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

SECOND RESPONDENT'S SUBMISSIONS

Part I: CERTIFICATION

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

Part II: STATEMENT OF ISSUES

2. The Minister for Industrial Relations (**the Minister**)[1], on behalf of the Commonwealth, intervenes in this matter pursuant to s 569 of the *Fair Work Act 2009* (Cth) (**the Act**).

3. The Minister intervenes for the purpose of addressing the legal principles governing this matter. The Minister does not propose to address Ground 1 or the competing submissions made by the Appellant (**WorkPac**) and the Respondent (**Mr Rossato**) as to the proper application of the principles to the facts of this matter.

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[1] The Minister was a party to the proceeding below, his predecessor, the Minister for Jobs and Industrial Relations, having intervened before the Federal Court of Australia.

4. The Minister addresses Grounds 2 and 3 below.

Part III: SECTION 78B NOTICES

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

Part IV: STATEMENT OF FACTS

6. The Minister does not propose to address any factual matters.

Part V: STATEMENT OF ARGUMENT

General principles applicable to Grounds 2 and 3

7. Before addressing Grounds 2 and 3, it is necessary to say something about the Act and its statutory purposes.

10 8. The applicable principles of statutory construction would not seem to be controversial in the present case.[2] The specific principles to be noted concern the need to construe the legislation:

(a) in a way that best achieves its purposes and objects;[3]

(b) to produce results which are workable and do not give rise to absurd results or inequitable outcomes;[4] and

(c) having due regard to the pre-existing legal context in which this legislation was enacted.[5]

9. The Act begins with an express statement of its overall object.[6] This include providing a *"balanced framework for cooperative and productive workplace relations"* by laws
20 that are fair to workers and flexible to businesses, by ensuring a guaranteed minimum safety net of entitlements through, inter alia, the National Employment Standards (**NES**) and modern awards, and by achieving productivity and fairness through an emphasis on enterprise-level collective bargaining.

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2 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 to 382 and 384; *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14]; and *R v A2* (2019) 93 ALJR 1106 at [32] to [37].

3 Section 15AA of the *Acts Interpretation Act 1901* (Cth).

4 *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union; Minister for Jobs and Industrial Relations v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 297 IR 338 ***(Mondelez)*** at [3].

5 *Mondelez* at [13].

6 Section 3 of the Act.

10. Chapter 2 of the Act creates the NES. This establishes a set of minimum terms and conditions that, in general, apply to all national system employees.[7] These statutory entitlements cannot be excluded and must not be contravened.[8]

11. Chapter 2 of the Act also creates a framework which, consistently with the NES, allows more specific entitlements to be established for particular categories of employees through modern awards and enterprise agreements.[9] This framework is based upon previous legislative schemes.[10] It contemplates that, through a statutory approval process, a framework of more detailed categories of employees would be adopted.[11] This system of categorisation then allows more specific rights and entitlements (including rates of pay) to be allocated to each category of employees, consistently with the NES.[12] Again, these rights cannot be excluded and must not be contravened.[13]

12. The apparent purpose of this framework is to allow a wide range of individual employers and employees, across the jurisdiction, to fairly and efficiently:

    (a) determine the appropriate category of employment (under the NES, modern award or enterprise agreement) which is applicable to an individual case;

    (b) enter into individual employment agreements which (at a minimum) provide the entitlements (including monetary entitlements) required by the statute; and

    (c) thereby create a co-existing matrix of statutory and contractual rights.[14]

13. By its nature, this process of categorisation must be undertaken at the outset of the employment relationship, to ensure that any proposed employment agreement is compliant.

14. In a framework of this kind, the purposes of the Act are furthered if the categories of employment created by the Act (or pursuant to its terms) are construed in a way which allows them to be applied in a certain, practical and workable way by those who are intended to use them. This minimises the risk of mis-categorisation which has been

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7 Sections 59 and 61 of the Act.
8 Sections 44 and 61 of the Act.
9 Parts 2-3 and 2-4 of Chapter 2 of the Act.
10 For example, the Australian Fair Pay and Conditions Standard, awards and workplace agreements in Parts 7, 8 and 10 of the *Workplace Relations Act 1996* (Cth).
11 As to modern awards, see Part 2-3 of Chapter 2. The approval process for enterprise agreements is provided for in Division 4, Part 2-4 of Chapter 2. As to the provisions of the Act that contemplate categorisation of employees in modern awards and enterprise agreements, see ss 139, 172 and 256A.
12 See, ss 52(2), 53(6), 114(4)(e), 139(1)(b), 172(1)(a), 172(1)(d), 256A(2) and 256A(4)(c).
13 Sections 45, 46, 50 and 51. Note that, a modern award will not apply where an enterprise agreement otherwise applies: s 57.
14 *Fair Work Bill 2008 Explanatory Memorandum* (**Explanatory Memorandum**) at pp.34-35, [206]-[217].

recognised as a source of concern under previous legislative schemes,[15] in circumstances where the consequences of mis-categorisation can have serious legal and practical effects.[16]

15. Relevantly to the application of the particular entitlements provided for in the NES, the Act distinguishes between employees who are *"casual employees"*[17] and those who are not. Unlike the term *"employee"*[18], the term *"casual employee"* is not defined in any way by the Act. Clearly, however, the term *"casual employee"* refers to a sub-category of *"employees"*.[19]

16. The meaning of the term *"casual employee"* for the purposes of the Act is the question asked of this Court in Ground 1 which the Minister does not propose to address.

Ground 2: Casual employment under the Enterprise Agreement

17. This ground would not seem to give rise to issues of principle.

18. Subject to the statutory constraints, an enterprise agreement may be based upon its own terminology and system of categorisation of employees. So, for example, the parties can limit entitlements (for example redundancy entitlements) based on that system, including by denying them to employees designated as casual employees using whatever system is agreed.

19. However, an enterprise agreement can only validly operate within the constraints created by the Act, including the requirement that its terms are not detrimental to an employee when compared with the NES.[20] In the above example, the consequence of ss 55 and 56 of the Act would be that, at least to the extent of the NES guaranteed minimum benefits, the term might have no effect. However, there would be no reason why it could not still have effect so far as it restricted access to benefits in excess of the NES minima (for example more generous redundancy entitlements provided under the

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15 *Ray v Radano* [1967] AR (NSW) 471 at 478.

16 Sections 545 to 547 of the Act.

17 For example, sections 23, 65, 67, 86, 95, 106 and 384 of the Act.

18 Part 1-2 of the Act (Definitions) defines the term "*employee*" as having "*its ordinary meaning*": s 11. Part 1-2 then builds upon this definition to establish the narrower concept of a "*national system employee*": s 13. In subsequent Parts of the Act, separate definitions state whether "*employee*" is to be construed in that Part as applying to "*employees*" generally or only to "*national system employees*": ss 25, 42 etc. However, the explanatory memorandum confirms that the term *"national system employee"* is still intended to refer to the common law or ordinary meaning of *"employee"*: Explanatory Memorandum at pp.5-6, [27]-[29]. The definition referring to *"ordinary meaning"* adopts the technical legal concept, which has been developed by the common law, to define the legal relationship of employment: *C v Commonwealth* (2015) 234 FCR 81 at [34], [36].

19 *"Casual"* employment is expressly referred to as a *"type"* of employment in sections 114(4)(e) and 139(1)(b) of the Act.

20 Section 55(4) of the Act.

relevant enterprise agreement to employees described in the agreement as other than casuals). That would not offend the injunction in s 55(4) because the entitlement to supplementary benefits would not be detrimental when compared to the NES.

20. In principle, an enterprise agreement should be construed with a view to upholding its validity by operating consistently with these statutory requirements.[21] This may require the terminology of the enterprise agreement (eg references to *"casual"* employees) to be read as limited to persons who also fall within a statutory category of employees (eg "casual employees"). However, it would remain an exercise of construction of the relevant terms. If it unambiguously defined casual employees as something other than a casual employee for the purposes of the NES, then subject to the application of sections 55 and 56 of the Act (and the resulting partial or total invalidity which might follow) that would be the result, and, to the extent the term remained in effect, the benefits under the enterprise agreement would be available or not available accordingly.

21. In the present case, it is necessary to apply these principles, as part of the conventional process of construction, to determine whether the expression *"Casual FTM"* which is used in the *WorkPac Pty Ltd Mining (Coal) Industry Enterprise Agreement 2012* operates only upon employees who fall within the category of *"casual employees"* under the Act.

Ground 3 - Issue 1: Is WorkPac entitled to credit for payments made to Mr Rossato?

22. This issue arises if it is found that Mr Rossato was not a "*casual employee*" for the purposes of the Act.

23. In that event, the position will be that Mr Rossato had in respect of the same employment:

    (a) a range of specific *statutory* entitlements, including monetary entitlements, by virtue of his status as a non-casual employee.

    (b) a range of specific *contractual* entitlements, including monetary entitlements, which arose under the terms of his various employment agreements and which co-existed with his statutory entitlements.

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21 Noting, the approach to the construction of industrial agreements (like enterprise agreements) discussed in *Amcor Ltd v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241 at [2] and [96] and *WorkPac Pty Ltd v Skene* (2018) 264 FCR 536 at [197]. Enterprise agreements are agreements which are given statutory force under the Act: s 50-54 of the Act; *Australian Industry Group v Fair Work Australia* (2012) 205 FCR 339 at [72]. As an instrument made under statute and given statutory force, it is generally to be construed with a view to giving it legal effect: *Air Services Australia v Canadian Airlines International Limited* (1999) 202 CLR 133 at [228] - [230] per McHugh J citing *Widgee Shire Council v Bonney* (1907) 4 CLR 977 at 983 per Griffith CJ.

(c) a statutory entitlement, under s 545(1) and (2) of the Act, to apply to a court for a *"civil remedy"*,[22] on the basis that a civil remedy provision has been contravened, with the court having power to make *"any order the court considers appropriate"*, including an *"order awarding compensation for loss...suffered because of the contravention"*.[23]

24. In these circumstances, the key question arising is the extent to which any payments received by Mr Rossato, pursuant to his contractual entitlements, may be taken into account in considering the *"appropriate"* order to be made under s 545 of the Act.

25. Over time, questions of this kind have repeatedly arisen for consideration by Australian courts.[24] Whilst these questions arose under a series of different statutory provisions, each of these provisions was expressed in broad remedial terms and had a similar statutory purpose. This has allowed the courts to develop a principled approach to the resolution of issues of this kind, deriving from the approach originally articulated in *Ray v Radano* [1967] AR (NSW) 471.

26. In *Ray v Radano*, the relevant employee (a chef) had a statutory right to recover *"the full amount of any balance due in respect of"* statutory entitlements created by an award.[25] In that case, these entitlements included an amount for wages, based upon specified rates for ordinary hours of work together with overtime rates. The employee had in fact been paid pursuant to an informal arrangement, made without any apparent knowledge of the award, in which he was paid a fixed weekly amount for working specified and lengthy hours of work. All members of the court accepted that, for the purposes of the statutory claim, the *"balance"* which was payable should be understood as a *"true"* or *"correct"* balance.[26] To determine the amount payable for award wages, it was necessary to give credit for monies already paid to the employee

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22 Sections 7(2) and 537 of the Act.

23 State or Territory courts also have jurisdiction to make payment orders: s 545(3). However, the principles governing the discretionary exercise of this power would appear to be no different to those applicable under ss 545(1) and (2).

24 *Ray v Radano* [1967] AR (NSW) 471 (Industrial Commission) ***(Ray v Radano)***; *Pacific Publications Pty Ltd v Cantlon* (1983) 4 IR 415 (Industrial Relations Commission of New South Wales) ***(Pacific Publications)***; *Poletti* v *Ecob (No 2)* (1989) 31 IR 321 (Full Federal Court) ***(Poletti)***; *TransAdelaide v Leddy (No 2)* (1998) 71 SASR 413; *Logan v Otis Elevator Co Pty Ltd* (1999) 94 IR 218 (Industrial Relations Court of Australia); *Australia and New Zealand Banking Group Limited v Finance Sector Union of Australia* (2001) 111 IR 227 (Full Federal Court) ***(ANZ)***; *Textile, Clothing and Footwear Union of Australia v Givoni Pty Ltd* (2002) 121 IR 250 (Federal Court); *James Turner Roofing Pty Ltd v Peters* (2003) 132 IR 122 (Western Australian Industrial Appeal Court) ***(James Turner Roofing)***; *O'Shea v Heinemann Electric Pty Ltd* (2008) 172 FCR 475 ***(O'Shea)***; *Fair Work Ombudsman v Transpetrol TM AS* [2019] FCA 400.

25 *Industrial Arbitration Act 1940* (NSW), s 92.

26 *Ray v Radano* at 475, 477, 480.

of the same character. It was not necessary that such payments be made in contemplation of discharging statutory rights.[27] It was sufficient that the *"essential character"* of the payment was *"properly attributable"* to the relevant category of compensation under the award – and not a payment for *"extraneous"* purposes.[28]

27. The reasoning in *Ray v Radano* does not suggest that this approach turned upon the particular language adopted in the *Industrial Arbitration Act 1940* (NSW). Rather, the approach appears to have been adopted to give effect to the statutory purpose of the provision.[29] The core purpose of the provision was to ensure that, in substance, employees obtained for their work the minimum quantum of remuneration to which they were entitled by statute. In furtherance of this purpose, it was also necessary to deal justly with the common problem of misalignment between contractual and statutory rights. This situation was described as *"of frequent occurrence and of considerable practical importance arising in a great variety of employer-employee relationships which are often created with little regard for, or even knowledge of, their contractual or award implications"*.[30]

28. The approach in *Ray v Radano* has been applied by subsequent Australian authorities, when considering claims under analogous statutory provisions.[31] In principle, it should continue to be applied to analogous claims under the Act.

29. The relevant principles of statutory construction, and the relevant features of the statutory context and purpose, have been identified above.[32]

30. With these contextual factors in mind, consideration can be given to the language of s 545(1) and (2) of the Act. These provisions are broadly expressed, empowering the court to make orders it considers *"appropriate"*, including injunctions *"to…remedy the effects of a contravention"* or award of *"compensation for loss…because of a contravention"*. Penal orders are the subject of a separate power created by s 546.

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27 *Ray v Radano* at 476, 480.
28 *Ray v Radano* at 475, 478.
29 See the reasoning in *Ray v Radano* at 475, 478, where the analysis was described as an application of common sense.
30 *Ray v Radano* at 478.
31 For example in: *Poletti* at 333; *ANZ* at [47]; *James Turner Roofing* at [34].
32 Outline at [8]-[16], and [23(c)].

31. The text, context and purpose of these provisions suggests that:

(a) s 545 is limited by its preventative, remedial and compensatory purposes.[33]

(b) in relation to money claims, that purpose is remedial or compensatory – it requires the award to be calculated so as to place the employee in the position they would have been in had no contravention occurred.[34]

(c) to effect a remedial or compensatory purpose, it is necessary for an allowance to be made for any relevant benefits which have in fact been received by the employee.[35]

(d) in principle, these benefits should include payments received, under an employment agreement, which, as a matter of substance, are properly attributable to the statutory entitlement.

32. This approach serves the apparent statutory purposes of: (a) providing an appropriate compensatory remedy to employees; and (b) not indirectly penalising employers for acting upon what may be an innocent mischaracterisation of the employment relationship. The question of whether penalisation is required, depends upon different considerations and is governed by s 546.

33. In seeking to determine whether a particular payment is of a character which should be taken into account when assessing a claim under s 545 of the Act, the following principles would appear to be applicable.

34. ***First***, the character of a payment should be determined objectively.[36]

35. ***Secondly,*** the character of a payment should be determined by its substantive object. The relevant question is for what, in substance, was the payment being made? Was it as payment for the same work which is the subject of the statutory claim?[37] If so, was

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33 *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157 at [107] and [110].

34 *Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union (the Hutchison Ports Appeal)* [2019] FCAFC 69 ***(Hutchison Ports Appeal)*** at [132].

35 Statutory provisions which have a remedial or compensatory purpose are commonly construed as requiring relevant benefits to be taken into account to avoid overcompensation: eg *Murphy v Overton* (2004) 216 CLR 388 at 408, [44], [50] and [63]; *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 515-516 at [52] and [57]; *Redland City Council v Edgarange Pty Ltd* [2009] 1 Qd R 546 at 549-550, [11] and [12]. Further, the broad power conferred in s 545 admits of the possibility that no order for compensation may be made even if there has been a contravention or alternatively, that the quantum of an order may be affected by, for example, issues of mitigation: *Hutchison Ports Appeal* at [127] to [128] and [143].

36 *O'Shea* at [49] per Middleton J. That the character of the payment is determined objectively is also apparent from the reasons in *Poletti* at 332-333 and in *ANZ* at [48]-[51].

37 Thus, for example, a payment in the nature of a gratuity would be excluded: *Ray v Radano* at 479; *Pacific Publications* at 421.

it paid in respect of all entitlements[38] – or only for some limited purpose?[39] These enquiries allow a true assessment to be made of what monetary compensation (if any) the employee has already received which is properly attributable to the relevant statutory entitlements.

36. ***Thirdly,*** in general, the particular legal form which the transaction adopted is of limited relevance.[40] If, in substance, an employee has received relevant payment for their work, it may not be disregarded merely because: (a) the payment was made on the basis of an incorrect assumption that the payee was an independent contractor (rather than an employee); (b) the payment was made on the basis of an incorrect assumption as to the employee's category; or (c) the payment was made in the form of an *"all up"* payment, rather than by reference to specific categories of payment.[41] Indeed, in general, the question of whether the parties even knew of the existence of their statutory rights and obligations is irrelevant.[42]

37. ***Fourthly,*** to determine the substantive object of a payment, the conventional approach of the common law may be adopted. If a payment is made under an agreement, then the terms of the agreement may be considered with a view to establishing its substantive object.[43] Similarly, to the extent that a payment is validly appropriated by a payer (or payee) in a particular way, then objective acts of appropriation may also be considered to link a particular payment to a particular obligation – the substantive object of which can then be characterised.[44] However, the characterisation enquiry must be undertaken in the light of all the relevant circumstances of the matter.[45]

38. ***Fifthly,*** where the substance of the payment is a casual loading, it should ordinarily be treated as attributable to the entitlements the employee would otherwise have received as a permanent employee. As White J observed in the present case, at [475] to [477], the payment of loadings to casuals is well-established, is contemplated in the Act to be provided for in modern awards and enterprise agreements, and is something provided in addition to an amount determined to be appropriate for the performance of work.[46]

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38 Thus, for example, a lump sum payable for wages should be credited to both ordinary and overtime award rates: eg *Ray v Radano* at 477; *Poletti* at 335; *ANZ* at [49].

39 Thus, for example, an over-award rate of payment for ordinary wages or clothing allowance could not be credited to statutory overtime entitlements: eg *Ray v Radano* at 479; *ANZ* at [49].

40 *ANZ* at [52].

41 *Ray v Radano* at 478; *James Turner Roofing* at [29].

42 *Ray v Radano* at 478; *James Turner Roofing* at [29] and [45].

43 *ANZ* at [50]-[52].

44 *Poletti* at 333; *ANZ* at [54]-[56]; *James Turner Roofing* at [21].

45 *ANZ* at [56]; *James Turner Roofing* at [21].

46 Noting, also ss 16 and 18 of the Act that support the last proposition.

White J further explained that *"the [Act] intends the loading to be compensation for recognised disabilities associated with casual work....or as compensation for detriments suffered by casual employees (for example, the absence of entitlements to paid leave).... [A] casual loading is in the nature of a compensation for an absence of entitlement, not a payment in lieu of taking the entitlement."*[47] Wheelahan J appears to have accepted with approval White J's analysis of the nature and purpose of a casual loading.[48] A nexus of this kind is sufficient to establish that, in substance, the payment received was properly attributable to the statutory entitlements.

39. On this basis, where an employee who is not properly characterised as a casual receives payment of what is in substance a casual loading, then credit should ordinarily be allowed for that payment if the employee seeks statutory relief for non-payment of additional entitlements due to them as a permanent employee.

40. In cases where the casual loading was paid on an apportioned basis amongst specific categories of entitlements, then credit for that payment should also be apportioned on the same basis.

Ground 3 – Issue 2: Is restitutionary relief available?

41. This issue arises if it is found that:

(a) the employment agreements, between WorkPac and Mr Rossato, viewed objectively, were entered into upon the assumed basis he was a casual employee.

(b) the payments to be made by WorkPac to Mr Rossato under the employment agreements, viewed objectively, incorporated amounts which were assumed to be legally payable because Mr Rossato was a casual employee (**casual loading**).

(c) Mr Rossato was never a casual employee.

(d) Mr Rossato is now entitled to recover additional statutory entitlements, which are payable only to permanent employees, but is not under a statutory or contractual obligation to give credit for the casual loading he received.

42. In these circumstances, the question which arises is whether WorkPac has a legal right to restitution of the amount of the casual loading paid, on the basis that there has been a total failure of consideration for these payments.

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47 *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84 (**Decision**), [477] and [480].

48 Decision, [951].

43. In principle, where payments have been made under a contract, restitution is available in respect of an identifiable and severable part of the money paid, where the only purpose, basis or assumed state of affairs upon which that part of the money was paid has subsequently failed, altered, disappeared or otherwise, been falsified.[49]

44. In these circumstances, restitution is available even if, upon the proper construction of the contract: (a) the payment was contractually due; (b) there was no contractual right in the payer to recover it back; and (c) there was no failure of counter-performance by the payee.[50]

45. In this category of case, restitution serves a "gap filling" role, within the framework of the parties' contractual arrangements, to remedy an injustice which would otherwise arise.[51] That is because in this category of case: (a) the payment has enriched the payee at the expense of the payer;[52] (b) the enrichment was only objectively contemplated as occurring upon a particular basis;[53] (c) this basis has totally failed;[54] (d) these circumstances were not specifically provided for by the contract;[55] and (d) in these circumstances, it would be unjust to simply allow the loss to lie where it falls.[56]

46. In this category of case, where the total failure of consideration relates only to an identifiable part of the monies paid under a contract, a key concern is severability.[57] To meet this concern, it is necessary to consider whether: (a) the amount of the relevant payment is sufficiently identifiable and distinct; (b) the relevant basis or consideration for the payment is also sufficiently identifiable; and (c) the court is thereby able to conclude that the basis for the payment has totally failed.

47. In applying this restitutionary principle, an objective test is involved.[58] For this purpose, the materials which may be considered include: (a) the terms of the contract;

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49 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 ***(Roxborough)*** at [13]-[17] (Gleeson CJ, Gaudron and Hayne JJ) and [60], [104]-[109] (Gummow J); *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at [29]-[33] (***Equuscorp***) (French CJ, Crennan and Kiefel JJ); and *Mann v Paterson Constructions Pty Ltd* (2019) 373 ALR 1 at 45 at [23]-[24] (***Mann***) (Kiefel CJ, Bell and Keane JJ) and [168] (Nettle, Gordon and Edelman JJ). And see *Goss v Chilcott* [1996] AC 788 ***(Goss)*** at 797-798 (PC) and *Barnes v Eastenders Cash & Carry plc* [2015] AC 1 (***Barnes***) at [102]-[115] (Lord Toulson, with whom Lady Hale, Lord Kerr, Lord Wilson and Lord Hughes agreed).

50 *Roxborough* at [16], [20], [60]; *Equuscorp* at [32]; *Barnes* at [106].

51 *Roxborough* at [20], [75]; *Equuscorp* at [30]-[32]; *Mann* at [23]-[24].

52 *Roxborough* at [20], [26]; *Equuscorp* at [30]-[32].

53 *Roxborough* at [16], [71], [102]-[104]; *Equuscorp* at [31]; *Barnes* [103]-[113]; *Mann* at [168].

54 *Roxborough* at [16]- [17]; *Equuscorp* at [31]-[32]; *Mann* at [168].

55 *Roxborough* at [16], [100], [104].

56 *Roxborough* at [5], [75].

57 *Roxborough* at [17].

58 *Fostif Pty Ltd v Campbell's Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at [239]-[240] (not considered on appeal at (2006) 229 CLR 386).

(b) the materials referred to in the contract; and (c) the materials which constitute the factual and legal matrix within which the contract was made.[59] These materials are considered for the purpose of both construing the contract and determining, as a matter of substance, whether the relevant elements of the restitutionary principle have been satisfied.[60]

48. The first element to be considered is whether the claimed amount is sufficiently identifiable and severable from other amounts payable under the contract.[61] For this purpose, it is not necessary for the claimed amount to have been separately provided for under the terms of the contract. It is sufficient if the court is able to infer, from the relevant materials, that an amount paid under the contract included a component which had a particular objective purpose or basis (eg satisfying a statutory obligation).[62] This issue is approached having regard to the commercial reality of the transaction.[63] In these circumstances, the amount is then capable of being severed from the balance of the payments made under the contract.

49. In *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, this element was satisfied because it could be inferred, from the relevant materials, that the contractual purchase price for tobacco included a component which was attributable only to a statutory licence fee. A similar analysis may be applied by analogy in the present category of case, if the Court is able to infer, by application of an objective test, that: (a) the parties proceeded on the basis that the relevant employment agreements were subject to statutory requirements, derived from an enterprise agreement, governing the minimum wage rates for casuals; (b) these minimum rates, whether expressed as a base rate or a flat rate, included an identifiable amount by way of casual loading; (c) the only purpose of the casual loading was to compensate a casual employee for not having the statutory entitlements of a permanent employee; and (d) the parties sought to comply with these statutory requirements by incorporating this minimum casual loading within the rate of pay which was agreed and then paid.

50. The second element to be considered is whether the claimed amount was paid only upon a particular basis or in exchange for a distinct act of contractual performance.[64]

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59 *Roxborough* at [6]-[12].
60 *Roxborough* at [12]-[19].
61 *Roxborough* at [14], [17]-[19].
62 *Roxborough* at [14], [17]-[19]. And see *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 383; *Goss* at 797-798 (PC); *Barnes* at [114]; and *Mann* at [175].
63 *Barnes* at [114].
64 *Roxborough* at [14], [17]-[19].

51. As with many enquiries of this nature, it is necessary to frame the enquiry at an appropriate level of abstraction.[65] That is because, at an unduly high level of abstraction, the purpose of virtually any payment made under a contract can be described as being made to procure performance generally by the other party (eg to procure the purchase of tobacco[66]). The correct focus is upon the specific purpose, within the contractual framework, for the payment of the relevant amount. The question is whether, within that framework, it can be objectively inferred that the amount was paid only for an identifiable purpose or on an identifiable basis.

52. In *Roxborough,* it could be inferred that the contract price paid for tobacco was based upon two components: (a) a component which reflected the parties' bargain for the goods sold; and (b) a component which was only included to indirectly meet the cost of the licence fee which was assumed to be payable. Again, a similar approach may be applied to the present category of case. The question is whether the Court is able to infer, on an objective basis, that: (i) the casual loading was a payment which, by its nature, was intended to be supplementary to the wage rate otherwise applicable to the employment; (ii) the only purpose for paying the casual loading was to satisfy a statutory obligation which was designed to compensate casual employees for not having all the entitlements of a permanent employee; and (iii) if that assumption about employment status had not been adopted, no casual loading would have been adopted, because the employee would have had a statutory right to the full benefit of the relevant entitlements of a permanent employee.

53. The final element to be considered is whether the only purpose, basis or assumed state of affairs upon which the amount was paid has subsequently failed, altered, disappeared or otherwise, been falsified, so that there has been a total failure of consideration.[67]

54. In *Roxborough*, this element was satisfied because an assumption of law proved to be false. In the present category of case, an analogous conclusion can be reached if it is determined that Mr Rossato was not a casual employee and so no casual loading was ever payable.

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65 *Roxborough* at [16].
66 *Roxborough* at [16].
67 *Roxborough* at [16].

Ground 3 – Issue 3: Does regulation 2.03A of the *Fair Work Regulations 2009* (Cth) provide WorkPac with a separate right to relief?

55. The Full Court did not err in concluding that r 2.03A was not intended to alter the existing law.[68]

56. It is submitted, however, that the Full Court erred in concluding r 2.03A could have no application to a case of the present kind.[69] The Full Court adopted an unduly narrow interpretation of the words "in lieu of" in the regulation.[70] That interpretation is inconsistent with the stated purpose of the regulation as applying to a misclassified casual employee[71] and in circumstances where the relevant NES entitlement was not paid at the required time due to that misclassification.

57. The substantive basis upon which r 2.03A could have application to circumstances of the present kind are outlined in the discussion of Ground 3 above.

Part VI: STATEMENT OF ARGUMENT REGARDING NOTICES OF CONTENTION OR CROSS-APPEAL

58. Not applicable.

Part VII: TIME ESTIMATE

59. The Minister estimates that 30 minutes will be required for his oral argument.

Dated 11 February 2021

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68 Decision at [1022] to [1024] per Wheelahan JJ (with whom Bromberg J agreed at [262]).
69 Cf. Decision at [938] to [946] per White J (with whom Wheelahan and Bromberg JJ agreed at [262] and [1022]).
70 Decision at [944] per White J.
71 Note 1 to r 2.03A. See, Decision at [939] for an extract of the relevant provision.

ANNEXURE

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

1. *Acts Interpretation Act 1901* (Cth) (current) – section 15AA.

2. *Fair Work Act 2009* (Cth) (current) – sections 3, 7, 11, 12, 13, 16, 18, 23, 25, 42, 44, 45, 46, 50, 51, 52, 53, 54, 55, 56, 57, 59, 61, 65, 67, 86, 87, 95, 106, 114, 139, 172, 256A, 384, 537, 545, 546, 547, 569.

3. *Fair Work Regulations 2009* (Cth) (current) – regulation 2.03A.