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 REPLY

Part I: CERTIFICATION

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

Part II: ARGUMENT

Ground 1 and the related Contentions

[2] Mr Rossato's status must be determined by the terms of his contracts: *cf* First Respondent's submissions (**RS**) [17]; Third Respondent's submissions (**CS**) [48]-[51]; Fourth Respondent's submissions (**PS**) [8], [9], [49], [50]. Where, as here, the contracts are wholly written, the correct test is, by analogy, that in *Connelly v Wells* at 74; *Australian Mutual Provident Society v Chaplin* (1978) 52 ALJR 407, 411; *Narich Pty Ltd v Commissioner of Pay-Roll Tax* [1983] 2 NSWLR 597, 601; see also *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570, [35]. *Hollis v Vabu* (2001) 207 CLR 21, [24] has been misunderstood: CAB 182-183 [625]-[629]. The nature of the contract considered in *Doyle v Sydney Steel Co Ltd* (1936) 56 CLR 545 is not apparent, but there is no indication that it was wholly written.

[3] The requisite firm advance commitment must be a contractual promise. The issue is whether, as WorkPac contends, the firm advance commitment is a contractual promise that work will be offered and performed, or whether, as the Full Court found and the respondents contend, a mere expectation, understanding, or contemplation will do.

[4] Mr Rossato was not employed to work a 'standard work week': *cf* RS [11], [13](a). The first three NOCEs stated that this was only a guide: AFM 232, 276, 294. The second three NOCEs gave no guidance, and made clear that the hours worked were dependant on Mr Rossato's availability, WorkPac's business needs, the client's needs, and safety considerations. When the prospect of a fall in demand was raised with Mr Rossato, he elected to take a role at another mine: AFM 20 [6.35]-[6.37].

[5] Clause 5.4 of the General Conditions is not inconsistent with casual employment: *cf* RS [13](b); CS [13](vi); PS [18], [23]. By this provision, Mr Rossato was required to perform each casual assignment in accordance with its terms. Those terms included that the assignment was on an 'hourly basis' (clause 5.1), was of an indeterminate and variable length (see, for example, CAB 116 [340] ('may vary and is a guide only') and clause 5.6), could be terminated on one hour's notice and, under the last three contracts, included Mr Rossato's express right to refuse and cancel shifts. (Clause 5 is at CAB 120-121 [355].)

[6] In this case, notice of no more than one hour is indicative of casual employment: *cf* RS [14]. The existence and nature of an employment commitment is tested against how long the contract requires that it endure, which necessarily is measured by how quickly and easily it can be brought to an end. White J's contrary reasoning at CAB 166 [551], [552], 171 [579] is incorrect.

[7] Mr Rossato unilaterally left work without seeking 'permission' (*cf* RS [15]): AFM 34-35 [6.111]-[6.112].

[8] A stable, regular, and predictable system of work does not preclude casual employment (*cf* RS [11]; CS [19]-[22]), as 'a person employed as a casual labourer could be employed on work of a permanent nature': *Williams v Haigh* (1925) 18 BWCC 549, 555; see also *Knight v Bucknell* (1913) 6 BWCC 160, 162; and ss.65(2)(b), 67(2), 384(2)(a) of the Act.

[9] Mr Petersen's 'on demand' test is not supported by *Hamzy*: *cf* PS [14]. Employees who work on demand are included in, but do not constitute, *Hamzy's* description of casual employment. *Hamzy* does not support the last sentence of PS [14].

[10] Mr Rossato's contracts were never varied (*cf* RS [52]; CS [52]-[54]; PS [51]), for the reasons WorkPac submitted below (AFM 896-905 [79]-[107]) and those identified by White J: CAB 184 [636].

Ground 2

[11] Mr Rossato was a Casual FTM. He was entitled to the rights and obligations that the Enterprise Agreement (**EA**) attached to Casual FTMs because he contracted to be employed under the EA in the category of Casual FTM, not because he was also a casual employee under the Act. The notion of 'contracts of adhesion' has never been applied to alter the operative effect of a contract: *cf* RS [22]. Sections 55 and 56 do not create the problems to which the respondents point (RS [20], [21]; PS [31], [32]), but instead prevent them arising. They are the mechanism by which the Act achieves its objectives, and ensures the consistent and harmonious operation of enterprise agreements and the NES.

Ground 3 and the related Contentions

[12] There was a separately identifiable casual loading of 25% in Mr Rossato's contracts: *cf* RS [44], [45]; PS [33], [34]. White J correctly held that the first three contracts incorporated by reference the stipulations for a casual loading in clauses 6.4.5 and 6.4.6 of the EA: CAB 127-128 [385]-[391] and CAB 201-203 [710]-[721]; see *Australian Workers Union v BHP Iron-Ore Pty Ltd* (2001) 106 FCR 482, [251].

[13] White J wrongly held that Mr Rossato's second three contracts did not incorporate those provisions: CAB 129 [397]. Clause 5.10 of the General Conditions is a promise by WorkPac to pay Mr Rossato the casual loading stipulated in the EA: CAB 120 [355]; *cf* CAB 126 [382], 128 [394], construed against the contextual fact that, as White J correctly found at CAB 125 [375], Mr Rossato is objectively taken to have known that the EA applied to his employment. The subjective considerations on which Mr Rossato relies at RS [45] are irrelevant: see CAB 123 [364].

[14] There was a separately identifiable casual loading of 25% in the EA: *cf* RS [46]-[50]. White J correctly so held: CAB 201 [709], 1st sentence. Mr Rossato's challenge to that conclusion depends on the erroneous premise that the loading should be in the same amount as the difference between the Casual and Permanent FTM Flat Rates: RS [47]. However, as White J correctly held, (a) the amount of the loading is calculated at 25% of a Permanent Base Rate FTM's rates, and (b) the Permanent Flat Rate FTM rates include allowances for extraneous elements: CAB 200 [704] point 30 and [706], 201 [708]. Mr Petersen's assertion

at PS [5], [6], [33] that Mr Rossato was not entitled to a casual loading under the EA is contrary to the plain language of clause 6.4.5(b), set out in CAB 110 [326].

[15] A contractual set off is consistent with the scope and purpose of the Act: see *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, [23]; and *cf* RS [24]-[26], [31], [40]; CS [55]-[61]; PS [36], [38], [53]. *First*, s.92 only prohibits cashing out the right to 'paid annual leave' in s.87 (see s.12, 'paid annual leave'); *cf* PS [36], [38]. Mr Rossato's claim in respect of annual leave, on the other hand, was under s.90(2), which expressly substitutes the 'compound entitlement' of a paid absence from work under ss.87 and 90(1) with a new monetary entitlement arising at the point of termination: see CAB 84-85 [229]. The reason why paid annual leave was not taken during employment is immaterial. *Second*, the legislative scheme is consistent with an entitlement to restitution or set off in respect of any of the relevant NES entitlements: see reg.2.03A of the *Fair Work Regulations*, and s.173 of the former *Workplace Relations Act* 1996, of which there is now no equivalent in the Act in relation to contracts. *Third*, for the reasons set out in WorkPac's submissions in chief (**WS**) [40], the statutory mechanism for recovering compensation for unpaid NES entitlements under s.545(2)(b) contemplates the avoidance of double compensation in the manner for which WorkPac contends. None of the respondents address this submission substantively. It is a purely legal argument, cognate with WorkPac's arguments made below in relation to reg.2.03A, and responds to the respondents' contentions as to illegality: *cf* RS [32].

[16] *James Turner, Linkhill* and *Transpetrol* show the way: *cf* RS [29], [30]; CS [35]. They each suggest that, where the parties subjectively intend to create a different relationship than the one that they objectively succeed in creating, 'there is no inflexible principle that precludes a creditor, who has appeared to designate or appropriate a payment to discharge a specific liability…to justify the use of that payment as a set off to a different liability': *Transpetrol* at [113]; see also *Linkhill* at [99]. A close correlation between the payment and the purpose of the kind on which the Full Court insisted should not be required. WorkPac contends for a flexible approach that avoids double compensation while maintaining fidelity to the parties' agreement: WS [34]-[36]; *cf* RS [29](c).

[17] Mr Rossato's principal answer is to support White J's finding that Mr Rossato and WorkPac had succeeded in creating the relationship they intended: RS [29](b). However, that finding wrongly disregarded the objective indications of a shared intention to create a relationship of casual employment, in respect of which there would be no entitlement to paid annual and personal/carer's leave – for example, the repeated contractual references to the

employment being casual, and the stipulations that the casual loading was paid 'in lieu of' these entitlements: WS [8].

[18] Mr Rossato and the CFMMEU rely on observations in *James Turner* that were not the subject of final determination, and in any event were confined to entitlements that 'cannot be discharged by payment of money'. Sub-section 90(2) is not such an entitlement. The significance of *James Turner* is in its treatment of 'double-dipping': WS [36].

[19] CS [32] supports Wheelahan J's misplaced reliance on *TransAdelaide v Leddy (No 2)* (1998) 71 SASR 413. In that case, the issue was whether a 20% loading 'in lieu of sick leave and annual leave entitlements and public holidays' could be appropriated in satisfaction of an employee's entitlement to wages owed to him as a full-time employee. It was held at 419-421 that such an appropriation was permitted. However, there was no finding that the payment could not be brought into account to reduce the employer's obligations with respect to leave. Instead, Doyle CJ at 419 expressly rejected the proposition that the loading could only be appropriated against the leave entitlements 'in lieu of' which it was paid: *cf* CAB 236 [855].

[20] **The defence of good consideration is not made out**: *cf* RS [38]-[40]. The rationale of the defence is that WorkPac not be unjustly enriched by an order for restitution: Edelman and Bant, *Unjust Enrichment* (Hart Publishing, 2nd ed, 2016) p.365-366. It would not, because the casual loading was part of the aggregate consideration for all aspects of Mr Rossato's service, including compensation for the absence of any entitlements attached to permanent employment. Restitution would not mean that Mr Rossato was not paid for the services he provided, or cut across the charter of his contracts with WorkPac.

Dated: **11 March 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 12, 55, 56, 65, 67, 87, 90, 92, 384, 545	Current
Fair Work Regulations 2009(Cth)	Regulation 2.03A	Current
Workplace Relations Act 1996 (Cth)	Section 173	As at 30 June 2009
WorkPac Pty Ltd Mining (Coal) Industry Enterprise Agreement 2012	Clauses 6.4.5, 6.4.6, 9.1.1(b)	27 June 2012