related entities ("Glencore"), which operate the Collinsville and Newlands mines in Queensland. At all relevant times, Glencore's workforce comprised both its own employees and workers sourced through labour-hire companies such as WorkPac¹.
- 2 The first respondent ("Mr Rossato") was an experienced production worker in the open-cut black coal mining industry. He was employed by WorkPac between 28 July 2014 and 9 April 2018, when he retired. During that time, WorkPac provided his services to Glencore at one or other of the Collinsville and Newlands mines². At all relevant times, WorkPac treated Mr Rossato as a casual employee³.
- 3 On 16 August 2018, the Full Court of the Federal Court of Australia delivered judgment in *WorkPac Pty Ltd v Skene*⁴ ("Skene"). The Full Court held that Mr Skene, who was employed by WorkPac in circumstances similar to those of Mr Rossato and who was likewise treated by WorkPac as a casual employee, was not a casual employee for the purposes of s 86 of the *Fair Work Act 2009* (Cth) ("the Act") and the enterprise agreement applicable to Mr Skene⁵.
- 4 On 2 October 2018, in reliance on the decision in *Skene*, Mr Rossato wrote to WorkPac claiming that he had not worked for it as a casual employee, and claiming that he was entitled to be paid for untaken annual leave, public holidays, and periods of personal leave and compassionate leave taken by him during his employment. These entitlements were said to be due under the Act and the

1 *WorkPac Pty Ltd v Rossato* (2020) 278 FCR 179 at 190 [18], [22] ("Rossato").

2 *Rossato* (2020) 278 FCR 179 at 190 [18], [21], [23], 239 [267].

3 *Rossato* (2020) 278 FCR 179 at 186-187 [2], 239 [268].

4 (2018) 264 FCR 536.

5 Mr Skene's employment was subject to the *WorkPac Pty Ltd Mining (Coal) Industry Workplace Agreement 2007*, the predecessor of the enterprise agreement that applied to Mr Rossato.

Kiefel CJ
Keane J
Gordon J
Edelman J
Steward J
Gleeson J

2.

WorkPac Pty Ltd Mining (Coal) Industry Enterprise Agreement 2012 ("the Enterprise Agreement"), which governed Mr Rossato's employment⁶.

5 WorkPac denied Mr Rossato's claims, and promptly filed an originating application in the Federal Court of Australia seeking declarations that throughout his employment Mr Rossato had been a casual employee for the purposes of the Act and the Enterprise Agreement. WorkPac also sought declarations that, by reason of that status, Mr Rossato was not entitled to paid annual, personal/carer's or compassionate leave or to payment for public holidays; and that he had been paid at a rate which incorporated a 25 per cent casual loading in lieu of those entitlements. In the alternative, if Mr Rossato were found to have been other than a casual employee, WorkPac sought declarations that it was entitled to set off, against the entitlements claimed by Mr Rossato, payments it had made to Mr Rossato in compensation for, or in lieu of, those entitlements; or that it was entitled to restitution in respect of the amounts it had paid to Mr Rossato in excess of his entitlement to remuneration as a permanent employee⁷.

6 On 21 December 2018, Allsop CJ directed, pursuant to s 20(1A) of the *Federal Court of Australia Act 1976* (Cth), that the matter be heard by a Full Court. Allsop CJ also granted leave to intervene in the proceedings to the second respondent ("the Minister") and the third respondent ("the CFMMEU")⁸. On 26 March 2019, Bromberg J granted leave to intervene in the proceedings to the fourth respondent ("Mr Petersen"), who is the applicant in a class action brought against WorkPac on behalf of employees who are said to have been employed in similar circumstances to Mr Skene⁹.

7 WorkPac, as the moving party, sought only declaratory relief. Mr Rossato did not cross-claim for payment of his entitlements, and the Full Court was not asked to quantify those entitlements. Instead, WorkPac agreed that if Mr Rossato

6 *Rossato* (2020) 278 FCR 179 at 187 [3].

7 *Rossato* (2020) 278 FCR 179 at 239-240 [271]-[272].

8 *WorkPac Pty Ltd v Rossato* [2018] FCA 2100.

9 *Rossato* (2020) 278 FCR 179 at 240 [274].

3.

were successful, it would pay him amounts which had been agreed between the parties. WorkPac also agreed to pay Mr Rossato's costs¹⁰.

8 The Full Court of the Federal Court of Australia (Bromberg, White and Wheelahan JJ) concluded that Mr Rossato was not a casual employee for the purposes of the Act and the Enterprise Agreement. The Full Court made declarations that Mr Rossato was entitled to the payments he claimed. The Full Court rejected WorkPac's set off and restitution claims, holding that Mr Rossato's entitlements were not to be reduced by taking into account the amounts paid to Mr Rossato in excess of his entitlements to remuneration as a non-casual employee¹¹.

9 WorkPac now appeals to this Court, arguing that the Full Court ought to have held that Mr Rossato was a casual employee for the purposes of the Act and the Enterprise Agreement. Alternatively, WorkPac argues that the Full Court erroneously rejected its claims in relation to set off and restitution. For the reasons that follow, WorkPac's appeal should be allowed on the basis that Mr Rossato was a casual employee of WorkPac. On that footing, it is unnecessary to consider WorkPac's alternative ground of appeal.

10 Before moving to a discussion of matters germane to the present appeal, it may be noted that the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth), which came into effect after the filing of this appeal but before the appeal was heard, inserted a definition of "casual employee" into the Act¹². It also provided that an award of compensation for permanent employee entitlements payable to an employee mistakenly treated as a casual must be reduced by the amount of any identifiable casual loading paid to the employee¹³. These amendments do not apply to employees like Mr Rossato in respect of whom a court has made a binding decision before commencement that the employee is

10 *Rossato* (2020) 278 FCR 179 at 240-241 [276], 313 [677].

11 *Rossato* (2020) 278 FCR 179 at 188 [10]-[12], 245 [292], 364 [952].

12 Newly inserted s 15A of the Act.

13 Newly inserted s 545A of the Act.

Kiefel CJ
 Keane J
 Gordon J
 Edelman J
 Steward J
 Gleeson J

4.

not a casual employee¹⁴. However, the amendments apply retrospectively to other employees, subject only to limited exceptions¹⁵. The amendments had the stated intention of introducing a statutory definition of casual employment that "incorporates key aspects of the common law as expressed in ... Skene and Rossato", as well as "a statutory offset mechanism so that employers will not have to pay twice for the same entitlements"¹⁶. WorkPac did not seek to argue that the amendments provided any support for its arguments in relation to the proper construction of the term "casual employee" in the Act¹⁷.

Mr Rossato's employment with WorkPac

11 It is useful at the outset to summarise in broad terms the history of
 Mr Rossato's employment with WorkPac to assist an understanding of the reasons
 of the Full Court and the arguments agitated by the parties in this Court.

12 Mr Rossato first applied for employment with WorkPac on 21 December
 2013, using an online registration form. Two days later, he attended WorkPac's
 office in Mackay, where he spoke to a recruitment coordinator and signed a
 single-page document entitled "Casual or Maximum Term Employee Terms &
 Conditions of Employment – Employee Declaration". By signing that document,
 Mr Rossato acknowledged that he had read, understood and agreed to the content

14 Newly inserted cl 46(2)-(4) of Sch 1 to the Act.

15 Newly inserted cl 46(1), (5)-(8) of Sch 1 to the Act.

16 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 9 December 2020 at 11016. See also Australia, House of Representatives, *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020*, Explanatory Memorandum at ii.

17 Compare *Grain Elevators Board (Vict) v Dunmunkle Corporation* (1946) 73 CLR 70 at 85-86. See also *Deputy Federal Commissioner of Taxes (SA) v Elder's Trustee and Executor Co Ltd* (1936) 57 CLR 610 at 625-626; *Masson v Parsons* (2019) 266 CLR 554 at 573-574 [28].

<i>Kiefel</i>	<i>CJ</i>
<i>Keane</i>	<i>J</i>
<i>Gordon</i>	<i>J</i>
<i>Edelman</i>	<i>J</i>
<i>Steward</i>	<i>J</i>
<i>Gleeson</i>	<i>J</i>

5.

of a document entitled "Casual or Maximum Term Employee – Terms and Conditions of Employment" ("the General Conditions")¹⁸.

13 Mr Rossato commenced working with WorkPac on 28 July 2014 as a product operator at Glencore's Collinsville mine. He was employed with WorkPac episodically until his retirement on 9 April 2018 pursuant to a series of six contracts, or "assignments". Each contract was entitled "Notice of Offer of Casual Employment – Flat Rate"¹⁹ except for the third contract, which was entitled "Notice of Offer of Casual Employment". The contracts may conveniently be referred to as the "first NOCE" through to the "sixth NOCE" respectively.

14 Under the first NOCE, Mr Rossato was employed to work at the Collinsville mine between 28 July 2014 and 29 May 2015. On 25 May 2015, Glencore personnel informed Mr Rossato of potential reductions in the workforce at the Collinsville mine. Over the following days, WorkPac encouraged Mr Rossato to accept a new assignment at the Newlands mine.

15 Mr Rossato accepted the terms of the second NOCE and, pursuant to its terms, was employed to work at the Newlands mine between 1 June 2015 and 19 February 2016. The third NOCE involved a reduction in Mr Rossato's rate of pay, and governed Mr Rossato's employment at the Newlands mine between 19 February 2016 and 27 September 2016.

16 Mr Rossato then recommenced working at the Collinsville mine, after the mine resumed operations following a period of shutdown, pursuant to the fourth NOCE, which covered the period between 27 September 2016 and 10 November 2016. The fifth and sixth NOCEs both concerned Mr Rossato's employment at the Collinsville mine and each provided for an increase in Mr Rossato's hourly rate. The fifth NOCE covered the period between 14 November 2016 and 21 December 2016 and the sixth NOCE covered the period between 21 December 2016 and Mr Rossato's retirement on 9 April 2018²⁰.

18 *Rossato* (2020) 278 FCR 179 at 190 [19], 245 [293].

19 *Rossato* (2020) 278 FCR 179 at 190 [20], 245 [294].

20 *Rossato* (2020) 278 FCR 179 at 190 [21], 245-246 [294]-[301].

Kiefel CJ
Keane J
Gordon J
Edelman J
Steward J
Gleeson J

6.

17 In each of Mr Rossato's assignments with WorkPac, he performed work as directed by Glencore. He was allocated to work in crews pursuant to shift rosters issued by Glencore. Each crew consisted of a combination of Glencore employees and WorkPac employees, all performing the same production operator duties under the supervision of a Glencore employee²¹.

18 Shift arrangements were typically set well in advance by the distribution of rosters. Both WorkPac and Mr Rossato were familiar with the regular patterns of work pursuant to these rosters²². Site rosters for the Collinsville and Newlands mines were provided by WorkPac to Mr Rossato together with the first and second NOCEs respectively²³. Towards the end of each year, Glencore provided rosters for each site for the whole of the following year²⁴.

19 Mr Rossato worked on a "drive-in, drive-out" basis: at the commencement of each rostered-on phase of shifts, he drove to the mine site and stayed in accommodation provided by Glencore, and then drove home once the shifts were finished. The accommodation was provided at no charge, with the exception of a period at the Newlands mine during which WorkPac deducted \$35 per week from Mr Rossato's pay²⁵.

20 Most of the time, Mr Rossato worked according to either a "7/7 roster" (seven days on, seven days off)²⁶ or a "5/5/4 roster" (five days on, five days off, four days on, five days off, five days on, four days off)²⁷. The only exceptions to these arrangements were a nine-day induction period at the Collinsville mine, and

21 *Rossato* (2020) 278 FCR 179 at 191 [24], 247 [305].

22 *Rossato* (2020) 278 FCR 179 at 217 [156], 301 [600].

23 *Rossato* (2020) 278 FCR 179 at 208 [107], 217 [152], 218 [160], 247 [306].

24 *Rossato* (2020) 278 FCR 179 at 216 [146], 219 [165], 225-226 [203], 247 [306].

25 *Rossato* (2020) 278 FCR 179 at 215 [142], 218 [159], 247 [304].

26 *Rossato* (2020) 278 FCR 179 at 215-216 [144], 216 [146], 219-220 [172], 225 [199], 225-226 [203], 246 [300], 247 [303].

27 *Rossato* (2020) 278 FCR 179 at 217 [155], 247 [303].

7.

an eight-week "start-up" period while the Collinsville mine recommenced operations after its temporary shutdown²⁸. Both mines closed down for Christmas each year and the Collinsville mine closed between 26 March 2017 and 1 April 2017 due to Cyclone Debbie²⁹.

21 Apart from the mine closures, the only occasions on which Mr Rossato deviated from his rostered hours were three instances to complete additional training or induction at the direction of Glencore³⁰, one shift in February 2016 where his crew was directed not to work because of inclement weather³¹, two shifts in November 2016 as directed by Glencore to allow Mr Rossato a sufficient break between changing from A Crew to D Crew³², and the period between 10 March 2018 and 5 April 2018 when Mr Rossato left the mine to care for his partner, who was suffering a serious illness and had been airlifted to hospital³³. Mr Rossato returned to work for one day on 5 April 2018, before leaving again to care for his partner. Mr Rossato retired on 9 April 2018³⁴.

22 For the duration of the six NOCEs, and aside from the incidents mentioned, Mr Rossato was never asked by WorkPac or Glencore whether he intended to attend work on a day he was rostered; nor did Mr Rossato ever enquire whether he would be required to attend work on a day he was rostered³⁵.

28 *Rossato* (2020) 278 FCR 179 at 247 [303].

29 *Rossato* (2020) 278 FCR 179 at 216 [145], 218 [161], 225-226 [203], 247 [307]-[309].

30 *Rossato* (2020) 278 FCR 179 at 216 [145], 218 [161], 225-226 [203].

31 *Rossato* (2020) 278 FCR 179 at 218 [161], 247 [308].

32 *Rossato* (2020) 278 FCR 179 at 225 [199], 247 [308].

33 *Rossato* (2020) 278 FCR 179 at 225-226 [203], 247-248 [310].

34 *Rossato* (2020) 278 FCR 179 at 247-248 [310].

35 *Rossato* (2020) 278 FCR 179 at 216 [147], 219 [167], 220 [173], 224 [197], 225 [200], 226 [204].

Kiefel CJ
Keane J
Gordon J
Edelman J
Steward J
Gleeson J

8.

The entitlements claimed by Mr Rossato

Under the National Employment Standards

23 Part 2-2 of the Act contains the National Employment Standards ("the NES"), which are said by the Act to be "minimum standards that apply to the employment of employees which cannot be displaced"³⁶. An enterprise agreement must not exclude all or any part of the NES³⁷, and an enterprise agreement has no effect to the extent that it purports to do so³⁸. Among the matters dealt with in the NES are minimum entitlements in respect of annual leave, personal/carer's leave, compassionate leave and public holidays.

24 Division 6 of Pt 2-2 of the Act deals with annual leave. Section 86 provides that Div 6 "applies to employees, other than casual employees". Section 87 creates an entitlement to paid annual leave, and provides that this entitlement shall accrue progressively during a year of service and shall accumulate from year to year. Paid annual leave may be taken for a period agreed between the employee and employer, and the employer must not unreasonably refuse a request to take paid annual leave³⁹. If an employee takes paid annual leave, the employer must pay the employee his or her base rate of pay for his or her ordinary hours of work⁴⁰. Pursuant to s 90(2), if an employee has a period of untaken paid annual leave when his or her employment ends, the employer must pay the employee the amount that would have been payable had the employee taken that leave. Sections 92 to 94 prohibit the "cashing out" of paid annual leave, subject to certain prescribed exceptions.

25 Subdivision A of Div 7 of Pt 2-2 deals with paid personal/carer's leave. Section 95 provides that Subdiv A "applies to employees, other than casual employees". Section 96 creates an entitlement to paid personal/carer's leave. Like

36 s 61(1) of the Act. See also ss 41, 44.

37 s 55(1) of the Act.

38 s 56 of the Act.

39 s 88 of the Act.

40 s 90(1) of the Act.

9.

paid annual leave, this entitlement accrues progressively during a year of service and accumulates from year to year⁴¹; when taken, obliges the employer to pay the employee his or her base rate of pay for his or her ordinary hours of work⁴²; and may not be cashed out subject to certain prescribed exceptions⁴³. All employees, including casual employees, are entitled to two days' unpaid personal/carer's leave⁴⁴.

- 26 Subdivision C of Div 7 of Pt 2-2 deals with compassionate leave. Section 104 provides that all employees, including casual employees, are entitled to compassionate leave. However, s 106 provides that only "an employee, other than a casual employee" is entitled to payment at his or her base rate of pay for his or her ordinary hours of work when taking compassionate leave.

Under the Enterprise Agreement

- 27 The Enterprise Agreement also provided for entitlements, which were superior in some respects to those provided by the NES. As such, the characterisation of Mr Rossato's employment for the purposes of the Enterprise Agreement remains significant. The terms of the Enterprise Agreement insofar as they governed Mr Rossato's employment conditions are summarised more fulsomely later in these reasons. For present purposes, it suffices to note that the Enterprise Agreement employed its own terminology, in that it referred to WorkPac employees as "Field Team Members" ("FTMs") and provided that FTMs were to be employed in one or more of the following five subcategories listed in cl 6.4.1:

- "(a) full-time FTMs; or
- (b) part-time FTMs; or
- (c) casual FTMs; or

41 s 96(2) of the Act.

42 s 99 of the Act.

43 ss 100, 101 of the Act.

44 Pt 2-2, Div 7, Subdiv B of the Act.

Kiefel	CJ
Keane	J
Gordon	J
Edelman	J
Steward	J
Gleeson	J

10.

- (d) limited term or assignment FTMs; or
- (e) FTMs employed for a specific project/site or workplace related task."

28 Leave entitlements were dealt with in cl 19. Clause 19.2 provided that "[a]n FTM" was entitled to annual leave, in addition to the amount provided for in the NES, such that the employee's total entitlement to annual leave was 175 ordinary hours per year. However, cl 19.3, concerning accrual of annual leave, applied only to "FTMs, other than casual employees":

"Accrual of annual leave

FTMs, other than casual employees, accrue annual leave at the following rate:

- 175 hours per annum for 5 weeks annual leave (average of 3.3654 hours per week)
- 210 hours per annum for 6 weeks annual leave (average of 4.0385 hours per week)

- (a) Annual leave is cumulative from year to year.
- (b) Part-time FTMs accrue annual leave on a pro-rata basis."

29 Clauses 19.7 to 19.10 dealt with personal/carer's leave. Clause 19.7 was entitled "Personal / Carer's Leave Entitlement (Permanent FTMs)". It provided that "FTMs, other than casuals" were entitled to 105 ordinary hours of personal/carer's leave (inclusive of the NES entitlement) upon commencing employment, and each year thereafter. Untaken personal leave was to accumulate without limitation. Clause 19.10 provided that "Casual FTMs" were entitled to two days' unpaid carer's leave "in accordance with the Fair Work Act 2009".

30 Clause 19.12 dealt with compassionate leave. Clause 19.12.1 provided that "a permanent FTM" was entitled to two days' compassionate leave for each occasion that an immediate family member or household member developed a serious personal injury or illness or died. This entitlement was expressed to be "[i]n accordance with and subject to the requirements of the *Fair Work Act 2009*". Permanent FTMs were entitled to be paid at the amount they would reasonably

have expected to be paid if they had worked for the period of paid leave⁴⁵. Clause 19.12.5 provided that "Casual FTMs" were entitled to two days' unpaid compassionate leave "in accordance with Fair Work Act 2009".

31 Clause 20 dealt with public holidays. It provided that FTMs may be required to work on public holidays and that flat rate FTMs would be paid at their ordinary rate for any work performed on public holidays. However, it had the effect that only a "permanent FTM" stood down during December would be entitled to payment for Christmas Day, Boxing Day and New Year's Day⁴⁶.

A firm advance commitment

32 Both before the Full Court⁴⁷ and in this Court, the parties accepted that the expression "casual employee" in the Act refers to an employee who has no "firm advance commitment as to the duration of the employee's employment or the days (or hours) the employee will work"⁴⁸.

33 The question whether such a firm advance commitment existed in respect to Mr Rossato is pivotal to the resolution of this appeal. Given that the decision in *Skene* provoked the present litigation, it is desirable to begin by summarising the reasoning in that decision before turning to assess how the Full Court below addressed the issue.

The decision in Skene

34 In *Skene*, the Full Court of the Federal Court of Australia (Tracey, Bromberg and Rangiah JJ) held that the expression "casual employee" was used in s 86 according to its "general law meaning"⁴⁹. As to that meaning, the Full Court

45 Enterprise Agreement, cl 19.12.4.

46 Enterprise Agreement, cl 20.6.

47 *Rossato* (2020) 278 FCR 179 at 191 [31], 240-241 [276], 244 [285], 245 [290].

48 *Skene* (2018) 264 FCR 536 at 571 [153], citing *Hamzy v Tricon International Restaurants* (2001) 115 FCR 78 at 89 [38].

49 *Skene* (2018) 264 FCR 536 at 571 [153]-[155].

Kiefel CJ
Keane J
Gordon J
Edelman J
Steward J
Gleeson J

12.

adopted⁵⁰ the statement of the Full Court in *Hamzy v Tricon International Restaurants*⁵¹ ("*Hamzy*") that:

"The essence of casualness is the absence of a firm advance commitment as to the duration of the employee's employment or the days (or hours) the employee will work."

35 The Full Court in *Skene* considered that the expression "casual employee" takes its meaning, at least in part, by comparing it against other types of employment such as full-time and part-time employment⁵². The Full Court elaborated on the characteristics of casual employment in the following passage⁵³:

"[A] casual employee has no firm advance commitment from the employer to continuing and indefinite work according to an agreed pattern of work. Nor does a casual employee provide a reciprocal commitment to the employer. ... In our view, what is referred to in *Hamzy* as the 'essence of casualness', captures well what typifies casual employment and distinguishes it from either full-time or part-time employment.

The indicia of casual employment referred to in the authorities – irregular work patterns, uncertainty, discontinuity, intermittency of work and unpredictability – are the usual manifestations of an absence of a firm advance commitment of the kind just discussed. An irregular pattern of work may not always be apparent but will not necessarily mean that the underlying cause of the usual features of casual employment, what *Hamzy* identified as the 'essence of casualness', will be absent."

36 The Full Court noted that this understanding was consistent with the scheme of the Act, which excluded casual employees from certain leave entitlements.

50 *Skene* (2018) 264 FCR 536 at 571 [153].

51 (2001) 115 FCR 78 at 89 [38]. See also *Doyle v Sydney Steel Co Ltd* (1936) 56 CLR 545; *Shugg v Commissioner for Road Transport and Tramways (NSW)* (1937) 57 CLR 485 at 491, 496-498.

52 *Skene* (2018) 264 FCR 536 at 574 [170].

53 *Skene* (2018) 264 FCR 536 at 575 [172]-[173].

13.

Casual employees, being those employees who had given and received no firm advance commitment to continuing work, were therefore able to make their own arrangements for rest and recreation, and did not need to be guaranteed leave in the same way as other employees⁵⁴.

37 Their Honours went on to suggest that the characterisation of employment as casual or otherwise required an assessment of "[t]he conduct of the parties to the employment relationship and the real substance, practical reality and true nature of that relationship"⁵⁵. Their Honours observed that this was the settled approach to the question whether a person was an employee as distinct from a contractor, and reasoned that the same approach was appropriate in determining the nature of an employment relationship⁵⁶. Their Honours also said that regard must be had to "the surrounding circumstances created by both the contractual terms and the regulatory regime (including the [Act], awards and enterprise agreements) applicable to the employment"⁵⁷.

The reasoning in the Full Court in this case

38 Before the Full Court, WorkPac argued that the question whether a firm advance commitment had been made was to be determined at the time of entry into the employment contract and, in the case of an employment contract wholly in writing, by reference solely to the express terms of the contract. Resort to post-contractual conduct as an aid to determining the nature of the employment relationship was said to be impermissible. WorkPac submitted that to the extent that it had been held in *Skene* that regard could be had to extrinsic matters, including post-contractual conduct, the decision was wrong and should not be followed⁵⁸. This submission was renewed in this Court.

54 *Skene* (2018) 264 FCR 536 at 574 [168].

55 *Skene* (2018) 264 FCR 536 at 576 [180].

56 *Skene* (2018) 264 FCR 536 at 576 [180].

57 *Skene* (2018) 264 FCR 536 at 577 [181].

58 *Rossato* (2020) 278 FCR 179 at 193 [38]-[41], 244 [287].

Kiefel CJ
Keane J
Gordon J
Edelman J
Steward J
Gleeson J

14.

39 Mr Rossato argued that, taking WorkPac's case at its highest and limiting the analysis to the written terms of the employment contracts, the requisite firm advance commitment was evident in this case from those terms⁵⁹. Bromberg J and White J (with whom Wheelahan J relevantly agreed⁶⁰) accepted this contention and concluded that Mr Rossato was not a casual employee⁶¹. Both of their Honours characterised the NOCEs as contracts that provided for ongoing or indefinite employment in which Mr Rossato was to work regular, constant, predictable hours fixed long in advance. In their Honours' view, employment of this type was, "by its very nature", employment that involved a firm advance commitment⁶².

40 Mr Rossato had also contended⁶³ that the proper approach to determining the existence of a firm advance commitment should be a process of "characterisation" having regard to "[t]he conduct of the parties to the employment relationship and the real substance, practical reality and true nature of that relationship"⁶⁴. In this regard, Bromberg J was disposed to accept that because an employment relationship is dynamic, the character of the relationship may be discerned from the course of dealing between the parties and their conduct, not only in the written terms of the contract which created the relationship⁶⁵. On this view, which Bromberg J did not consider to have been decisive in this case, it was not only the written contract which was being construed or characterised, but the entirety of the employment relationship⁶⁶.

59 *Rossato* (2020) 278 FCR 179 at 193 [40], 194 [43].

60 *Rossato* (2020) 278 FCR 179 at 364 [952].

61 *Rossato* (2020) 278 FCR 179 at 194 [43], 202-203 [80], 286 [518], 288-289 [529].

62 *Rossato* (2020) 278 FCR 179 at 209-210 [114], 296 [576], 298-299 [588].

63 *Rossato* (2020) 278 FCR 179 at 193 [40], 245 [290], 266 [405].

64 *Skene* (2018) 264 FCR 536 at 576 [180].

65 *Rossato* (2020) 278 FCR 179 at 195 [46].

66 *Rossato* (2020) 278 FCR 179 at 195-197 [50]-[54].

15.

41 White J was not persuaded that the conclusion in *Skene*, that it was appropriate to assess the totality of the relationship in determining the nature of the employment relationship, was plainly wrong⁶⁷. However, his Honour expressed his preference for the contrary view: that the existence of a firm advance commitment was properly to be assessed at the time of the commencement of the employment relationship, subject to the possibility of later variation⁶⁸. White J said, rightly, that the Act contemplates that employer and employee alike should know their obligations and entitlements at the commencement of the employment⁶⁹. Nevertheless, as will be seen, his Honour was influenced in his reasoning by the approach in *Skene*, which, for reasons which follow, was erroneous.

WorkPac's submissions

42 In this Court, WorkPac submitted that the characterisation of an employee as "casual" depends entirely on the express or implied terms of the employment contract and (in the case of wholly written employment contracts) without reference to post-contractual conduct. WorkPac noted, by reference to ss 65(2), 67(2) and 384(2) of the Act, that the Act explicitly recognises that casual employment can be "long term", and can involve "a reasonable expectation of continuing employment ... on a regular and systematic basis".

43 WorkPac submitted that no firm advance commitment was evident in the express or implied terms of any of the six NOCEs or otherwise. WorkPac argued that White J erred in the significance he accorded to the rosters pursuant to which Mr Rossato worked, contending that regularity of work is consistent with casual employment. WorkPac emphasised that it was not obliged by the contracts to offer any assignments to Mr Rossato and that he could accept or reject any offer of an assignment.

44 WorkPac submitted that Mr Rossato had been categorised as a "casual FTM" for the purposes of the Enterprise Agreement by virtue of WorkPac informing him (as required by cl 6.4.7) in each NOCE that the status of his engagement was "casual employment", and Mr Rossato accepting each offer of

67 *Rossato* (2020) 278 FCR 179 at 304 [623]-[624], 305 [628]-[630].

68 *Rossato* (2020) 278 FCR 179 at 285-286 [512].

69 *Rossato* (2020) 278 FCR 179 at 281-282 [482]-[484], 285 [510].

Kiefel CJ
Keane J
Gordon J
Edelman J
Steward J
Gleeson J

16.

employment. In this regard, WorkPac accepted that the label "casual" was neither essential nor controlling.

Mr Rossato's submissions

45 None of the members of the Full Court found a firm advance commitment limited in duration. In this Court, Mr Rossato accepted that the relevant firm advance commitment must be for an indefinite period in this case although, in a different case, a firm advance commitment for a fixed period might be sufficient to demonstrate that the employment is not casual. Mr Rossato argued that he had a firm advance commitment to his working hours, agreed by roster, such that neither he nor WorkPac ever had to confirm or query whether he was required for work or whether he would attend work on a particular day.

46 Mr Rossato submitted that Glencore's workforce organisation meant the work he was employed to perform was ongoing and indefinite, and WorkPac's need for him to perform this work was stable and predictable. Mr Rossato emphasised that he was engaged to work a "standard work week"⁷⁰, according to rostered hours, and alongside full-time Glencore employees. Mr Rossato also noted that he worked at the mine on a drive-in, drive-out basis and stayed in accommodation arranged by WorkPac in advance.

47 The respondents who had been granted leave to intervene also made submissions. The CFMMEU and Mr Petersen made submissions generally in support of Mr Rossato. Those submissions did not shed any additional light on the issues before the Court. For the sake of completeness, however, these submissions will be referred to briefly after the arguments agitated by WorkPac and Mr Rossato have been discussed.

The nature of the requisite firm advance commitment

The Act contemplates casual employment may be regular

48 As the issue before this Court is, ultimately, a matter of statutory interpretation, it is as well to begin a consideration of the arguments of the parties with some reference to the Act.

70 Enterprise Agreement, cll 1.6, 14.2; General Conditions, cll 6.28, 7.1; first NOCE, "Daily Working Hours" clause.

17.

49

The Act did not, at material times, define the term "casual employment". However, the view that there must exist a "firm advance commitment" to continuing work unqualified by indicia of irregularity, such as uncertainty, discontinuity, intermittency and unpredictability, in order for employment to be other than casual conforms with several provisions of the Act. In s 65, which is concerned to facilitate requests by employees for changes in their working arrangements, s 65(2) provides that an employee is:

"not entitled to make the request unless:

- (a) for an employee other than a casual employee – the employee has completed at least 12 months of continuous service with the employer immediately before making the request; or
- (b) for a casual employee – the employee:
 - (i) is a long term casual employee of the employer immediately before making the request; and
 - (ii) has a reasonable expectation of continuing employment by the employer on a regular and systematic basis."

50

Section 65(2)(b)(i) thus contemplates that an employee may be a casual employee even though the employee is a "long term casual employee", which is a term defined to mean a casual employee who⁷¹:

"has been employed by the employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months."

51

Section 65(2)(b)(ii) demonstrates further that the Act does not regard the existence of "a reasonable expectation of continuing employment ... on a regular and systematic basis" to be inconsistent with the nature of casual employment. Rather, such an expectation is entirely consistent with an employee's status as a casual. It can therefore be seen that, so far as the Act is concerned, such an expectation, however reasonable, remains an expectation only and falls short of a "firm ... commitment". A reasonable expectation of continuing employment is

⁷¹ s 12 of the Act.

Kiefel CJ
Keane J
Gordon J
Edelman J
Steward J
Gleeson J

18.

simply not the kind of firm advance commitment to continuing employment the absence of which typifies casual employment.

52 Similar observations may be made in relation to ss 67(2) and 384(2)(a) of the Act. The latter provision is particularly noteworthy in that it is designed to protect employees from unfair dismissal where they have completed a minimum period of employment. Section 384(2)(a) provides:

"[A] period of service as a casual employee does not count towards the employee's period of employment unless:

- (i) the employment as a casual employee was on a regular and systematic basis; and
- (ii) during the period of service as a casual employee, the employee had a reasonable expectation of continuing employment by the employer on a regular and systematic basis".

53 These contextual considerations are strong indications that a mere expectation of continuing employment, however reasonable, is not a basis for distinguishing the employment of other employees from that of a casual employee. White J considered these provisions only in the limited context of addressing the question of when a person's status as a casual employee is to be determined⁷². It is noteworthy, however, that none of the members of the Full Court considered that these provisions had a bearing upon the nature of the firm advance commitment that distinguishes other types of employment from casual employment.

A firm advance commitment is an enforceable commitment

54 In this Court, Mr Rossato's counsel submitted that the existence of "ambiguities" in the written agreements between the parties justified advertence to the manner in which the parties performed the employment to assess whether there was a mutual firm advance commitment to continuing employment on an indefinite basis. Mr Rossato's counsel did not, in the course of argument, press any identified "ambiguity" upon this Court in support of this line of argument.

72 See *Rossato* (2020) 278 FCR 179 at 279-280 [469]-[472], 282 [488]-[490], 283 [494]-[496].

55 Additionally, and importantly, it is to be noted that counsel for Mr Rossato expressly disavowed any suggestion that the contractual agreements between the parties were sham transactions not to be given effect according to their tenor. No suggestion was made that the six NOCEs were intended, in truth, not to be a series of separate engagements but instead to be a disguise for one continuing engagement between the parties. In the absence of such a contention, there is no reason not to regard the NOCEs and associated contractual documents as true, reliable and realistic statements of the rights and obligations to which the parties agreed to bind themselves.

56 In *Commonwealth Bank of Australia v Barker*⁷³, French CJ, Bell and Keane JJ said:

"The employment relationship, in Australia, operates within a legal framework defined by statute and by common law principles, informing the construction and content of the contract of employment."

57 A court can determine the character of a legal relationship between the parties only by reference to the legal rights and obligations which constitute that relationship. The search for the existence or otherwise of a "firm advance commitment" must be for enforceable terms, and not unenforceable expectations or understandings that might be said to reflect the manner in which the parties performed their agreement. To the extent that Bromberg J expressed support for the notion that the characterisation exercise should have regard to the entirety of the employment relationship⁷⁴, his Honour erred.

58 While it is true to say that "[t]he history of the employment relationship is considerably longer than the history of the employment contract"⁷⁵, it is also true that the evolution of the employment relationship is "a classic illustration of the shift from status (that of master and servant) to that of contract (between employer

73 (2014) 253 CLR 169 at 178 [1].

74 *Rossato* (2020) 278 FCR 179 at 195-197 [50]-[54].

75 *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 at 182 [16].

Kiefel CJ
Keane J
Gordon J
Edelman J
Steward J
Gleeson J

20.

and employee)"⁷⁶. Nothing in the statutory framework within which the employment relationship in the present case has been established relevantly inhibits the freedom of parties to enter into a contract for casual employment. So far as casual employment is concerned, the Act leaves the making of such an arrangement to be agreed between employer and employee.

59 In the Full Court, White J referred⁷⁷ to the discussion of the two-tiered structure of an employment contract in Freedland's *The Personal Employment Contract*⁷⁸, where it was said that:

"At the first level there is an exchange of work and remuneration. At the second level there is an exchange of mutual obligations for future performance. The second level – the promises to employ and be employed – provides the arrangement with its stability and its continuity as a contract. The promises to employ and to be employed may be of short duration, or may be terminable at short notice; but they still form an integral and most important part of the structure of the contract. *They are the mutual undertakings to maintain the employment relationship in being which are inherent in any contract of employment properly so called.*" (emphasis in original)

60 White J went on to say⁷⁹:

"In the present context, it is the existence and nature of the underlying mutual undertakings in the second tier which are in question. The undertakings of that kind are commonly not express. They may be implicit in the contract or be inferred from other matters which are express. In an informal contract, they may, like any other term, be inferred from the parties' conduct.

76 *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 at 182-183 [16], citing *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 436.

77 *Rossato* (2020) 278 FCR 179 at 276 [446].

78 Freedland, *The Personal Employment Contract* (2003) at 91.

79 *Rossato* (2020) 278 FCR 179 at 276 [447]-[448].

21.

This counts against WorkPac's submission that the firm advance commitment must be express. It may, however, suggest that the requisite commitment involves something more than an expectation."

61 It is difficult to square these last observations with his Honour's expressed preference for an approach focussed upon the written agreements of the parties, subject to the possibility of a contractual variation⁸⁰. Indeed, it is difficult to be confident about what is meant by "something more than an expectation" if that "something more" is not a binding agreement between the parties by way of a contract or a variation of a contract. Something that is not binding cannot meaningfully be described in a court of law as a "commitment" at all. Some amorphous, innominate hope or expectation falling short of a binding promise enforceable by the courts is not sufficient to deprive an agreement for casual employment of that character.

62 To insist upon binding contractual promises as reliable indicators of the true character of the employment relationship is to recognise that it is the function of the courts to enforce legal obligations, not to act as an industrial arbiter whose function is to synthesise a new concord out of industrial differences. That it is no part of the judicial function to reshape or recast a contractual relationship in order to reflect a quasi-legislative judgment as to the just settlement of an industrial dispute has been emphatically the case in Australia at the federal level since the *Boilermakers Case*⁸¹.

63 To insist that nothing less than binding contractual terms are apt to characterise the legal relationship between employer and employee is also necessary in order to avoid the descent into the obscurantism that would accompany acceptance of an invitation to enforce "something more than an expectation" but less than a contractual obligation. It is no part of the judicial function in relation to the construction of contracts to strain language and legal concepts in order to moderate a perceived unfairness resulting from a disparity in bargaining power between the parties so as to adjust their bargain. It has rightly

80 *Rossato* (2020) 278 FCR 179 at 285-286 [512].

81 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254. See also *Dietrich v The Queen* (1992) 177 CLR 292 at 320. In relation to the position at State level, see *Fish v Solution 6 Holdings Ltd* (2006) 225 CLR 180.

Kiefel CJ
Keane J
Gordon J
Edelman J
Steward J
Gleeson J

22.

been said that it is not a legitimate role for a court to force upon the words of the parties' bargain "a meaning which they cannot fairly bear [to] substitute for the bargain actually made one which the court believes could better have been made"⁸². Even the recognised doctrines of unconscionability or undue influence do not support such a course; and in any event, neither Mr Rossato, nor any of the interveners, sought to suggest that the doctrines of unconscionability or undue influence had any part to play in the resolution of the present dispute.

64 Notwithstanding the express preference of White J for a contractual analysis that establishes the parties' enforceable rights and duties at the commencement of the employment, his Honour reasoned to his conclusion by reference to notions of "underlying"⁸³ and "unspoken mutual undertaking[s]"⁸⁴, shared "contemplation[s]"⁸⁵, "indication[s]"⁸⁶ and "expectation[s]"⁸⁷. None of these notions amounted to express contractual terms; nor would any have satisfied the test for the implication of a term⁸⁸. The deployment of these notions signals a departure from orthodox legal analysis.

65 Three additional points may be made here. First, while mutual undertakings may not always be express, where there are express terms of the contract between the parties, they must be given effect unless they are contrary to statute. Secondly, if the mutual undertakings are said to be implied in what has been agreed, they

82 *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 at 388.

83 *Rossato* (2020) 278 FCR 179 at 276 [447].

84 *Rossato* (2020) 278 FCR 179 at 296 [572]. See also 291 [542], 292 [549], 302 [609].

85 *Rossato* (2020) 278 FCR 179 at 292 [548]. See also 292 [547].

86 *Rossato* (2020) 278 FCR 179 at 298 [588].

87 *Rossato* (2020) 278 FCR 179 at 291 [543], 300 [594]; cf 276 [448].

88 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 453; *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 68 [78]. Compare *Breen v Williams* (1996) 186 CLR 71 at 80, 90-92, 102-103, 123-124.

cannot be inconsistent with the express terms of the contract⁸⁹. Thirdly, if the mutual undertakings are to be inferred from conduct, then they may take effect as contractual variations. It is because contracts, whether as originally agreed or as varied, create binding obligations that they constitute "firm advance commitments".

Skene fell into error

66 In light of this discussion, it should now be understood that in approaching the characterisation exercise by reference to "[t]he conduct of the parties to the employment relationship and the real substance, practical reality and true nature of that relationship"⁹⁰, the Full Court in *Skene* strayed from the orthodox path.

67 None of the authorities cited by the Full Court in *Skene*⁹¹ in support of its approach to the characterisation exercise were cases where the parties had committed the terms of the employment relationship to a written contract and thereafter adhered to those terms. In such a case, it is to those terms that one must look to determine the character of the employment relationship. WorkPac's submission that *Skene* was wrongly decided in this respect should be accepted.

The terms and conditions of Mr Rossato's employment

68 It is necessary now to consider the terms and conditions governing the employment relationship between Mr Rossato and WorkPac in order to discern whether they established a firm advance commitment to continuing work beyond the completion of an assignment. Mr Rossato's employment was governed by the General Conditions, the Enterprise Agreement, and the six NOCEs⁹².

69 Mr Rossato and the CFMMEU argued that Glencore's rosters provided to Mr Rossato formed part of the contractual suite of documents regulating

89 *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 282-283.

90 *Skene* (2018) 264 FCR 536 at 576 [180].

91 *Skene* (2018) 264 FCR 536 at 576 [180].

92 See *Rossato* (2020) 278 FCR 179 at 190 [20], 253 [336].

Kiefel CJ
Keane J
Gordon J
Edelman J
Steward J
Gleeson J

24.

Mr Rossato's employment⁹³. In this Court, the significance of this contention shifted to become a suggestion that these rosters, combined with the contractual stipulations that Mr Rossato was to work in accordance with his rostered arrangements, were in some way evidence of an obligation and entitlement to work the entire roster. As to this, it may be said immediately that the provision of Glencore's rosters to Mr Rossato fell well short of being, even arguably, a contractual promise that he would be entitled or required to work all the shifts listed.

The General Conditions

70 The General Conditions were expressed to apply to "all assignments" undertaken by an employee on behalf of WorkPac⁹⁴. Clause 5.1 provided that employment with WorkPac was on an "assignment-by-assignment basis, with each assignment representing a discrete period of employment on a Casual or Maximum Term hourly basis". Clause 5.3 provided that an employee could accept or reject any offer of an assignment.

71 Clause 5.4 provided:

"The employee agrees to complete an assignment once the employee has accepted it. Should the employee elect not to complete the assignment for whatever reason, WorkPac reserves the right to recover any costs incurred relating to the employee's assignment."

72 Clause 5.5 provided:

"On completion of an assignment, whether satisfactory or otherwise, WorkPac is under no obligation to offer any other assignment/s."

73 Clause 5.6 provided that the period of an assignment could be varied by WorkPac, or by WorkPac's client, on one hour's notice. Clause 5.12 provided that casual assignments could be terminated by either WorkPac or the employee on one

93 A similar contention was advanced in the Full Court: see *Rossato* (2020) 278 FCR 179 at 253 [336]. The Full Court held that it was unnecessary to decide this question: 295 [564], cf 214 [134].

94 General Conditions, cl 4.2.

25.

hour's notice. All employees were to serve a six-month minimum qualifying period⁹⁵. Employees on an assignment with WorkPac agreed to work exclusively for WorkPac⁹⁶.

74 The General Conditions provided for ordinary working hours of between 35 and 38 hours per week and provided that the employee may be requested to work such reasonable additional hours as requested by WorkPac⁹⁷. Clause 7.4 required employees to work shifts and/or rosters "as prescribed in the Notice of Offer of Employment", and additional or replacement shifts or rosters as agreed to during the engagement. There was provision for employees to be stood down without pay in the event of strike, breakdown of machinery or other circumstances beyond WorkPac's control⁹⁸.

The NOCEs

75 The six NOCEs shared common features. All referred to the employment as an "assignment" with Glencore at one or other of the two mines. There were some differences between the first three NOCEs and the fourth, fifth and sixth NOCEs, but in the scheme of things those differences are not significant. It will be sufficient to refer to the first three NOCEs.

76 The first three NOCEs identified Mr Rossato's daily working hours as "06:00 – 17:00" (in the first and second NOCEs) or "06:00 – 18:30" (in the third NOCE), but each noted "[t]his may vary and is a guide". Likewise, the first three NOCEs provided for a length of assignment of "6 Months" (in the first and third NOCEs) or "154 Days" (in the second NOCE), again noting in each case that "[t]his may vary and is a guide only". The first three NOCEs each identified that Mr Rossato would work an alternating shift structure, and the first two NOCEs referred to the working of additional reasonable hours in accordance with "your rostered arrangements".

95 General Conditions, cl 5.11.

96 General Conditions, cl 6.15.

97 General Conditions, cl 7.1.

98 General Conditions, cll 7.1, 7.14.

Kiefel CJ
Keane J
Gordon J
Edelman J
Steward J
Gleeson J

26.

77 Each of the first three NOCEs contained some reference to a "casual loading". The first and second NOCEs provided for a flat rate of pay of \$49 per hour, and included the following note:

"Your flat rate of pay includes the payment of overtime, weekend penalties, public holiday loadings, shift penalties, casual loading (refer to Schedule 2 for more information on your casual loading) and any industry and special allowances that may apply."

78 The third NOCE did not contain such a note and instead provided for a "casual rate" of pay:

"Your Pay Rate is a Casual Rate of:

Normal Time	\$43.05
Time Half	\$43.05
Double Time	\$43.05"

79 The third NOCE did, however, refer Mr Rossato to Schedule 2 in the following note:

"If any other allowances are applicable to your role, the amount that would be paid is detailed below, (please note payment is ONLY if applicable). Refer to Schedule 2 for more information on your casual loading."

80 The Schedule 2 referred to in each of the first three NOCEs contained a breakdown of the "casual loading" in the following terms:

"Schedule 2 – Configuration of Casual Loading"

Your ordinary rate of pay is your hourly rate less your performance incentive bonus where applicable. Refer to the appropriate Agreement contained in Schedule 1^[99] to determine your casual loading. Where your casual loading is 25%, it is made up of the following components:

99 Schedule 1 was titled "Where do I find my Agreement?" and listed 21 workplace or enterprise agreements, including the Enterprise Agreement applicable to Mr Rossato.

<i>Kiefel</i>	<i>CJ</i>
<i>Keane</i>	<i>J</i>
<i>Gordon</i>	<i>J</i>
<i>Edelman</i>	<i>J</i>
<i>Steward</i>	<i>J</i>
<i>Gleeson</i>	<i>J</i>

27.

- a. 11% of your loading is paid in lieu of Annual Leave and Leave Loading entitlements;
- b. 5% of your loading is paid in lieu of Personal Leave entitlement;
- c. 4% of your loading is paid in lieu of Notice of Termination requirements;
- d. 2.5% of your loading is paid in recognition of the itinerant nature of casual work;
- e. 2.5% of your loading is paid in lieu of Redundancy entitlements.

If your casual loading is less than 25% as prescribed in your Agreement, the above breakdown applies to your casual loading on a pro rata basis."

The Enterprise Agreement

81 The provisions of the Enterprise Agreement, insofar as they regulated Mr Rossato's entitlements to leave, have been set out above. The Enterprise Agreement also contained terms which regulated Mr Rossato's employment and which are relevant to the assessment of whether there existed a firm advance commitment to ongoing work.

82 Pursuant to cl 6 of the Enterprise Agreement, all FTMs were required to perform work within their skill, competence and training as required by WorkPac¹⁰⁰ and follow all reasonable and lawful directions¹⁰¹. Refusal to comply with any reasonable and lawful direction could result in disciplinary action, including termination¹⁰². All new FTMs were engaged on a six-month "qualifying period", after which their employment status would be confirmed¹⁰³.

83 Clause 6.4 was entitled "Status of Employment". Clause 6.4.7 provided that FTMs would, at the time of their engagement, be informed by WorkPac "of the

100 Enterprise Agreement, cl 6.3.1.

101 Enterprise Agreement, cl 6.2.1.

102 Enterprise Agreement, cl 6.2.2.

103 Enterprise Agreement, cl 6.1.

<i>Kiefel</i>	<i>CJ</i>
<i>Keane</i>	<i>J</i>
<i>Gordon</i>	<i>J</i>
<i>Edelman</i>	<i>J</i>
<i>Steward</i>	<i>J</i>
<i>Gleeson</i>	<i>J</i>

28.

status and terms of their engagement". As foreshadowed above, cl 6.4.1 purported to categorise FTMs in the following way:

"FTMs under this Agreement will be employed in one or more of the following categories:

- (a) full-time FTMs; or
- (b) part-time FTMs; or
- (c) casual FTMs; or
- (d) limited term or assignment FTMs; or
- (e) FTMs employed for a specific project/site or workplace related task."

84 Clauses 6.4.2 to 6.4.4 further categorised FTMs into "base rate FTMs" and "flat rate FTMs" depending on whether they were engaged on the basis of, and paid, a base rate of pay or a flat rate of pay. It was not in dispute that Mr Rossato was a "flat rate FTM"; the only question was whether his employment was casual or otherwise. Clauses 6.4.5 and 6.4.6 contained further terms relating to "casual FTMs", including terms relating to "casual loading":

"6.4.5 Casual FTMs will be for a minimum of four (4) hours:

- (a) A person engaged as a base rate casual, as defined in clause 9.1.1, will be paid a casual loading of 25% on the rates prescribed herein. The casual loading is in lieu of all paid leave entitlements (with the exception of long service leave).
- (b) A person engaged as a flat rate casual, as defined in clause 9.1.1, will not be paid an additional amount as the casual loading has been incorporated into the flat rate of pay.

6.4.6 As your casual loading is 25%, it is made up of the following components:

- (a) 11% of your loading is paid in lieu of Annual Leave and Leave Loading entitlements;

<i>Kiefel</i>	<i>CJ</i>
<i>Keane</i>	<i>J</i>
<i>Gordon</i>	<i>J</i>
<i>Edelman</i>	<i>J</i>
<i>Steward</i>	<i>J</i>
<i>Gleeson</i>	<i>J</i>

29.

- (b) 5% of your loading is paid in lieu of Personal Leave entitlement;
- (c) 4% of your loading is paid in lieu of Notice of Termination requirements;
- (d) 2.5% of your loading is paid in recognition of the itinerant nature of casual work;
- (e) 2.5% of your loading is paid in lieu of Redundancy entitlements."

85 Clause 6.5.1 provided the notice period for termination by either WorkPac or an FTM. For "[a]ll FTMs other than casuals", notice of one week or longer was required, with the period of notice increasing based on length of service. For "[a]ll Casual FTMs", no notice of termination was required.

86 Clause 9.1.1 dealt with wage rates. It provided, in relation to flat rate FTMs:

"At the election of the Company an FTM will be paid either:

...

Flat Rate FTMs

- (b) The flat rate of pay as prescribed in Schedules 3, 4, 5, 6 and 7 for each classification. Flat rates are provided as compensation for all work (including overtime, weekend penalties, public holiday loadings, shift penalties, annual leave loading (where applicable), casual loading (where applicable), any industry and special allowances that apply to all FTMs covered by this Agreement and any industry and special allowances specifically incorporated that may not apply to all FTMs covered by this Agreement. Flat Rate FTMs shall also be entitled to any applicable allowances (which have not already been specifically incorporated) provided for by this Agreement unless such allowance is identified as applying only to Base Rate FTMs."

87 Clause 14 specified hours of work for flat rate FTMs. It provided that ordinary hours of work for a flat rate FTM were a "standard work week", plus

Kiefel CJ
Keane J
Gordon J
Edelman J
Steward J
Gleeson J

30.

reasonable additional hours¹⁰⁴. A flat rate FTM could be employed on either day work or shift work, and was required to work hours "as rostered by [WorkPac] to meet business operational needs"¹⁰⁵. Clause 14.9 then provided:

"Flat rate FTMs do not receive any additional payment for overtime loadings, weekend penalty rates, shift penalties, annual leave loading, casual loading (where applicable), public holiday rates or time worked outside the spread of hours as these have been incorporated into the flat rate."

No commitment to ongoing work

88 The provisions which are critical to the assessment of the existence or otherwise of a firm advance commitment to ongoing work are cll 5.1, 5.3 and 5.5 of the General Conditions. These clauses expressly provided that Mr Rossato's employment was on an "assignment-by-assignment basis", with Mr Rossato entitled to accept or reject an offer of an assignment and WorkPac under no obligation to offer any further assignments. On the plain and ordinary meaning of these provisions, the parties deliberately avoided a firm commitment to ongoing employment once a given assignment had been completed. Once it is accepted, as it must be, that these clauses bound the parties according to their ordinary meaning, it must also be accepted that on a straightforward application of the test which the parties accepted to be the hallmark of casual employment, Mr Rossato was a casual employee.

89 It was not, and could not be, suggested that WorkPac and Mr Rossato agreed, at any time, that once an assignment was completed he would thereupon be engaged for further assignments. That this was so is readily understandable. Indeed, the whole point of the arrangements under which the parties undertook one assignment at a time was that there should be no basis for any suggestion that either of them was providing a firm advance commitment to continuing work in circumstances not marked by indicia of irregularity, such as uncertainty, discontinuity, intermittency and unpredictability.

90 The absence of a firm advance commitment to ongoing work is also reflected in cll 5.6 and 5.12 of the General Conditions. These provided for

104 Enterprise Agreement, cl 14.2.

105 Enterprise Agreement, cl 14.3.

31.

variation of the period of an assignment, or termination of an assignment, on one hour's notice. The conferral of a power unilaterally to vary the period of an assignment cannot be confused with the creation of a mutual obligation to pursue a continuing working relationship beyond the completion of a given assignment.

91 In the Full Court, White J placed significant reliance on cl 5.4. By that clause, Mr Rossato agreed to complete each assignment, and WorkPac reserved the right to recover any costs relating to the assignment if Mr Rossato elected not to do so. In his Honour's view, cl 5.4 made implausible the notion that Mr Rossato could elect to work or not work any shift as he chose from time to time, and was evidence of the firm advance commitment given by Mr Rossato to WorkPac¹⁰⁶. In so concluding, his Honour erred.

92 Clause 5.4 must be read in context. The obligation to "complete an assignment" must be read together with the right of either party under cl 5.12 to terminate an assignment on one hour's notice. Given the evident tension between those clauses, the right of recovery conferred by cl 5.4 also cannot be given an expansive operation. It is arguable that it has no operation at all unless a right of recovery can be found to have been "reserve[d]" elsewhere in the contractual arrangements between the parties. It may also be that the right of recovery could not extend beyond the recovery of any costs thrown away in transporting the employee to and from the worksite, or the costs of one hour's notice period not duly provided. But it is not necessary to resolve these issues, because, on any view, cl 5.4 cannot be understood to impose an obligation on an employee to work beyond the completion of an assignment, and so lends limited weight to the notion that Mr Rossato provided a firm advance commitment to continue to work on an ongoing basis.

The significance of the roster system

93 Much of the argument in this Court, as in the Full Court, focussed upon the significance of the roster system under which Mr Rossato was obliged to work. For the reasons which follow, that Mr Rossato's working hours were fixed by rosters is of limited significance, and the Full Court placed inordinate emphasis on this facet of Mr Rossato's employment.

94 The first two NOCEs, in providing for Mr Rossato's daily working hours, referred to "rostered arrangements". Clause 7.4 of the General Conditions also

106 *Rossato* (2020) 278 FCR 179 at 293-294 [557]-[558], 298-299 [588].

Kiefel CJ
Keane J
Gordon J
Edelman J
Steward J
Gleeson J

32.

required Mr Rossato to work "shifts and or rosters as prescribed in the [NOCEs]". It will be recalled that Mr Rossato was provided with rosters for Glencore's mines which fixed his working hours up to a year in advance. The Full Court considered that the fact that Mr Rossato was to work in accordance with an established shift structure fixed long in advance by roster was strongly indicative of a firm advance commitment¹⁰⁷.

95 No doubt the availability of an organised team of employees who would work regular, full-time hours according to a fixed pattern of work was as important to WorkPac as it was to its customer, Glencore. It may also be accepted that WorkPac, as Glencore's supplier of labour, appreciated this and engaged employees in order to satisfy this requirement¹⁰⁸. Nevertheless, to say, as the Full Court did, that Mr Rossato would have had an appreciation of Glencore's system of work from his previous experience working at open-cut coal mines, including the Collinsville mine¹⁰⁹, or that it would have been uncommercial for Glencore (and thus for WorkPac) to engage employees on the basis of an irregular or discontinuous work pattern¹¹⁰, is to fall distinctly short of describing a commitment on the part of Mr Rossato and WorkPac to an ongoing employment relationship beyond the completion of each assignment.

96 The Full Court erred in attributing to the systematic nature of Mr Rossato's work under Glencore's rosters a significance that was critical to that Court's ultimate characterisation of Mr Rossato's employment as one that involved a firm advance commitment to continuing work beyond the completion of the particular assignment. Inasmuch as the rosters imbued Mr Rossato's employment with the qualities of regularity and systematic organisation during the period of each assignment, those qualities have been demonstrated to be entirely compatible with the notion of "casual employment" in the Act. What was absent was a firm advance commitment to continuing work beyond the completion of the particular assignment. While Mr Rossato might fairly be said to have had, over time, a reasonable expectation of continuing employment on a regular and systematic

107 *Rossato* (2020) 278 FCR 179 at 210 [115]. See also 295 [565]-[566], 296 [573]-[576].

108 *Rossato* (2020) 278 FCR 179 at 214 [136]-[137].

109 *Rossato* (2020) 278 FCR 179 at 214-215 [138], 290-291 [541].

110 *Rossato* (2020) 278 FCR 179 at 210 [118], 214 [136]-[137]. See also 298 [587].

basis, that was not a firm advance commitment to continuing employment beyond the particular assignment. Indeed, the express terms of the contracts between them, especially cll 5.1, 5.3 and 5.5 of the General Conditions, were inconsistent with the making of any such commitment.

Labels are not decisive

97 Mr Rossato was described as a casual employee by the NOCEs. It is true, of course, that whether employment is casual or not for the purposes of the Act is not determined by the "label" which the parties choose to attach to their relationship¹¹¹. The character of the relationship between the parties is established by the rights and obligations which constitute the relationship¹¹². Nevertheless, use by the parties in their contract of the label "casual" might be a factor which influences the interpretation of their rights and obligations. That said, Mr Rossato was paid a casual loading pursuant to cll 6.4.5 and 6.4.6 of the Enterprise Agreement, which clauses were incorporated into each of the NOCEs. The circumstance that, as in this case, the parties expressly agreed that the employee would be paid a loading in lieu of entitlements whose rationale presupposes an ongoing working relationship extending beyond the duration of a particular assignment (such as, for example, an entitlement to paid annual leave) is a compelling indication by the parties that their relationship did not include such a commitment.

The interveners' submissions

98 The CFMMEU submitted that the Full Court ought to have decided that Mr Rossato was not a casual employee based on a characterisation of his employment at the time the impugned statutory entitlements arose, rather than at the time the contract was made at the outset of the employment. The CFMMEU supported the observations of Bromberg J as to the merits of such an approach¹¹³.

111 *Australian Mutual Provident Society v Chaplin* (1978) 52 ALJR 407 at 409-410; 18 ALR 385 at 389-390; *Narich Pty Ltd v Commissioner of Pay-roll Tax* [1983] 2 NSWLR 597 at 600-601.

112 *R v Foster; Ex parte The Commonwealth Life (Amalgamated) Assurances Ltd* (1952) 85 CLR 138 at 151.

113 *Rossato* (2020) 278 FCR 179 at 197 [54].

Kiefel CJ
Keane J
Gordon J
Edelman J
Steward J
Gleeson J

34.

The CFMMEU also submitted that regard should be had to the real substance, practical reality and true nature of the employment relationship, for the reasons given by the Full Court in *Skene*, which adopted that approach.

99 The submissions by the CFMMEU, if accepted, would mean that the parties could not know what their respective obligations were at the outset of their relationship and would not know until a court pronounced upon the question. That outcome does not accord with elementary notions of freedom of contract¹¹⁴. The submissions by the CFMMEU involve the very kind of obscurantism that has been said to be alien to the judicial function¹¹⁵.

100 Mr Petersen submitted that WorkPac's contention that the characterisation of Mr Rossato's employment depended entirely on the express or implied terms of the contracts was wrong on two grounds. First, authorities concerning the employee and contractor distinction, including *Hollis v Vabu Pty Ltd*¹¹⁶, consider the "totality of the relationship" between the parties. Further, Mr Petersen contended that *Doyle v Sydney Steel Co Ltd*¹¹⁷ was authority for the proposition that the question of who is a casual worker depends on all the circumstances. These submissions may be dealt with seriatim.

101 *Hollis v Vabu* was concerned with whether a person was an employee or an independent contractor of another. On one view, the resolution of that question may depend upon the extent to which it can be shown that one party acts in the business of, and under the control and direction of, the other¹¹⁸. It should be borne in mind that the answer to that question affects the rights not only of the parties to the arrangement but also of third parties with whom they deal under its colours. As much is illustrated by *Hollis v Vabu* itself. There the ultimate issue was whether the appellant enjoyed rights against Vabu or merely against the hapless and impecunious courier. In contrast, the present case is concerned with the character of an employment relationship, a question the resolution of which has no

114 *Connelly v Wells* (1994) 55 IR 73 at 74.

115 See [63].

116 (2001) 207 CLR 21 at 33 [24].

117 (1936) 56 CLR 545.

118 *R v Foster; Ex parte The Commonwealth Life (Amalgamated) Assurances Ltd* (1952) 85 CLR 138 at 151.

significance for the rights of persons who are not privy to the relationship. The analysis in *Hollis v Vabu* affords no assistance, even by analogy, in the resolution of a question as to the character of an employment relationship, where there is no reason to doubt that the terms of that relationship are committed comprehensively to the written agreements by which the parties have agreed to be bound.

102 This Court's decision in *Doyle* concerned a workers' compensation claim made by the appellant boilermaker against the respondent company. At the time, the statutory workers' compensation regime provided for a particular method of calculating "average weekly earnings" of a "casual worker". The Workers' Compensation Commission found that the appellant was a "casual" and this decision was not disturbed by the Supreme Court of New South Wales. The High Court, comprised of four Justices, was split on the question whether the appellant was a casual employee. This Court being evenly split, the decision of the Supreme Court of New South Wales was affirmed. The only member of the Court to comment on the test to be applied was McTiernan J, who said¹¹⁹:

"Each case is to be determined on its own facts, consideration being given not only to 'the nature of the work but also the way in which the wages are paid, or the amount of the wages, the period of time over which the employment extends, indeed all the facts and circumstances of the case'¹²⁰."

103 To say, as did McTiernan J, that the resolution of the issue depends on "all the facts and circumstances" is not to say anything very helpful at all. In any event, many years have elapsed since the modest observations of McTiernan J, and in that time, as has been seen, a consensus has emerged in the case law as to the distinguishing characteristics of casual employment. Indeed, within a year of the decision in *Doyle*, in *Shugg v Commissioner for Road Transport and Tramways (NSW)*¹²¹, Dixon J said:

"The expression 'casual' is a word of indefinite meaning which elsewhere has caused difficulty. We are apt to associate with the word elements of

119 *Doyle v Sydney Steel Co Ltd* (1936) 56 CLR 545 at 565.

120 *Stoker v Wortham* [1919] 1 KB 499 at 503-504.

121 (1937) 57 CLR 485 at 496.

Kiefel CJ
Keane J
Gordon J
Edelman J
Steward J
Gleeson J

36.

chance or of discontinuity. We perhaps think of casual employment as occasional or intermittent."

His Honour went on to say of the use of the term in the statutory context then before the Court¹²²:

"The distinction upon which the application of [the Act] turns is, I think, between a general, indefinite or continuous employment and an employment for a particular occasion or occasions, or to fulfil some special or defined purpose of brief duration."

104 In these observations of Dixon J can be seen the basis for the view that has come to prevail.

Conclusion

105 The contractual arrangements between WorkPac and Mr Rossato did not include a mutual commitment to an ongoing working relationship between them after the completion of each assignment. The express terms of the relationship between WorkPac and Mr Rossato were distinctly inconsistent with any such commitment. Mr Rossato's entitlement to remuneration was agreed on that basis.

106 That the performance of Mr Rossato's obligations was organised in accordance with Glencore's rosters and thereby exhibited features of regularity and consistency did not establish a commitment between the parties to an ongoing working relationship after each assignment was completed. In carrying out each assignment, Mr Rossato worked as a casual employee.

Orders

107 The appeal should be allowed and the orders of the Full Court set aside. In their place, it should be declared that Mr Rossato was a casual employee for the purposes of ss 86, 95 and 106 of the Act in respect of each of the six assignments with WorkPac between 28 July 2014 and 9 April 2018. It should also be declared that Mr Rossato was a "Casual Field Team Member" for the purposes of the Enterprise Agreement.

122 *Shugg v Commissioner for Road Transport and Tramways (NSW)* (1937) 57 CLR 485 at 496-497.

<i>Kiefel</i>	<i>CJ</i>
<i>Keane</i>	<i>J</i>
<i>Gordon</i>	<i>J</i>
<i>Edelman</i>	<i>J</i>
<i>Steward</i>	<i>J</i>
<i>Gleeson</i>	<i>J</i>

37.

108

No order as to costs was sought.

109 GAGELER J. The central question in this appeal is as to the meaning of undefined references to "casual employee" in the *Fair Work Act 2009* (Cth) ("the Act"), which defines "employee" by reference to the ordinary meaning of that term¹²³. The question was of national importance at the time of the grant of special leave to appeal.

110 The importance of the question diminished with the subsequent insertion into the Act of a definition of "casual employee"¹²⁴. The definition operates comprehensively for the future. The definition also operates for the past subject to the narrowest of exceptions¹²⁵. A relevant exception is in relation to a person previously determined by a court not to be a casual employee¹²⁶.

111 This Court is restricted by the nature of the appeal to determining the meaning and application of the Act as the Act stood at the time of the decision under appeal¹²⁷. That restricted temporal focus does not, however, require it to ignore the circumstance that the new definition has stripped the decision under appeal¹²⁸ and the earlier decision on which the decision under appeal was based¹²⁹ of precedential effect and that its own decision on the appeal will have significance for few other than the parties. The legislatively confined consequences of the appeal provide justification and incentive for determining the appeal by a process of reasoning that is no more expansive than is strictly necessary to determine the rights of the parties that are in issue. That is the approach I prefer to adopt.

112 The parties were agreed that "[t]he essence of casualness is the absence of a firm advance commitment as to the duration of the employee's employment or

123 Section 12 of the Act (definitions of "employee" and "national system employee") and ss 13-15 of the Act.

124 Section 15A of the Act as inserted by the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth).

125 Clause 46 of Pt 10 of Sch 1 to the Act as inserted by the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act*.

126 Clause 46(2)(a) of Pt 10 of Sch 1 to the Act.

127 *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 106-111; *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 556 [31].

128 *WorkPac Pty Ltd v Rossato* (2020) 278 FCR 179.

129 *WorkPac Pty Ltd v Skene* (2018) 264 FCR 536.

the days (or hours) the employee will work"¹³⁰. They were at issue as to whether the undefined expression limited the firm advance commitment, absence of which they agreed was necessary for an employee to be a casual employee, to an enforceable contractual obligation on the part of the employer.

113 "The evolution in the common law as to the relationship of employment has been seen as a classic illustration of the shift from status (that of master and servant) to that of contract (between employer and employee)"¹³¹. But the transformation has not been so complete for it yet to have been said that the relationship between employer and employee has been subsumed within the law of contract. The legally cognisable incidents of an employment relationship have not to date been treated as wholly coincident with the terms of a contract of service. To the contrary, the observation has been made and repeated in this Court that it would be "unusual" for an employment relationship to be defined purely by contract¹³². And in respect of an employment relationship founded on a contract of service, as in respect of other forms of relationship founded on other forms of contract, it has been and remains not uncommon for a court to be required to examine some non-contractual aspect of the relationship (sometimes referred to as an "arrangement" or "collateral arrangement"¹³³) in order to characterise the relationship for some statutory purpose.

114 Whether the firm advance commitment accepted by the parties to have been needed to exclude an employee from the undefined statutory references to "casual employee" was limited to an enforceable contractual obligation is therefore an issue which, to my mind, cannot be resolved by reference merely to the nature of the relationship of employment or the nature of judicial power. Were resolution of the issue necessary to the determination of the rights of the parties, I would have felt the need to give greater attention to the statutory context and to industrial usage than was given in the decision under appeal and in the argument on the appeal.

115 My preference is not to undertake that exercise if the rights of the parties can be determined without resolution of the issue. They can.

130 *Hamzy v Tricon International Restaurants* (2001) 115 FCR 78 at 89 [38].

131 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 436, referring to *Attorney-General for New South Wales v Perpetual Trustee Co Ltd* (1955) 92 CLR 113 at 122-123; [1955] AC 457 at 482-483.

132 *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312 at 315 [17]; 176 ALR 693 at 697; *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 at 182-183 [16].

133 See eg s 106 of the *Industrial Relations Act 1996* (NSW), considered in *Fish v Solution 6 Holdings Ltd* (2006) 225 CLR 180.

116 On the hearing of the appeal, it was common ground between the parties that Mr Rossato had been engaged by WorkPac under six consecutive contracts of employment. Though there appeared to be a measure of agreement between the parties that a contract of employment to work regular hours for a long fixed period might not give rise to a relationship of casual employment, argument on the appeal proceeded on the basis that the firm advance commitment, absence of which was necessary for Mr Rossato to meet the undefined statutory description of a "casual employee", was a commitment not only as to the regularity of the hours he was to work but also as to the indefinite duration of his employment.

117 Mr Rossato relied on non-contractual aspects of his employment relationship (principally the operation of the roster system) only to establish the existence of a firm advance commitment as to the hours that he was to work during his employment. To the extent he sought to establish a firm advance commitment as to the duration of his employment, he was driven to rely solely on the terms of each contract of employment.

118 I agree with the plurality that the terms of each contract of employment contained nothing to oblige WorkPac to continue each contract of employment beyond completion of the assignment to which each contract related. That feature of the relationship between Mr Rossato as employee and WorkPac as employer was enough in the circumstances to negative the existence of any firm advance commitment on the part of WorkPac to the indefinite continuation of Mr Rossato's employment. He was a "casual employee".

119 The result is that I agree with the orders proposed by the plurality.

