HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 18 Feb 2021 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	B73/2020
File Title:	WorkPac Pty Ltd v. Rossato & Ors
Registry:	Brisbane
Document filed:	Form 27D - Respondent's submissions-Third Respondent's Su
Filing party:	Respondents
Date filed:	18 Feb 2021

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

B73/2020

ON APPEAL FROM THE FULL COURT OF THE
THE FEDERAL COURT OF AUSTRALIA

BETWEEN:

WorkPac Pty Ltd
ACN 111 046 012

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

THIRD RESPONDENT'S SUBMISSIONS

PART I CERTIFICATION

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

PART II CONCISE STATEMENT OF ISSUES

2. The Third Respondent agrees that the appeal raises the two broad issues raised by the Appellant (**WorkPac**). In its notice of contention the Third Respondent contends that the appeal also presents the following issues:

(i) Whether the First Respondent **(Mr Rossato)** was a casual employee in each of his engagements with WorkPac based on the characterisation of his employment at the time the impugned entitlements under the *Fair Work Act 2009* (Cth) **(FW Act)** accrued.

(ii) Whether Mr Rossato was a casual employee in each of his engagements with WorkPac based on a variation to the contracts of employment applicable to each of his engagements.

(iii) If the provisions of the contracts between Mr Rossato and WorkPac in relation to each of his engagements included a severable provision excluding leave entitlements on the basis that Mr Rossato was a casual, whether those provisions were unenforceable or inoperative on the basis that they were unlawful and/or against public policy.

PART III SECTION 78B NOTICES

3. The Third Respondent does not consider that any notice need be given in compliance with section 78B of the *Judiciary Act 1903* (Cth).

PART IV MATERIAL FACTS

4. The Third Respondent contests the proposition that the contracts of Mr Rossato were to be found wholly in the General Conditions and each Notice of Offer of Casual Employment (**NOCE**)[1]. Apart from implied terms of the contracts, the Third Respondent relies on facts relevant to the employment conditions of Mr Rossato not found in the General Conditions and NOCEs, including the rosters provided by WorkPac to Mr Rossato[2] and the fact that Mr Rossato was a long-distance worker who had to "Drive In – Drive Out" to his work at the coal mines from his home and had to reside in the accommodation provided by the coal mines[3].

5. There was no formal contract of employment and neither the General Conditions nor the NOCEs purported to be exhaustive of the terms of the contract of

---

[1] Appellant's Submissions (**AS**) at [7]
[2] Primary Judgment (**PJ**) at CAB 106 [306], CAB 114-115 [336]
[3] PJ at CAB 106 [304], CAB 163 [543]

employment. When WorkPac's submissions refer to the "contracts" of Mr Rossato they are only referring to the General Conditions and NOCEs.

PART V ARGUMENT IN ANSWER TO APPELLANT

Ground 1

6. Chapter 2 of the FW Act provides for employment rights. At the apex are the National Employment Standards (**NES**) in Part 2-2, which are minimum standards that apply to the employment of employees and which, pursuant to s 61(1) of the FW Act cannot be displaced[4]. The NES relevantly include entitlements to annual leave in Division 6 and personal leave in Division 7. Section 44(1) of the FW Act provides that an employer must not contravene a provision of the NES. Casual employees are excluded from those entitlements. Beneath the NES are awards and enterprise agreements. Section 55 of the FW Act provides that awards and enterprise agreements must not exclude the NES. Section 45 of the FW Act provides that, if an award applies to a person, then the person must not contravene the award. Section 50 of the FW Act provides that, if an enterprise agreement applies to a person, then the person must not contravene the enterprise agreement.

7. As the Full Federal Court said in *WorkPac Pty Ltd v Skene* (***Skene***), the expression "*casual employee*" has been the subject of extensive judicial consideration, has acquired a legal meaning, and was extensively used in relation to the legislative predecessors of the FW Act[5], including in what are now called the NES.

8. Before the Full Federal Court (**Full Court**) in this case, it was accepted by WorkPac that *Skene* correctly determined that a casual employee is an employee who has no firm advance commitment from her or his employer to continuing and indefinite work (**requisite firm advance commitment**)[6]. Indeed, WorkPac based its case before the Full Court on that proposition[7]. Further, WorkPac relied on its concession in *Skene* that there was a requisite firm advance commitment as the reason for WorkPac not applying for special leave to appeal *Skene*[8]. Therefore, it is

---

[4] *WorkPac Pty Ltd v Skene* [2018] FCAFC 131; 264 FCR 536 (***Skene***) at [87].
[5] [2018] FCAFC 131; (2018) 264 FCR 536 at [128] and [172].
[6] PJ at CAB 33 [31] , CAB 98 [276(vi)]
[7] PJ at CAB 102 [286], CAB 103 [290], CAB 129 [398]
[8] Full Court at CAB 98 [276(vii)] and CAB 101-102 [284]

not surprising that the Full Court decided this case on the basis of whether there was a requisite firm advance commitment[9].

9. Contrary to the contention of WorkPac[10], White J did not decide that the concepts of irregularity, intermittency or uncertainty[11] define casual employment. He went no further than the Full Court in *Skene*[12] in commenting that these are the usual manifestations of the absence of the requisite firm advance commitment, while recognising that such manifestations did not necessarily lead to the conclusion that the work was permanent[13]. Indeed, WorkPac accepted before the Full Court that evidence of the regularity of employment may constitute a manifestation of the requisite firm advanced commitment[14].

10. WorkPac's reliance on other sections of the FW Act that refer to casual employment with characteristics like regularity[15] and require a retrospective assessment of those characteristics is misplaced. These provisions only apply if there is separate determination that the employee was already a casual by applying the essential test of whether there was the requisite firm advanced commitment. They do not preclude the contract being analysed to see whether the work provided for by the contract is irregular, intermittent or uncertain for the purpose of considering manifestations of inconsistency with the requisite firm advance commitment.

11. WorkPac's case in the Full Court depended on the contention that the Full Court, in determining whether Mr Rossato was a casual employee, was not entitled to look beyond the express terms of the General Conditions and NOCEs. This contention was in part based on the proposition that the existence or otherwise of the requisite firm advance commitment had to be assessed at the time of the commencement of each of Mr Rossato's six periods of employment.

---

[9] PJ White J at CAB 130 [402]ff
[10] AS at [14]
[11] PJ at CAB 150 [481]
[12] *Skene* at [173]
[13] See the examples in *Skene* at [174] and [175]
[14] Appellant's Further Material (**AFM**) 818 [19](c)
[15] AS at [14]

12. Subject to the possibility of variation, which was not determined by White J[16], White J decided the case based on an acceptance of this proposition[17]. However, White J found that the requisite firm advance commitment existed at the time of the commencement of each engagement[18].

13. First, White J found that the requisite firm advance commitment could be discerned from provisions in the express terms of the General Conditions and NOCEs. The relevant provisions were summarised[19] as including:

(i) the use of the words "an assignment", a word which by itself conveys connotations of continuity;

(ii) that each assignment was "a discrete period of employment";[20]

(iii) that during the time of the assignment, Mr Rossato's service was to be exclusive to WorkPac;[21]

(iv) the provision for stand down of Mr Rossato;[22]

(v) the requirement that Mr Rossato work the shifts or rosters prescribed or any agreed replacement shifts or rosters;[23]

(vi) clause 5.4 of the General Conditions, which contained a commitment by Mr Rossato to complete the assignment with the prospect of him facing a claim for damages from WorkPac if he failed to do so;[24]

(vii) that employees were to serve a 6-month minimum qualifying period;[25] and

(viii) in relation to the first three contracts, that the assignment was not of fixed length and although it specified a period of time, this was to be a guide only.

14. Contrary to WorkPac's contention which relies on some of these provisions[26], these provisions suggested to White J a well organised and stable structure of work

---

[16] PJ at CAB 184 [635]
[17] PJ at CAB 156 [512]
[18] In relation to the first contract PJ at CAB 173-174 [588]; see also CAB 165 [548]; Also applicable to second and third contracts: PJ at CAB 175 [593]
[19] PJ at CAB 165 [548], CAB 173 [588] (first contract); applicable to subsequent contracts except where stated: CAB 175 [593], CAB 178 [606], CAB 181 [621]
[20] General Conditions at [5.1]; AFM 133
[21] General Conditions at [6.15]; AFM 134
[22] General Conditions at [7.1] [7.14]; AFM 135, 136
[23] General Conditions at [7.4]; AFM 136
[24] PJ at CAB 166-167 [557], [558] and CAB 180 [615];
[25] General Conditions at [5.11]; AFM 133
[26] AS at [17]

according to a known pattern conveying a requisite firm advance commitment[27]. The provisions also negatived any inference that the arrangement was one in which WorkPac could choose on any particular day whether or not to offer work on that day[28].

15. White J also found that the provision that the assignment could be varied or terminated on periods of short notice, relied on by WorkPac[29], did not alter this conclusion[30]. Relevant to this finding is that permanent employees can be dismissed by the giving of notice and that notice is not inconsistent with a requisite firm advance commitment [31].

16. In any event, White J took into account as relevant the shortness of the notice together with other matters in favour of WorkPac's argument[32], namely the payment of an hourly rate (albeit also applicable to any permanent employees) and the designation in the express documents of Mr Rossato as a casual[33]. However, some of these provisions were a consequence of WorkPac's own incorrect designation of Mr Rossato as casual and the label of casual could not be determinative of the issue before the Full Court[34].

17. White J also found, without relying on post contractual conduct[35], that there was uncertainty about the nature of the commitment to the future employment in each contract which made it appropriate to have regard to the factual matrix in which each contract was made[36], on the basis that the express terms were ambiguous or susceptible to more than one meaning[37].

18. It is not intended in this submission to attempt to deal in detail with all the factual matters that White J relied on as part of this factual matrix. However, in relation to the first contract of Mr Rossato relevant matters in the factual matrix included:

---

[27] PJ at CAB 173 [588]
[28] Ibid
[29] AS at [18]
[30] PJ at CAB 173 [588]
[31] PJ at CAB 131 [403] and CAB 166 [551]
[32] Cf AS at [21]
[33] PJ at CAB 174 [589]
[34] PJ at CAB 174 [590]
[35] PJ at CAB 160 [529]
[36] PJ at CAB159 [526]
[37] PJ at CAB159 [524]

(i) WorkPac and Mr Rossato each can be taken to have known that the mining was undertaken by production workers such as Mr Rossato working in established shifts[38].

(ii) The provision by WorkPac of rosters which indicated a mutual understanding that the employment offered was organised, structured, ongoing, regular and predictable[39].

(iii) The "Drive In – Drive Out" and accommodation arrangements at the mine which were inconsistent with an expectation of the employment being intermittent or discontinuous and, further, inconsistent with Mr Rossato having a choice as to whether to work on a particular day[40].

19. In relation to subsequent contracts, White J found that, to the extent that the matters relevant to the factual matrix in the first contract were not repeated, they demonstrated that both parties knew the system under which production operators worked and, in particular, of the shift structure providing continuity, regularity and predictability of the work[41].

20. Further, in relation to the subsequent contracts, the agreed pattern of work was confirmed by the fact that WorkPac had entered the commencement and completion times for each day of work by Mr Rossato in relation to the first contract in advance of the shifts being worked. White J found that this showed that WorkPac knew in advance the hours required by the coal mine and indicated a mutual understanding in advance that Mr Rossato's employment would be regular and predictable.[42]

21. WorkPac takes particular issue[43] with the reliance by White J on the provision of long-term rosters to Mr Rossato by WorkPac with the NOCEs in relation to the first

---

[38] PJ at CAB 163 [541]
[39] PJ at CAB 163 [542], CAB176 [598]
[40] PJ at CAB 163 [543], See also CAB 175 [595] in relation to the second contract.
[41] PJ at CAB 175 [593], CAB 178 [607]
[42] PJ at CAB 172 [585], CAB 178 [607] and [608]; AFM 39 [6.132], AFM 599-639, 711-779
[43] AS at [20]

two contracts[44] and their knowledge of this in subsequent contracts[45]. White J found that, read in conjunction, the General Conditions, the First NOCE and the roster indicated objectively that Mr Rossato was being offered and agreed to a pattern of work which would involve him working regular and predictable hours of shift work in accordance with the roster[46].

22. The rosters given to Mr Rossato were for full time employment and provided for regular and predictable employment[47].They essentially prevented him from picking and choosing the days on which he might work and showed an agreed pattern of work. The rosters demonstrated that there was an expectation that Mr Rossato would be available on an ongoing basis for regular work in accordance with rosters determined significantly in advance.

23. WorkPac's argument that the rosters were generic and not personal to Mr Rossato[48] ignores the fact that the roster was initially sent to Mr Rossato with his NOCE and that cl 7.4 of the General Conditions provided that Mr Rossato was required to work the shifts and rosters prescribed in the NOCE[49] In. any event, the General Conditions[50] expressly provided that the client would be responsible for issuing Mr Rossato with work instructions[51]. This was also relevant in relation to later engagements where the coal mining client provided the rosters, which demonstrated a continuation of the pattern of shift arrangements contained in the rosters which accompanied the earlier NOCEs[52].

24. WorkPac attempts to extrapolate from the findings of White J about rosters that he ignored the need to find implied terms and has introduced an incorrect principle about mutual undertakings that is extraneous to the law relating to employment

---

[44] PJ at CAB 106 [306], CAB 162-163 [539], [542], CAB 168-172 [563]-[584], CAB 175-176 [596]-[598],
[45] PJ at CAB 177 [602] and CAB 179 [611]
[46] PJ at CAB 169 [566]
[47] See *Skene* at [183]; *Skene FCC* at[81](a), [85]
[48] AS at [20]
[49] PJ at CAB 171 [577]
[50] Clause 2, AFM 132
[51] PJ at CAB 172 [583]
[52] PJ at CAB 172 [584], CAB175-176 [596]-[598], CAB 178 [605]-[607].

contracts[53]. Indeed, this was the basis for its special leave application in relation to Ground 1. This contention distracts from the fundamental basis of the judgment of White J.

25. To the extent that White J discussed the concept of mutual undertakings,[54] he proceeded on the basis that they were the promises to employ and be employed that are inherent in the employment contract[55]. There was no dispute in the case before the Full Court that such promises were implied in the contract. The only dispute was as to the nature of those promises and whether they included the requisite firm advance commitment.

10 26. This analysis of White J was directed at whether there were implied terms. WorkPac's submissions ignore the reference by White J to what was "inherent in any contract of employment"[56] and his Honour's juxtaposition of an express term of a contract with undertakings that may be implicit in a contract or be inferred from other matters which are express"[57].

Ground 2

27. WorkPac's argument is that irrespective of the correct legal position for other purposes, Mr Rossato was a casual employee for the purpose of the 2012 Enterprise Agreement (**Enterprise Agreement**). It is not apparent from WorkPac's submissions that its argument in *Skene* was different than its argument before the
20 Full Court.

28. WorkPac originally argued in *Skene* that cl 5.5.6 of the 2007 Enterprise Agreement, which required WorkPac to inform the employee of his employment status (the equivalent of cl 6.4.7 of the Enterprise Agreement), meant that, if WorkPac told an employee that the employee was a casual on engagement, that was sufficient to mean the employee was a casual for the purposes of the 2007 Enterprise

---

[53] AS at [22]
[54] PJ at CAB 143-144 [446] to [447], CAB 170 [572]
[55] PJ at CAB 143 [446]
[56] PJ at CAB 143 [446]
[57] PJ at CAB 144 [447]

Agreement[58]. That argument failed in *Skene*[59]. In particular, *Skene* said that cl 5.5.6 only required WorkPac to communicate what it understood as at the time of engagement[60].

29. Before the Full Court WorkPac did not seek to maintain the position which it had advanced in *Skene*[61]. It is not surprising in those circumstances that the Full Court accepted that the reasoning in *Skene* was correct[62]. Further, given that it did not base its case before the Full Court on Clause 6.4.7, the complaint by WorkPac in this appeal about the use of the word "unilateral" in *Skene*, which is central to WorkPac's ground 2 argument[63], is misplaced.

30. Before the Full Court WorkPac relied on clause 6.4.1 rather than clause 6.4.7[64]. The Full Court did not characterise clause 6.4.1 as involving a unilateral election of WorkPac[65]. WorkPac's argument before the Full Court was that clause 6.4.1 meant that an employee engaged and designated as a casual was necessarily a casual for the purpose of the Enterprise Agreement[66].

31. However, clause 6.4.1 does not so provide. Like the NES and the rest of the Enterprise Agreement, it provides no definition for a casual employee. By contrast, many industrial instruments actually do have a provision saying that an employee engaged and paid as a casual is a casual for the purpose of the industrial instrument[67].

Ground 3

Set-Off

32. Central to WorkPac's submissions on set off is its criticism of the that part of the judgment of Wheelahan J that draws a distinction between claiming set off on the basis of a contract that compensates for statutory entitlements and a contract that purports to compensate for the absence of statutory entitlements[68]. This submission

---

[58] *Skene* at [196]
[59] PJ at CAB 188 [657]; *Skene* at [193] to [227]
[60] *Skene* at [220]: PJ at CAB 188 [657]
[61] PJ at CAB 188 [658]
[62] PJ at CAB 191-192 [672]-[674]
[63] AS at [26]
[64] PJ at CAB 188 [658], CAB 185-186 [643]-[644]
[65] Cf AS at [26]
[66] PJ at CAB 189 [662]
[67] PJ at CAB 190 [665]
[68] AS at [38]

treats the two types of compensation as indistinguishable for the purposes of determining whether there is the requisite correlation. However, there is a clear difference based on the fact that the wages were not paid on account of any statutory entitlements, and any loadings that were incorporated in the NOCEs were ostensibly paid on account of the absence of those statutory entitlements[69].

33. The fact that this will result in actual payments to Mr Rossato rather than leave is beside the point[70], not least because they only arise because the leave or public holiday was not taken. In any event, there is not a sufficiently close correlation between payments for those entitlements which are made on termination, such as unused leave, and the provision included in the NOCEs providing for the payment of a "casual loading" on a regular basis during the course of Mr Rossato's employment and prior to termination.

34. As it did before the Full Court, WorkPac places heavy reliance on[71] *Linkhill Pty Ltd v Director, Office of the Fair Work Building Industry Inspectorate* [72] (***Linkhill***) and James *Turner Roofing Pty Ltd v Peters*[73] (***James Turner***) which were followed in *Transpetrol Fair Work Ombudsman v Transpetrol TM AS*[74]. The Full Court deals at some length with the inapplicability of these authorities to the current case[75].

35. In particular it is surprising that WorkPac give so much attention to *James Turner* in which it was doubted that there was a sufficient degree of correlation to allow set off between the nature of the payment made to the employee for hours worked and the nature of the obligation to pay untaken long service leave[76]. Likewise, it is surprising that WorkPac relies on the obiter in *Linkhill*, which otherwise does not embrace as applicable or correct[77] the parts of *James Turner* that WorkPac calls in aid.

---

[69] PJ at CAB 284 [1020] per Wheelahan J with which Bromberg J agreed at CAB 83 [225], with additional reasons at CAB 83-85 [226]-[231]. The reasoning of White J at CAB 250 [910] and CAB 252 [917] is to similar effect. See also *TransAdelaide v Leddy (No 2)*(1998) 71 SASR 413; Wheelahan J at CAB 273-274 [992] - [994] and CAB 284-285 [1021]; White J at CAB 235-236 [853] - [855]

[70] Cf AS [38]

[71] AS [36]

[72] [2015] FCAFC 99; (2015) 240 FCR 578 at [99]

[73] [2003] WASCA 28, (2003) 132 IR 122 at [29]

[74] [2019] FCA 400 at [113]

[75] PJ at CAB 233-234 [848]-[849], CAB 241-243 [874]-[881], CAB 276-277 [999]-[1000]

[76] *James Turner* at [48]

[77] *Linkhill* at [95]-[100] per North and Bromberg JJ

36. In any event, the Full Court also relied on two features of the FW Act that militate against WorkPac's submissions that it can offset wages to include a casual loading, against payments referrable to leave entitlements[78]. First, the entitlements to leave were composite entitlements to paid leave which meant there was thus no correlation between the payments, and any leave in fact taken, or liability under the FW Act to pay a sum on account of accrued leave at the end of the employment. Secondly, the prohibition against cashing out annual leave and personal/carer's leave in s 92 and s 100 of the Act tells against any finding that the contracts had the effect of appropriating any part of Mr Rossato's weekly wages to his entitlements to paid leave[79].

Restitution

37. Contrary to WorkPac's submissions[80] the Full Court correctly distinguished *Roxborough v Rothmans of Pall Mall Ltd* (***Roxborough***) in the following ways[81]:

(i) The object of WorkPac's agreements to pay remuneration to Mr Rossato at the agreed hourly rates was to secure the performance of work by Mr Rossato and there was no failure of that object.

(ii) Under the contracts of employment the parties intended that Mr Rossato be the recipient of the remuneration that WorkPac agreed to pay him, and that he enjoy the benefit of those moneys and there was nothing unconscionable about Mr Rossato retaining and enjoying the benefit of the remuneration that WorkPac had agreed to pay him on account of the work that he had performed.

(iii) The bargains that the parties struck involved securing Mr Rossato's time and labour in return for remuneration that was for his benefit and, assuming that any severable part of the basis for the payments of remuneration failed, the position of the parties cannot in any real sense be restored.

---

[78] PJ at CAB 284-285 [1021]; see also CAB 281 [1012] and CAB 283 [1016]; agreed to by Bromberg J at CAB 83 [225]

[79] See also PJ at CAB 108-109 [319]-[321] and CAB 219 [794] per White J.

[80] AS [47]

[81] PJ at CAB 268 [978] per Wheelahan J with whom Bromberg J agreed PJ at CAB 68 [265]

(iv) Any casual loading did not form a severable part of the remuneration that WorkPac paid to Mr Rossato the consideration for which can be said to have failed.

38. The necessary but not determinative basis for WorkPac's submissions on restitution is that there was an identifiable and severable amount of casual loading that was paid to Mr Rossato as part of his contractual hourly rate. However, WorkPac alone set the contractual hourly rates, adduced no cogent evidence as to the composition of the contractual hourly rates[82] and did not attempt to prove that any casual loading played a part in the determination of those rates[83].

10 39. The contractual rates, which in all assignments exceeded any applicable rate set under the Enterprise Agreement[84], were properly described as "market rates"[85]. These rates fluctuated for largely unexplained reasons apparently unconnected with the place, shift pattern or hours of work as between assignments[86]. They were equally explicable as market driven rates[87] which logically did not fall below the Enterprise Agreement casual rates, allowing WorkPac to designate Mr Rossato as a casual so as to avoid the incidents of a permanent classification.

40. WorkPac's contention[88] that it paid Mr Rossato more than Permanent FTMs "performing the same work" was not the subject of any agreed fact or evidence. Indeed, there was not even any agreed fact or evidence that there were any Permanent

20 FTMs "performing the same work"[89]. Mr Rossato was paid above the Enterprise Agreement rates, at a market rate. At the level of abstraction posed by WorkPac's contention, reference to the Enterprise Agreement rates is not sufficient. A hypothetical Permanent FTM would likely be paid a market rate and any likely relationship to Mr Rossato's contractual rate is simply unknown.

41. In circumstances where WorkPac carried the onus of proof, the Full Court was right to determine that WorkPac had failed to show that there was a distinct and severable

---

[82] There was no agreed fact on this topic.
[83] PJ at CAB 209-210 [752], CAB 210-212 [755]-[759], [762] per White J
[84] PJ at CAB 210 [754], CAB 218-219 [793]
[85] PJ at CAB 211 [758]
[86] ibid
[87] As an example see AFM 24-25 [6.57]-[6.60]
[88] AS [46]
[89] It was an agreed fact that all FTMs provided by WorkPac to the Newlands and Collinsville mines were designated by WorkPac as casual employees: AFM 6 [3.2].

payment which could found a claim for restitution based on failure of consideration[90]. In particular, the remuneration was not divisible merely because of an assumption based on casual employment which may have formed part of the calculation of the agreed flat hourly rates when there was in fact no casual employment[91].

42. The argument by WorkPac that the casual loading was paid as consideration for, or to obtain the "benefit" of, Mr Rossato's services as a casual FTM under the Enterprise Agreement[92] is highly artificial. The agreements between the parties were for the employment of Mr Rossato in particular roles at contractually fixed rates, in accordance with crew and roster allocations set by the mining companies.[93] The Enterprise Agreement then operated with statutory force on the true nature of the employment to prescribe minimum terms and conditions which could be exceeded by the contractual terms[94] but which could not exclude or displace the NES[95]. WorkPac's contention seeks to invert that order.

43. WorkPac's proposed construction of the contracts is not a sensible one. The "consideration" postulated by WorkPac does not constitute the "substratum of the joint relationship..."[96] or "the state of affairs contemplated as the basis of the payments" sought to be recovered[97].

Reg 2.03A

44. WorkPac relies on Reg 2.03A[98] to support its argument that there should be no payment to Mr Rossato. The Full Court rejected this argument.[99]

45. Mr Rossato sought the payment of NES entitlements rather than payment in lieu of NES entitlements[100]. WorkPac and the Minister ask the Court to ignore the ordinary meaning of use of the words "in lieu of" in Reg 2.03A. In relation to this contention,

---

[90] PJ at CAB 269 [980] and PJ at CAB 214-215 [772], [774]
[91] Ibid
[92] AS [41], [45]
[93] See PJ at CAB 218-219 [793]-[794] per White J, CAB 269 [980] per Wheelahan J.
[94] *Byrne v Australian Airlines* (1995) 185 CLR 410 at 421
[95] FW Act ss 55, 61(1)
[96] *Roxborough* at [16]
[97] *Roxborough* at [104]
[98] Reg 2.03A was introduced by the *Fair Work Amendment (Casual Loading Offset) Regulations 2018*
[99] PJ at CAB 256-257 [943]-[946] per White J; at CAB 285-286 [1022]-[1024] per Wheelahan J; Bromberg J agreed with both judgments, PJ at CAB 92 [262]
[100] Ibid

WorkPac, without saying how, relies on the purpose evident in the *Explanatory Statement to the Fair Work Amendment (Casual Loading Offset) Regulations* 2018.

46. However, as recognized by the Minister, the Explanatory Statement makes clear that Reg 2.03A purports to be declaratory of existing law which justifies its retrospective operation[101].

47. In arguing to the contrary, WorkPac fails to address the Explanatory Statement by saying that the Full Court should have confined itself to the text. However, the text actually goes no further than saying that an employer may make a claim to have a loading amount taken into account but does not purport to alter the substantive law that is applicable to the determination of such a claim[102].

PART VI ARGUMENT ON NOTICE OF CONTENTION

Ground 1

48. It is alternatively submitted by the Third Respondent that Grounds 1 and 2 of the appeal should fail because the plurality should have decided that Mr Rossato was not a casual employee in each of his engagements with WorkPac based on the characterisation of his employment at the time the impugned entitlements under the FW Act accrued.

49. The Third Respondent relies on the judgment of Bromberg J which found that, in the context of considering the meaning of the exclusion for a "casual employee" in ss 86, 95 and 106 of the FW Act, which are directed at accrued entitlements, the exclusion should be directed at the characterisation of the type of employment Mr Rossato worked in at the time those entitlements accrued, rather than what type of contract he made at the outset of that employment[103].

50. The Third Respondent also submits that in determining whether Mr Rossato was a casual regard can be had to the conduct of the parties to the employment relationship and the real substance, practical reality and true nature of the relationship[104]. This is the approach that has previously been taken in the Federal Court[105] and is similar to the settled approach taken to determining the question of

---

[101] CAB 285 [1022]
[102] PJ at CAB 285 [1022]
[103] PJ at CAB 40 [54]
[104] See *Skene* at [180] cited in the PJ at CAB 37 [45]
[105] Ibid

whether a person is an employee[106], a question that often arises in determining whether a worker is eligible for the NES. It would be incongruous for the courts to look at the reality of the relationship in determining if an employment relationship has been entered into for the purpose of the NES, but not to look at the reality of the relationship in determining the nature of the employment relationship for the purpose of the NES.

51. White J saw merit in making the assessment at the time the entitlement in question is asserted[107], did not find the characterisation approach wrong[108] and would have found that Mr Rossato was not a casual for the purpose of the entitlements if characterisation test was applied[109]. However, as discussed above, ultimately he decided the case on the basis of an acceptance of WorkPac's premises that any non-contractual or post contractual matters were irrelevant.

Ground 2

52. In the alternative to Ground 1 of the Third Respondent's notice of contention, it is submitted that there was a variation after the commencement of each of the employment periods of Mr Rossato with WorkPac by which his employment status was no longer casual.

53. As Bromberg J found, the authorities supported the proposition that the subsequent actions of the parties may impliedly vary or amend the contract such that the true agreement between the parties is no longer reflected by the written contact[110]. Applying this proposition, Bromberg J also found that there was nothing in the evidence of post-contractual conduct for each of the contracts, other than the existence of the requisite firm advance commitment, that would serve to explain why all of the usual manifestations of the requisite firm advance commitment were present and the most likely explanation is that the pattern of work made available to Mr Rossato was provided to him in furtherance of the requisite firm advance commitment implicitly given shortly after the commencement of each contract

---

[106] Ibid
[107] PJ at CAB 145 [456]
[108] PJ at CAB 183 [630]; also PJ at CAB 174 [590]-[591]
[109] PJ at CAB 183 [631]
[110] PJ at CAB 51 [92]

when the fact that Mr Rossato's work would be regular and continuing became apparent[111].

54. White J thought it unnecessary to decide the question of variation[112] but pointed to the lack of time for a variation to be brought into effect and the absence of any evidence as to any change[113]. WorkPac had the onus of proof in this case[114]. Moreover, the alternative nature of this argument meant that it arose if WorkPac succeeded in its argument that the rosters provided to Mr Rossato, which were inconsistent with the NOCEs, were irrelevant to the determination of the contents of the contract at the time of the commencement of any of the engagement periods of Mr Rossato with WorkPac.

Ground 3

55. The Third Respondent submits that, if the Court accepts the contention of WorkPac that the provisions of the contracts between Mr Rossato and WorkPac in relation to each of his engagements included a severable provision that is effective in excluding leave entitlements on the basis that Mr Rossato was a casual, those provisions were unenforceable or inoperative on the basis that they were unlawful and/or against public policy.

56. A finding that Mr Rossato was not a casual employee for the purposes of Part 2-2 of the FW Act and/or was not a casual FTM for the purposes of the Enterprise Agreement necessarily meant that WorkPac, in so far as it excluded leave entitlements, acted contrary to ss 44 and/or 50 of the FW Act. White J found that, given the terms of ss 92 and 100 of the FW Act, neither WorkPac nor Mr Rossato could contract lawfully on that basis that these provisions of the contracts discharged its obligations with respect to paid leave[115].

57. In addition, White J set out reasons for why the provisions were unenforceable or inoperative[116]. However, because of the conclusions reached by White J, as discussed above, his Honour found it unnecessary to express a concluded view on the question of whether the provisions of Mr Rossato's contracts excluding him from leave

---

[111] PJ at CAB 79 [210]
[112] PJ at CAB 184 [635]
[113] PJ at CAB 184 [636]
[114] PJ at CAB 98 [276(iv)]; CAB 164 [545]
[115] PJ at CAB 219 [794] per White J. see also PJ at CAB 259-260 [1021] per Wheelahan J.
[116] PJ at CAB 219-221 [796] to [803]

entitlements on the basis that he was a casual were unenforceable or inoperative, a conclusion with which Bromberg J[117] and Wheelahan J[118] agreed.

58. It is submitted that the provisions of Mr Rossato's contracts excluding him from leave entitlements on the basis that he was a casual were impliedly prohibited by statute[119]. Alternatively, it is submitted that the Court can discern from the scope and purpose of the FW Act that its legislative purpose will not be fulfilled without regarding the provisions of Mr Rossato's contracts excluding him from leave entitlements on the basis that he was a casual as inoperative or unenforceable[120].

59. The *Explanatory Memorandum to the Fair Work Bill 2008* provided as follows[121]:

> *No specific rule is provided about the relationship between the NES and contracts of employment. That relationship is governed by well known principles (e.g., a term in the contract of employment that is less favourable than a statutory entitlement is not effective) and does not require additional legislative elaboration.*

60. In this case, the Explanatory Memorandum makes it clear that the policy and purpose of the FW Act is to render ineffective a term of a contract of employment that is less favourable than the entitlements under the FW Act. Moreover the scope and purpose of the NES provision in the FW Act include the protection of employees. In those circumstances, it would be contrary to the policy of preserving the coherence of the law to allow WorkPac to rely on the provisions of Mr Rossato's contracts excluding him from leave entitlements on the basis that he was a casual.

61. It should be noted that in the recent decision of *Warren v Secretary, Attorney-General's Department* [2021] FCA 89, Wheelahan J dealt with a similar argument in relation to a contract that contained provisions that purported to exclude leave entitlements on the basis that the worker was a casual employee. Although his Honour did not have to decide this issue because he otherwise found reliance could

---

[117] PJ at CAB 93 [266]
[118] PJ at CAB 269-270 [982]
[119] Cf *Equuscorp Pty Ltd v Haxton* [2012] HCA 7; (2012) 246 CLR 498 at [23] per French CJ, Crennan and Kiefel JJ, applying *Miller v Miller* [2011] HCA 9; (2011) 242 CLR 446 at 459 [27]
[120] Ibid
[121] At [207]

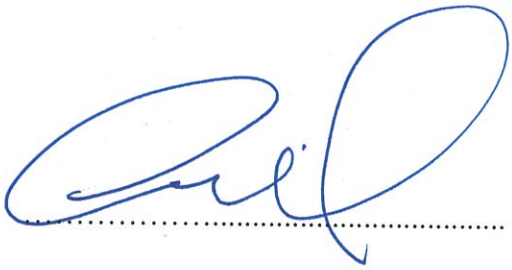
not be made on such provisions, he found that the contract was not directed to any immoral or illegal object such that the contract as a whole should be sterilised under general law principles on the grounds of public policy[122]. However, the submission of the Third Respondent is not directed at the contract as a whole but at the provisions excluding leave entitlements which it is submitted are ineffective because they purport to exclude leave entitlements provided for by the FW Act.

Part VII: TIME ESTIMATE

62. The Third Respondent estimates that 1 hour will be required for oral argument.

Dated 18 February 2021

10



Senior legal practitioner presenting the case in Court

Name: **S Crawshaw SC**

Telephone: 0413876285

Email: crawshaw@hbhiggins.com.au

[122] At [102]

ANNEXURE

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

1. *Fair Work Act 2009* (Cth) (current) – Chapter 2; Part 2-2; sections 44, 45, 50, 55, 61, 86, 92, 95, 100, 106
2. *Fair Work Amendment (Casual Loading Offset) Regulations 2018* (Cth) (current) – regulation 2.03A