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 and Energy Union
Third Respondent

Matthew Petersen
Fourth Respondent

APPELLANT'S SUBMISSIONS

Part I: CERTIFICATION

[1] These submissions are in a form suitable for publication on the internet.

Part II: ISSUES

[2] Was the first respondent, Mr Rossato, a casual employee for the purposes of the *Fair Work Act* 2009 (Cth)?[1]

[3] Was Mr Rossato a 'Casual FTM' for the purposes of the *WorkPac Pty Ltd Mining (Coal) Industry Enterprise Agreement 2012* (**Enterprise Agreement**)?

[4] Should the amount by which Mr Rossato's remuneration exceeded the amount to which he would have been entitled as a permanent employee, or the amount of his casual loading, be applied or appropriated in discharge of his entitlements under the Act and the Enterprise Agreement as a permanent employee, whether by way of 'set off', restitution or by reg 2.03A of the *Fair Work Regulations* 2009 (Cth)?

Part III: SECTION 78B NOTICES

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

Part IV: DECISION BELOW

[6] This is an appeal from the decision of the Full Court of the Federal Court of Australia in *WorkPac Pty Ltd v Rossato* (2020) 296 IR 38 (**Decision**).

Part V: STATEMENT OF FACTS

[7] WorkPac is a labour hire company. It employed Mr Rossato to work at its clients' coal mines between 28 July 2014 and 9 April 2018.[2] The contracts under which he was employed consisted of the 'Casual or Maximum Term Employee – Terms and Conditions' (**the General Conditions**)[3], and six discrete 'Notices of Offer of Casual Employment' (**NOCEs**).[4] He was covered by the Enterprise Agreement.[5]

[8] Throughout his employment with WorkPac, he was paid as a casual employee for the purposes of the Act, and a Casual FTM for the purposes of the Enterprise Agreement. His rate of pay was more than was payable to a permanent employee under the Enterprise Agreement.[6] WorkPac's case was that the additional amounts were paid by reason of his status as a casual employee, and that it included the casual loading of 25% prescribed by his contracts and the

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[1] All further references to statutory provisions are to provisions of the *Fair Work Act* 2009 (Cth), unless otherwise stated.

[2] Decision at CAB 104 [294], CAB 107 [310].

[3] Decision at CAB 122 [357]. The salient terms are set out in Decision at CAB 119-122 [351]-[357].

[4] Decision at CAB 104 [293]; CAB 114 [336]; CAB 115 [338]; CAB 117 [347]. The salient terms are set out in Decision at CAB 115-118 [337]-[350].

[5] Decision at CAB 109 [323]. The salient terms are set out in Decision at CAB 109-118 [323]-[335].

[6] Decision at CAB 245-246 [888]-[891].

Enterprise Agreement 'in lieu of' annual and other forms of leave prescribed under the Act.[7] He did not receive 'these forms of paid leave because he had been treated by WorkPac as a casual employee.'[8] He regarded himself as being a casual employee.[9]

[9] However, after his employment had ended, he asserted that he had not been a casual employee, relying on *WorkPac Pty Ltd v Skene.*[10]

[10] The Full Federal Court upheld that assertion, and ordered that Mr Rossato be paid entitlements under the Act and the Enterprise Agreement that were not due to casual employees, while at the same time allowing him to keep everything that he had already been paid.

Part VI: ARGUMENT

Ground 1: Casual employment for the purposes of the *Fair Work Act*

[11] There is not, and has never been, any definition of 'casual employees' or the concept of casual employment in the Act. That is so notwithstanding that 'casual employees' was held in *WorkPac Pty Ltd v Skene* to have a 'legal meaning'[11], and that that expression now has an important place in the National Employment Standards (**NES**) – a set of directly legislated and widely applicable minimum standards of employment[12] that cannot be displaced.[13] Relevantly, ss. 86 and 95 exclude casual employees from the NES entitlement to paid annual and personal/carer's leave.[14] Generally, as in this case, casual employees are instead entitled to a 'loading' on top of the rate paid to non-casuals.

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[7] Clause 6.4.5, Decision at CAB 110 [326].

[8] CAB 96 [268].

[9] Appellant's Further Material (**AFM**) 807 [7.6](c).

[10] (2018) 264 FCR 536.

[11] (2018) 264 FCR 536 at [129], [142].

[12] The subject matters are set out in s.61(2).

[13] See ss.43(1), 44, 55, and 61(1).

[14] See also ss.67(1), 106, 111, 116 and 123.

[12] Since at least the 18th century, casual employees have been recognised as a class of worker distinct from those engaged on a more stable and permanent basis. It appears that the concept of casual employment evolved from a statutory distinction between servants, who were expressly or presumptively engaged under a yearly hiring, and labourers, who were engaged for lesser periods, between which they were 'at their own liberty'.[15] In 1762 Blackstone referred to labourers as being 'casually employed'.[16] In the early 20th century, by which time the common law had begun to develop the modern conception of employment, workers compensation legislation in the United Kingdom and Australia specifically excluded casual employees. But the concept of casual employment was for practical purposes never legislatively defined, and courts in both jurisdictions have always struggled to articulate a definition.[17]

[13] Whether an employee is classified as a casual depends entirely on the express or implied terms of the employment contract.[18] Where, as in this case, the employment contracts are wholly written, the terms are identified and construed without reference to post-contractual conduct.[19] That is consistent with the rule that applies to all contracts, and with the Act's objectives of certainty, stability, fairness, and enforceability.[20]

[14] Courts in Australia have used notions of intermittency, irregularity, informality, uncertainty, discontinuity, and unpredictability to identify characteristics of casual employment.[21] However, these concepts do not define casual employment for the purposes of the Act, because the Act explicitly recognises in ss. 65(2)(b), 67(2) and 384(2)(a) that casual employment can be for 'a long term', and can involve employment on 'a regular and systematic

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[15] Simon Deakin and Frank Wilkinson, *The Law of the Labour Market – Industrialization, Employment and Legal Evolution* (Oxford University Press, 2005) at 45, 122 and Richard Burn, *The Justice of the Peace, and Parish Officer* (H Woodfall and W Strahan, 8th ed, 1764) at 233-234.

[16] William Blackstone, *An Analysis of the Laws of England* (Oxford Clarendon Press, 5th ed, 1762) at 24.

[17] See, for early examples, *Knight v Bucknill* (1913) 6 BWCC 160 at 164-165 and *Stoker v Wortham* (1919) 1 KB 499 at 503-504, both cited in *Doyle v Sydney Steel Co Ltd* (1936) 56 CLR 545, 565; in *Doyle* see also 551, 555.

[18] *Connelly v Wells* (1994) 55 IR 73 at 74.

[19] *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at [35].

[20] *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 297 IR 338 at [14], [25].

[21] See, for example, *Doyle* at 551, 555; *Shugg v Commissioner for Road Transport and Tramways (NSW)* (1937) 57 CLR 485 at 496; *Reed v Blue Line Cruises Ltd* (1996) 73 IR 420 at 425; *MacMahon Mining Services Pty Ltd v Williams* (2010) 201 IR 123 at [33]; and *Skene* at [173], [182].

basis', 'at least 12 months of continuous service', and 'a reasonable expectation of continuing employment…on a regular and systematic basis'. White J (with whom Wheelahan J agreed on the issue of casual employment under the Act[22]) wrongly held otherwise.[23] The reasoning of the Fair Work Commission and its predecessor in *Bluesuits Pty Ltd v Graham*[24], *Nightingale v Little Legends Childcare*[25], and *Telum Civil (Qld) Pty Ltd v CFMEU*[26] should be preferred.[27] White J's error meant that his Honour wrongly gave significant weight to the regularity and predictability of the rostering patterns of WorkPac's client[28] – notwithstanding that it was a stranger to the contracts between WorkPac and Mr Rossato.

[15] The Full Court proceeded on the basis, articulated in *Hamzy v Tricon International Restaurants*[29], that the 'essence of casualness' was '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'.[30] Consistent with WorkPac's position below,[31] and as White J correctly explained, this is only 'a statement about the general nature of casual employment, or…its consequences, rather than a statement of a hard and fast criterion for its existence.'[32]

[16] The statement in *Hamzy* describes a contractual relationship in which the employer makes no enforceable promise that future work will be made available to the employee; the employee makes no enforceable promise to perform all or any such work as may be made available; and the parties agree that they can terminate the employment readily and quickly. It follows that the purpose of the statutory prescriptions of paid leave for permanent employees does not exist for casual employees. Casual employees may decide for themselves whether to accept or attend

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[22] Decision at CAB 259 [953].

[23] Decision at CAB 150 [481].

[24] (1999) 101 IR 28 at [14].

[25] (2004) 134 IR 111 at [9].

[26] (2013) 230 IR 30 at [24], [25], [48].

[27] See also *Hamzy v Tricon International Restaurants* (2013) 230 IR 30 at [38] ('But that is not inconsistent with the possibility of the employee's work pattern turning out to be regular and systematic.').

[28] Decision at CAB 170 [573].

[29] (2001) 115 FCR 78.

[30] *Hamzy* at [38]; see also *Skene* at [153], [168], [169], [172].

[31] AFM 816-817 [13], [14].

[32] Decision at CAB 130 [401]; see also CAB 133 [413].

work. They are conventionally – as in this case – compensated incrementally in advance for such time off by way of a casual loading.

[17] None of the express or implied terms of the six wholly written contracts under which Mr Rossato was employed constituted or contained any commitment of the kind described in paragraphs 15 and 16 of these submissions. Under the General Conditions, Mr Rossato's employment was 'on an assignment-by-assignment basis' with each assignment forming 'a discrete period of employment on a Casual or Maximum Term hourly basis'.[33] The first three contracts provided for assignments of uncertain duration – '6 months' or '154 days', expressly as 'a guide only', and for daily working hours that could vary, including without prior reference to WorkPac.[34] The last three contracts expressly stipulated that Mr Rossato's hours might vary depending on WorkPac's and WorkPac's client's needs, and that he had the ability to refuse and cancel shifts.[35]

[18] All of these stipulations were subject to the parties' agreement that the employment might readily and quickly be terminated during an assignment.[36] Under the General Conditions, the employment could be terminated on only an hour's notice,[37] subject to payment of a minimum of four hours for the assignment.[38] The last three contracts expressly provided that Mr Rossato might terminate his employment in accordance with the Enterprise Agreement[39], which provided that no notice was required in the case of a Casual FTM.[40]

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[33] Clause 5.1, Decision at CAB 120 [355].

[34] First NOCE, Decision at CAB 115-116 [340]; Second NOCE, Decision at CAB 118 [348].

[35] Decision at CAB 118 [350].

[36] See Decision at CAB 45-46 [74], which is correct, and CAB 60 [127] and CAB 166 [552], which are not.

[37] Clause 5.12, Decision at CAB 120-121 [355].

[38] Clause 7.6, Decision at CAB 121 [356].

[39] Decision at CAB 118 [350].

[40] Clause 6.5.1, Decision at CAB 111 [327].

[19] Whatever expectations or intentions[41] WorkPac may have had, it did not expressly or impliedly promise to continue to employ Mr Rossato, or to give him any particular work in the future. It was expressly not obliged to offer any assignments to Mr Rossato.[42] Mr Rossato could 'accept or reject any offer of an assignment'.[43] Contrary to the construction that White J gave to clause 5.4,[44] Mr Rossato did not expressly or impliedly promise to work at particular times or for a particular period, other than to undertake to perform each casual assignment in accordance with its terms.

[20] White J found that Mr Rossato's contracts with WorkPac required him to work 'prescribed' rosters. However, the contracts actually contained no provision to the effect found by White J. None of Mr Rossato's contracts prescribed any rosters, although they did state that WorkPac's client worked patterns of alternating shifts. The client rosters that were provided to Mr Rossato were generic roster patterns that were not particular to him. However, White J held that WorkPac and Mr Rossato 'understood' that he would work 'regular and predictable…shifts'[45], and then converted that understanding into the critical findings that Mr Rossato had agreed to work particular shifts[46], and that WorkPac had imposed a 'requirement that he work the shifts or rosters prescribed'.[47]

[21] Consistently with the absence of a commitment of the kind described in *Hamzy*, the NOCEs explicitly identified the employment as being casual;[48] Mr Rossato was paid at an hourly rate according to shifts that he completed;[49] he was paid a casual loading;[50] he believed

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[41] See Decision at CAB 173-174 [588].

[42] Clause 5.5, Decision at CAB 120 [355].

[43] Clause 5.3, Decision at CAB 120 [355].

[44] Decision at CAB 166-167 [557], CAB 167 [558], CAB 173-174 [588]; *cf* AFM 881-883 [25]-[29]. Clause 5.4 is at Decision at CAB 120 [355].

[45] Decision at CAB 170 [572].

[46] Decision at CAB 170 [573].

[47] Decision at CAB 173-174 [588].

[48] First NOCE, Decision at CAB 115 [338].

[49] Decision at CAB 115-116 [340]-[341].

[50] See [31] and [32] of these submissions.

that he was a casual employee;[51] and he was not given annual or other leave.[52] On one occasion he did not attend for work without first seeking permission to do so.[53]

[22] It follows from paragraphs 17 to 21 of these submissions that Mr Rossato was a casual employee for the purposes of the Act. White J came to the opposite conclusion, substantially by an erroneous process of reasoning that borrowed a concept from Professor Freedland's *The Personal Employment Contract*.[54] The concept is variously described as 'underlying mutual undertakings'[55] and an 'unspoken mutual undertaking'[56], and is said to operate in a postulated 'second tier' of employment contracts.[57] His Honour used that concept as a 'framework of reference'[58] within which to locate commitments of the kind described in *Hamzy*.[59] These unspoken mutual undertakings are not express terms. His Honour did not analyse them as though they were implied terms, and, had his Honour done so, they could not have satisfied any test for implication. They are an extra-contractual construct: an innominate layer of the employment relationship, comprising mutual understandings[60], shared contemplations[61], and indications[62], hovering somewhere between an 'expectation'[63] and an enforceable promise or commitment. Paragraph 20 of these submissions identifies an important manifestation of this error.

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[51] AFM 807 [7.6](c).

[52] Decision at CAB 107 [311].

[53] AFM 34-35 [6.111].

[54] Decision at CAB 143-144 [446] citing Mark Freedland, *The Personal Employment Contract* (Oxford University Press, 2003) 91.

[55] Decision at CAB 144 [447].

[56] Decision at CAB 170 [572].

[57] Decision at CAB 144 [447].

[58] Decision at CAB 143-144 [446], CAB 144 [447].

[59] See also Decision at CAB 163 [542], CAB 165 [549], CAB 178 [609] ('mutual understanding'); CAB 163 [543], CAB 175 [594] ('expectation'); and the notion of shared 'contemplation' at CAB 164-165 [547]-[548].

[60] Decision at CAB 163 [542], CAB 165 [549], CAB 178 [609].

[61] Decision at CAB 164-165 [547], CAB 165 [548].

[62] Decision at CAB 169 [566], CAB 173-174 [588].

[63] Decision at CAB 144 [448], but *cf* CAB 163 [543], CAB 175 [594].

Ground 2: Casual employment under the Enterprise Agreement

[23] The Full Court followed *Skene* in wrongly holding that a 'Casual FTM' for the purposes of the Enterprise Agreement had the same meaning as a 'casual employee' under the Act, and accordingly that Mr Rossato was not a Casual FTM.[64]

[24] The statutory mechanisms for ensuring that the NES and enterprise agreements work harmoniously are ss. 55 and 56 of the Act, which have the effect that an enterprise agreement has no effect to the extent that it excludes the NES, although it can include provisions that are ancillary or incidental to, or supplement, the NES.[65]

[25] In clause 6.4.1 the Enterprise Agreement prescribed five categories of employment, including that of a Casual FTM. Mr Rossato became a Casual FTM for the purposes of the Enterprise Agreement when he was expressly offered, and expressly accepted, casual employment. Thereafter, WorkPac was required by clause 6.4.7 to inform him of the status of his engagement.[66] It did so by informing him in each NOCE that the status of his engagement was 'Casual Employment'.[67]

[26] Central to the reasoning in *Skene* was the erroneous view that the process of categorisation to which clause 6.4.1 refers was at the unilateral election of WorkPac. White J, with whom Wheelahan J agreed on the issue of casual employment under the Enterprise Agreement[68], adopted that reasoning.[69] The agreement between WorkPac and Mr Rossato was not unilateral in any sense: it was Mr Rossato's choice whether to accept or reject the employment offered by WorkPac, including the categorisation by reference to which that offer was made. Once their agreement was made, the Enterprise Agreement then built on the relationship thereby created.[70]

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[64] Decision at CAB 191 [672](c) and [674], CAB 80-81 [215], CAB 259 [952].

[65] *Mondelez* at [16].

[66] Clauses 6.4.1, 6.4.2, 6.4.3, 6.4.4 and 6.4.7, Decision at CAB 110-111 [326].

[67] Decision at CAB 115 [338].

[68] Decision at CAB 259 [953].

[69] Decision at CAB 191-192 [672](d), CAB 192 [673]-[674].

[70] *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 420-421; *Soliman v University of Technology, Sydney* (2009) 191 IR 277 at [19]-[24].

[27] Clause 6.4.7 required that WorkPac make clear exactly what category of employment was on offer, so that if the offer were accepted, as it was by Mr Rossato, both parties would know with certainty which of the rights and obligations prescribed by the Enterprise Agreement would attach to the resulting employment. The categories of employment so identified are foundational to the scheme of the Enterprise Agreement,[71] because they give content to the operation of the Enterprise Agreement in the circumstances of each employee.

[28] The category in question happens to be labelled 'Casual', but the label is neither essential nor controlling. What matters are the rights and obligations that the Enterprise Agreement attaches to each category. When, as in this case, an enterprise agreement expressly creates a category of employment, however called, and attaches specific rights and obligations to that category, the parties' agreement that an employee will be employed in that category has the effect that the parties have those rights and obligations, subject to ss. 55 and 56.

[29] Accordingly, when the parties agreed that WorkPac would employ Mr Rossato in a category of employment identified in the Enterprise Agreement, in a section headed 'Status of Employment', as a 'Casual FTM', WorkPac assumed an obligation to pay him at the higher rates of pay that the Enterprise Agreement attached to that category, and Mr Rossato agreed that he would not be entitled to paid annual and other leave under the Enterprise Agreement, because those entitlements were not attached to that category.

[30] To treat the agreed categorisation as no more than an opening move in a game of objective analysis to be later played out in a court denies reality, and subverts the choices made and acted on by WorkPac and Mr Rossato. It is also contrary to the purposive and practical generosity with which enterprise agreements are properly to be understood and applied[72], and to the Act's objectives of certainty and stability for employers and their employees.[73]

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[71] *cf Re Metal, Engineering & Associated Industries Award 1998* (2000) 110 IR 247 at [9].

[72] *Australian Communication Exchange Ltd v Deputy Commissioner of Taxation* (2003) 77 ALJR 1806 at [56].

[73] *Mondelez* at [14].

Ground 3: 'Double-dipping'

[31] As a casual employee, Mr Rossato was paid more than a Permanent FTM would have received for the same work. In these submissions, the difference between the hourly rates payable to a comparable Permanent Flat Rate FTM and the rates actually paid to Mr Rossato is called the **contractual overpayment**.[74]

[32] The Full Court made an express finding that under Mr Rossato's first three contracts the contractual overpayment included an identifiable casual loading of 25% of the rate of pay for a non-casual base rate FTM in Mr Rossato's classification.[75] However, the Full Court wrongly held that there was no identifiable casual loading under the last three contracts.[76] The correct position is that the casual loading was prescribed for the purposes of the last three contracts by the Enterprise Agreement. As White J correctly held, there was 'an identifiable amount of casual loading in the hourly rates' payable under the Enterprise Agreement.[77] That aspect of the Enterprise Agreement was either expressly incorporated into the contracts by clauses 1 and 5.10 of the General Conditions,[78] taken together with the matters set out in Decision at CAB 125-126 [380] and CAB 126 [381]; or it was part of the factual matrix in which each of the last three contracts was made.[79]

'Set off' in the context of employment

[33] WorkPac's case was that it should be permitted to appropriate the whole of the contractual overpayment, or at least the amount of the casual loading, to the discharge of the obligations that it would have to Mr Rossato on account of leave. That case was in part argued and decided by

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[74] Decision at CAB 245-246 [888]-[891].

[75] Decision at CAB 201 [710], CAB 203-204 [724]-[727], CAB 210 [753]; *cf* CAB 284 [1020].

[76] Decision at CAB 203 [723].

[77] Decision at CAB 201 [709].

[78] AFM 132, 133; *cf* Decision at CAB 203 [722].

[79] Decision at CAB 125 [375]; see also Decision at CAB 109 [323], CAB 125 [376], and AFM 27-28 [6.76], [6.80].

reference to a conception of 'set off'[80], developed in the context of employment, by which payments made by an employer may be appropriated to discharge statutory obligations.[81]

[34] The concept had its origins in *Ray v Radano*[82], in which it was held that such an appropriation was permitted where a payment was 'properly attributable' to a statutory entitlement, because the appropriation was consistent with the contractual intention of the parties.[83] It was confirmed in *Poletti v Ecob (No 2)*[84], which borrowed from principles of appropriation developed in the law of debtor and creditor.[85] The governing consideration is the intention of the parties,[86] manifested by the debtor's explicit appropriation, and the creditor's knowledge of it.[87] In the employment context, the justification for allowing payments made by an employer to discharge its liability to meet an employee's statutory entitlements lies in fidelity to their agreement.[88]

[35] *Australia and New Zealand Banking Group Ltd v Finance Sector Union of Australia* held that there had to be a 'close correlation' between, on the one hand, the contractually agreed purpose of the payment, and on the other hand, the obligation or liability to be discharged.[89]

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[80] *James Turner Roofing Pty Ltd v Peters* (2003) 132 IR 122 at [18]; Decision at CAB 270 [983].

[81] See, eg, *Ray v Radano* [1967] AR (NSW) 471; *Poletti v Ecob (No 2)* (1989) 31 IR 321*; Logan v Otis Elevator Co Pty Ltd* (1999) 94 IR 218*; Australia and New Zealand Banking Group Ltd v Finance Sector Union of Australia* (2001) 111 IR 227; *Linkhill Pty Ltd v Director, Officer of the Fair Work Building Industry Inspectorate* (2015) 240 FCR 578.

[82] [1967] AR (NSW) 471.

[83] *Ray v Radano* [1967] AR (NSW) 471 at 476, 478-479; *Poletti* at [42].

[84] (1989) 31 IR 321.

[85] *Poletti* at 332-333; Decision at CAB 239-240 [865](b).

[86] *Visbord v Federal Commissioner of Taxation* (1943) 68 CLR 354 at 371.

[87] *Re Walsh; Ex Parte Deputy Federal Commissioner of Taxation* (1982) 42 ALR 727 at 733; *Smith v Leveraged Equities Ltd* [2020] WASCA 122 at [132].

[88] *cf Poletti* at 332-333.

[89] (2001) 111 IR 227 at [48]-[52].

[36] However, *James Turner Roofing Pty Ltd v Peters*[90], *Linkhill Pty Ltd v Director, Officer of the Fair Work Building Industry Inspectorate*[91], and *Fair Work Ombudsman v Transpetrol TM AS*,[92] indicate that the requirement of a close correlation may not apply where the parties never contemplated the application of the statutory obligations sought to be discharged, but instead intended to create a relationship in which those obligations did not apply. This is the correct approach in this case. The parties explicitly intended to create a relationship of casual employment in respect of which – like the award rates for overtime work in *Ray v Radano*[93]– the application of the statutory entitlements were never in contemplation. Instead they intended to create a relationship in which those obligations did not apply – in fact, they were expressly disavowed. In that circumstance, the full amount of the contractual overpayment should have been appropriated to discharge such statutory liabilities as WorkPac would have to Mr Rossato in the event that, contrary to the parties' intentions, he was not a casual. In the alternative, the same argument applies, but with greater force, to the casual loading. The Full Court's contrary decision operates as 'a warrant to claim double payment of wages, that is, to accept and retain all payments made pursuant to an employment contract in which there is no reference to the award and as well claim all payments prescribed in the award'.[94] If double-dipping of that kind is allowed, then '[j]ustice and the law would have parted company'.[95]

[37] If the approach contended for in the preceding paragraph is not followed, such that a close correlation is required, then WorkPac's alternative submission is that the Full Court should have found that there was a sufficiently close correlation between the casual loadings and the statutory liabilities that WorkPac sought thereby to discharge. The Full Court rejected that case, essentially because it wrongly insisted on a correlation that was so unduly close as to be the 'same'.[96] That produced a result that defied the parties' contractual intention.

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[90] (2003) 132 IR 122 at [29].

[91] (2015) 240 FCR 578 at [99].

[92] [2019] FCA 400 at [113].

[93] [1967] AR (NSW) 471 at 476.

[94] *James Turner* at [29].

[95] *James Turner* at [29]. See also *Linkhill* at [99] and *Fair Work Ombudsman v Transpetrol TM AS* [2019] FCA 400 at [113].

[96] Decision at CAB 231 [844]; see also CAB 239 [865](a), *cf* CAB 280 [1008].

[38] Payment of the casual loading to Mr Rossato was to compensate him for a lack of the statutory entitlements that he now seeks to be paid.[97] In his first three contracts, an identified portion of the casual loading was expressly identified as being paid 'in lieu' of 'Annual Leave and Leave Loading entitlements'.[98] The parties made the last three contracts on the same basis.[99] Mr Rossato's claim was for payment of accrued but untaken annual leave pursuant to s. 90(2).[100] The Full Court should have found that there was a sufficiently close correlation between the payment and the entitlement in that both the casual loading and the obligation under s. 90(2) were obligations to make money payments in respect of untaken leave. Instead, the Full Court erroneously compared the purpose of the payment of the casual loading with a statutory entitlement of a different kind, namely, the entitlement to *take* paid annual leave pursuant to s. 87.[101]

[39] Wheelahan J accepted that Mr Rossato was 'paid on account of the absence of those entitlements'.[102] However, having regard to the primacy of fidelity to the parties' agreement in the context of set off, the distinction posited by Wheelahan J between making a payment for the purposes of discharging a statutory obligation to give Mr Rossato paid annual leave, or compensating Mr Rossato for the absence of such an entitlement, is immaterial. In both cases, where the relevant statutory entitlement is found to exist, appropriating the payment in satisfaction of that entitlement would be consistent with the parties' intention.

[40] A different, but analogous, context in which the concept of 'set off' is used describes the reduction of the true measure of damages payable to a claimant because of a benefit incidentally accruing to the claimant as a result of the defendant's breach.[103] 'Avoided loss' in the context of

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[97] Decision at CAB 97 [272](d), CAB 103 [287](h), CAB 149 [477], CAB 248-249 [902](e); CAB 259 [951], CAB 284 [1020].

[98] Decision at CAB 115-117 [340]-[342]; CAB 259-260 [951]-[952].

[99] See [32] of these submissions.

[100] Decision at CAB 250 [908]-[909].

[101] Decision at CAB 251 [913]-[914]; CAB 259 [953], CAB 284-285 [1021].

[102] Decision at CAB 284 [1020].

[103] Rory Derham, *Derham on The Law of Set-Off* (Oxford University Press, 4th ed, 2010) at [1.01] (and the authorities cited at fn 3).

mitigation is a similar concept.[104] Its underlying principles are compensation, justice, reasonableness, public policy and common sense.[105] Mr Rossato's statutory entitlements are recoverable in proceedings under s. 545(2)(b) for compensation for loss suffered by him because of WorkPac's contravention. The power conferred by s. 545 is broad, and compensation is assessed to restore those affected by a contravention of the Act 'to the positions they would have occupied but for its occurrence'[106], including by having regard to the principle of mitigation of loss[107], and to what is reasonable, just and appropriate.[108] Less than full compensation might be awarded in appropriate cases.[109] Double compensation should be avoided.[110]

Failure of consideration

[41] Mr Rossato's casual loading was paid to achieve a particular purpose: to enable WorkPac to procure his services as a Casual FTM under the Enterprise Agreement, and to compensate him for the absence of entitlements that he would have had as a Permanent FTM.[111] If he was not a Casual FTM, then the purpose of paying that loading will have failed, or the state of affairs upon which the parties contracted will have disappeared.[112] The Full Court's judgment creates an injustice: Mr Rossato is now owed for entitlements to annual and other leave, but is also permitted to retain the casual loading that he was paid to compensate him for not receiving the very same entitlements. Accordingly, if Mr Rossato was not a Casual FTM, then there will have been a total failure of consideration of a distinct and severable part of his remuneration, such that

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[104] *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 at 689-690; *Harold R Finger & Co Pty Ltd v Karellas Investments Pty Ltd* [2016] NSWCA 123 at [222] referring to *British Westinghouse Electric* at 689-690; see also *Clark v Macourt* (2013) 253 CLR 1 at [17], [18].

[105] *Silverbrook Research Pty Ltd v Lindley* [2010] NSWCA 357 at [12], [14].

[106] *Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union (the Hutchison Ports Appeal)* [2019] FCAFC 69 at [132] citing *Shizas v Commissioner of Police* [2017] FCA 61 at [209].

[107] *Hutchison Ports Appeal* at [143].

[108] *Dafallah v Fair Work Commission* (2014) 225 FCR 559 at [157]-[158]; *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157 at [103], referred to in *Retail and Fast Food Workers Union Incorporated v Tantex Holdings Pty Ltd* (2020) 299 IR 56 at [162].

[109] *Dafallah* at [157]-[158].

[110] By analogy, *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388 at [50], [63].

[111] See, eg, clauses 6.4.5 and 6.4.6 of the Enterprise Agreement, Decision at CAB 110-111 [326].

[112] *cf Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at [16], [101]-[102]; *Mann v Paterson Constructions Pty Ltd* (2019) 93 ALJR 1164 at [168].

the loading is a payment that he ought to be obliged by 'the ties of natural justice, to refund'.[113] The Full Court rejected this contention.[114]

[42] Contrary to the Full Court's reasoning, the casual loading was an identifiable portion of Mr Rossato's remuneration.[115] Notwithstanding that it was incorporated into a flat hourly rate, the amount of the loading nonetheless remains ascertainable.[116]

[43] The parties contracted against the backdrop of an overriding statutory obligation to pay Casual FTMs a casual loading.[117] A Casual FTM is entitled to enforce this statutory obligation independently of their contract of employment and irrespective of what their contract may say about the matter.[118] Further, payment of Mr Rossato's contractual hourly rate operated to discharge any amount owing by reason of statute for the same work. In this way, the Enterprise Agreement obligation was not, and could never be, subsumed into any alternative arrangements for which he contracted, with the result that he was paid an indivisible wage.[119] Alternatively, even if the Enterprise Agreement did not have that effect, payment of the casual loading was a term of each of Mr Rossato's employment contracts.[120]

[44] Contrary to the view of the Full Court,[121] it was therefore not necessary for WorkPac to demonstrate by evidence that the parties had conscious regard to the Enterprise Agreement in setting Mr Rossato's remuneration. In any event, **(a)** the references to the Enterprise Agreement in the General Conditions and the NOCEs were sufficient; and **(b)** in any event, the Full Court accepted there was a loading in the first three contracts[122], and the language of the fourth to sixth

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[113] *Moses v Macferlan* (1760) 97 ER 676 at 678; 2 Burr 1005 at 1008.

[114] The operative reasons were those of Wheelahan J (at CAB 264-269 [967]-[981]), with whom Bromberg J agreed (at CAB 93 [265]). White J concurred in that conclusion, giving separate reasons (at CAB 213-219 [765]-[794]).

[115] See [31] and [32] of these submissions.

[116] AFM 861-872.

[117] Clauses 6.4.5 and 6.4.6 of the Enterprise Agreement (Decision at CAB 110-111 [326]), taken together with s.50.

[118] See *Amalgamated Collieries of WA Ltd v True* (1938) 59 CLR 417 at 431, and ss.50, 539 and 545.

[119] *cf* Decision at CAB 214 [772]; CAB 269 [980].

[120] See [31] and [32] of these submissions.

[121] Decision at CAB 269 [980]; CAB 214-215 [772]-[774].

[122] Decision at CAB 201 [709], CAB 203-204 [724], CAB 204 [727]; CAB 284 [1020].

contracts and the factual matrix indicated that the parties were proceeding on the same basis.[123] The Full Court's approach to this issue was unduly strict and formalistic. If the Court is able to apportion the value of the benefit received by WorkPac from Mr Rossato's work and the value of the benefit it did not receive (that is, employment of a Casual FTM, rather than Permanent FTM), as it can, then it should do so.[124] The Enterprise Agreement (both independently and as incorporated in the contractual arrangements) provides the basis for such apportionment. Apportionment should be approached on the basis of 'common sense rather than…as dependent on an express or implied agreement in the contract' and by taking 'a flexible and robust approach'.[125]

[45] Contrary to the Full Court's reasoning, the casual loading was referable to distinct and severable consideration, namely, to obtain the performance of work pursuant to a particular legal relationship (that is, employment as a Casual FTM) that did not entail the provision of entitlements that accrued to Permanent FTMs. Consideration in this context refers to the purpose, condition, or contemplated state of affairs or benefit for which the parties bargained.[126] The parties' intention as to the purpose of the loading was required to be identified objectively.[127]

[46] The Full Court, without analysis, erroneously concluded that the purpose of Mr Rossato's remuneration, taken as a whole, was merely to obtain the 'performance of work'.[128] This conclusion was not open in the face of the express terms of Mr Rossato's first three contracts and clauses 6.4.5 and 6.4.6 of the Enterprise Agreement (whether incorporated into the contracts or not). Nor is it commercially logical: Why pay Mr Rossato more than Permanent FTMs performing the same work, if not to derive some benefit over and above the bare performance of work?

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[123] Decision at CAB 125 [375].

[124] See *Goss v Chilcott* [1996] AC 788 (PC) at 798; see also *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 383.

[125] *Giedo Van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 at [300], [323]; see generally at [297]-[323].

[126] *Roxborough* at [16]; *Mann* at [168].

[127] *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at [225]-[248].

[128] Decision at CAB 268-269 [978].

[47] WorkPac's contention that any finding that Mr Rossato was not a Casual FTM would give rise to a total failure of consideration was not addressed by the Full Court, principally because it did not consider that the casual loading formed a severable part of Mr Rossato's remuneration[129], and because it took an inappropriately narrow view of what constituted the relevant purpose or state of affairs – confining itself to Mr Rossato's contractual performance as the object of any payment,[130] rather than (as in *Roxborough v Rothmans of Pall Mall Australia Ltd*[131]) looking at the falsification, by court decision, of the state of affairs upon which the parties contracted. The present case is indistinguishable from *Roxborough* in this respect.

[48] The risk of Mr Rossato being found to be other than a Casual FTM was not one for which it could be said the parties sought to contractually allocate between themselves. White J's suggestion to the contrary[132] is incorrect. Even if it be accepted that the terms to which White J referred demonstrated an allocation of the contractual risk of inconsistency between the Enterprise Agreement and the contracts, the risk in this case is of a different kind. Here, there existed a judicial determination that an employee's status under the Enterprise Agreement was different. A decision undoing such a fundamental premise also undoes the contractual bargain. This was not a contractual risk the parties anticipated.

[49] Bearing in mind the obligation (consequent upon a finding that Mr Rossato was not a casual employee) to pay Mr Rossato in respect of unpaid entitlements, restitution would have the effect of ensuring that he was ultimately remunerated on the basis that he was not a Casual FTM.

Regulation 2.03A of the *Fair Work Regulations* 2009 (Cth)

[50] WorkPac relied on reg 2.03A as a basis for setting off the casual loading paid to Mr Rossato against the entitlements that he was owed. The Full Court wrongly rejected this claim for two reasons.

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[129] Decision at CAB 268-269 [978]-[980], CAB 214 [772].

[130] See Decision at CAB 265 [969], CAB 268-269 [978].

[131] (2001) 208 CLR 516.

[132] Decision at CAB 217-218 [786]-[790].

[51] *First,* the Full Court considered that reg 2.03A(1)(d) was not engaged because Mr Rossato was making a claim for payment of a 'relevant NES entitlement' rather than, as that provision requires, a claim for payment 'in lieu of' such an entitlement.[133] However, this is a misconstruction. The regulation was obviously intended to apply where an employee did not receive the entitlement itself and was instead seeking the payment that they would have received had their employment status been correctly classified.[134] In reg 2.03A, 'in lieu of' simply means 'instead of'.

[52] *Second,* Wheelahan and Bromberg JJ concluded[135] that reg 2.03A was intended to be declaratory of the general law and conferred no right of set off. That ignores the text of reg 2.03A(3).

Part VII: ORDERS SOUGHT

[53] The appeal be allowed.

[54] The orders and declarations made by the Full Federal Court in Matter No. QUD 724 of 2018 on 20 May 2020 and 29 May 2020 be set aside.

[55] In lieu of the orders and declarations referred to paragraph 54,

(a) the declarations sought in paragraphs 1 to 6 and 8 of the Amended Originating Application in Matter No. QUD 724 of 2018, or,

(b) in the alternative to sub-paragraph (a), one or more of the declarations sought in paragraphs 9 [but not 9(e)], 10, 11, and/or 12 [but not 12(b)(ii)] of the Amended Originating Application in Matter No. QUD 724 of 2018.

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[133] Decision at CAB 92 [262]; CAB 256-257 [943]-[946]; CAB 285 [1022].

[134] See *Explanatory Statement to the Fair Work Amendment (Casual Loading Offset) Regulations* 2018.

[135] Decision at CAB 92 [262]; CAB 285 [1022].

Part VIII: TIME ESTIMATE

[56] The Appellant estimates that 2.5 hours will be required for its oral argument.

Dated: **21 January 2021**

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Annexure

List of constitutional provisions, statutes and statutory instruments referred to in submissions

Title	Provisions / sections	Date
Fair Work Act 2009 (Cth)	Sections 43, 44, 50, 55, 56, 61, 65, 67, 86, 87, 90, 95, 106, 111, 116, 123, 384, 539 and 545	Current
Fair Work Regulations 2009 (Cth)	Regulation 2.03A	Current
WorkPac Pty Ltd Mining (Coal) Industry Enterprise Agreement 2012	Clauses 5.1, 5.3, 5.4, 5.5, 5.12, 6.4.1, 6.4.2, 6.4.3, 6.4.4, 6.4.5, 6.4.6, 6.4.7, 6.5.1 and 7.6	27 June 2012