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
Appellant
and
Robert Rossato
First Respondent
Minister for Jobs and Industrial Relations
10 Second Respondent
Construction, Forestry, Maritime, Mining and Energy Union
Third Respondent
Matthew Petersen
Fourth Respondent

FOURTH RESPONDENT'S SUBMISSIONS

Part I: CERTIFICATION

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

Part II: ISSUES

[2] The Fourth Respondent (**Mr Petersen**) agrees with the formulation of the issues set out
20 in WorkPac's submissions dated 21 January 2020 (**WorkPac's Submissions**). Terms in the present submissions taken from WorkPac's Submissions have the meanings defined there.

Part III: SECTION 78B NOTICES

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

Part IV: FACTS

[4] With the following exceptions, Mr Petersen accepts the accuracy of the facts set out at Part V of WorkPac's Submissions.

[5] Mr Petersen does not accept the correctness of the implication in WorkPac's Submissions at [8] that the Enterprise Agreement prescribed a 25% casual loading to be paid to Mr Rossato. He was a "Flat Rate FTM" as defined in the Enterprise Agreement, who

received a flat rate of pay. He was not (in contrast to a "Base Rate FTM") entitled to receive any casual loading in addition to that flat rate.[1]

[6] Similarly, and again contrary to [8] of WorkPac's Submissions, Mr Rossato's contracts did not prescribe a 25% casual loading. The NOCEs provided a flat hourly rate of pay. The first three NOCEs provided that the rate "includes" a casual loading, but only if conferred by the Enterprise Agreement.[2] The Fourth NOCE did not mention casual loadings at all.[3] The Fifth and Sixth NOCEs merely provided that the flat rate "may" include any casual loading "that may apply".[4] As the Enterprise Agreement did not entitle "Flat Rate" Casual FTMs to any casual loading, no such loading was included in any of his contracts.

10 **[7]** Contrary to WorkPac's Submissions at [10], the Full Court did not order WorkPac to pay Mr Rossato his entitlements. It declared he was entitled to them, but no order was sought or made as payment. Presumably this was the result of the unusual way in which the proceeding had been initiated by WorkPac seeking only declaratory relief. During an interlocutory hearing it became apparent that as well as funding legal representation for Mr Rossato,[5] WorkPac had undertaken to pay all amounts found due to Mr Rossato[6] and the parties had agreed as to quantum.[7]

Part V: ARGUMENT ON WORKPAC'S APPEAL

Ground 1: Casual employment for the purposes of the *Fair Work Act 2009* (Cth)

Casual status does not depend on the contract alone

20 **[8]** Mr Petersen contends that WorkPac's first and fundamental error in propounding this ground stems from the assertion at WorkPac's Submissions [13] that the question of whether an employee is a casual "depends entirely" on the express or implied terms of the contract. The submission cites *Connelly v Wells* for the proposition. But *Connelly* was a case concerning the employee/contractor distinction, not casual status as distinguished from permanency. Moreover, the holding in *Connelly* is inconsistent with the later decision in this Court in *Hollis v Vabu*, where the Court held that not only the contract, but also the "system"

[1] Clause 6.4.5(b): Applicant's Further Materials (**AFM**) 51.
[2] First NOCE: AFM 233.18, 236.15; Second NOCE: AFM 277.18, 280.15; Third NOCE: AFM 295.31, 299.15.
[3] Fourth NOCE: AFM 303.47.
[4] Fifth NOCE: AFM 330.12; Sixth NOCE: AFM 337.47.
[5] Transcript before the Federal Court (18 Oct 2018) at T8.10-.23: excerpt at Fourth Respondent's Book of Further Materials (**4RFM**) 4.
[6] WorkPac's Further Submissions on Case Management to the Federal Court (25 March 2019) [38]: excerpt at 4RFM 6.
[7] Transcript before the Full Federal Court (7 May 2019) at T7.06: excerpt at 4RFM 8.

and "work practices" of the putative employer, were relevant to consider in determining whether a work relationship was one of contracting versus employment.[8]

[9] Further, there is a line of authority beginning 80 years ago treating the question of who is a casual worker as depending on all of the circumstances, not just the contract. For example, in 1936, in *Doyle v Sydney Steel Co Ltd*, the Workers' Compensation Commission found that Mr Doyle was a "casual worker" (a statutory term), despite him working 44 hours per week.[9] The Commission relied[10] not on the terms of his contract, but rather the "casual" (ie, *ad hoc*[11]) nature of his employment, that he was paid the wages usually paid to casuals, and his prior history of working casual jobs. His appeals to the NSW Supreme Court and the
10 High Court were dismissed. The High Court treated the question of whether Mr Doyle was a "casual worker" as a question of fact,[12] and no Justice suggested that the answer was wholly supplied by the terms of the contract. *Doyle* has not been overruled.

[10] In more recent times, apart from the decision presently under appeal, the Full Federal Court in both *Hamzy v Tricon International Restaurants*[13] and *WorkPac v Skene*[14] has taken a global approach to determining the question of casual status, rather than focussing solely on the written terms of the contract. Mr Petersen contends that this orthodox approach is correct.

[11] It is not to the point, as [14] of WorkPac's Submissions states, that the Act confers some rights on "long term" casuals: those provisions work harmoniously with the *Doyle*/*Hamzy*/*Skene* approach to identifying casual status.

20 **[12]** Paragraph 13 of WorkPac's Submission further asserts that the contracts in issue are wholly written, and accordingly infers that the terms of the contracts are to be construed without any reference to post-contractual conduct, that is, without any reference to what actually occurred during the employment. As set out below, Mr Petersen rejects that proposition.

Erroneous formulation of *Hamzy* test

[13] WorkPac's Submission also mischaracterises the holding in *Hamzy*. At [16], WorkPac suggests that *Hamzy* requires an "enforceable promise" of future work before an employment

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[8] *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, 33 [24].
[9] (1936) 56 CLR 545, 561, point 1 on page.
[10] *Doyle at* 560.3 for the reasons of the Workers' Compensation Commission below.
[11] Dixon J's description, at *Doyle* 557.
[12] *Doyle* 551 (Starke J). See also 555 (Dixon J), 561-2 (Evatt J), 565 (McTiernan J).
[13] (2001) 115 FCR 78.
[14] (2018) 264 FCR 536.

relationship can be characterised as non-casual. Mr Petersen does not accept that statement as correct.

[14] In *Hamzy* the Full Court held to the effect that a casual employee is one who works **on demand**.[15] The on-demand character of the employment may be evidenced by the absence of any firm advance commitment as to the duration of the employment, or by the pattern of work.[16] The judgment in *Hamzy* does not state that the firm advance commitment must be contractual. The discussion of *Reed* v *Blue Line Cruises Ltd*[17] at [37] of *Hamzy* suggests that even non-contractual representations by the employer as to the likely[18] length of employment could suffice to induce in the employee a reasonable expectation of continuing employment[19]
10 and so render the employment non-casual in nature.

[15] WorkPac's Submission also ignores the relevance of other conduct by an employer, whether promissory or not, which does not find expression in the written contract. For example, it would be surprising if a statement from an employer to a new hire that they intend to keep the newcomer employed for 20 years working fixed hours (although no such promise appears in the written contract) could be entirely ignored by a court needing some years later to characterise the relationship.

[16] WorkPac's second error of characterisation, also at [16], is to suggest that *Hamzy* stands for the proposition that the ability to terminate the employment "readily and quickly" is a key indicator of casual employment. The judgment in *Hamzy* does not contain such a
20 statement. Bromberg J was correct at [74] of the decision below to note that short notice periods **may** point to casual employment, but will not always do so.

<u>Misapplication of *Hamzy*</u>

[17] WorkPac's next error is to misapply the *Hamzy* approach, at [19]-[22] of its Submissions. If the question was whether Mr Rossato employed to work casually or "on demand", the clear answer is no.

[18] While WorkPac focuses on Mr Rossato being able to reject any assignment offered, in fact he accepted each of the six assignments offered and, having done so, he was bound by clause 5.4 of the General Conditions to complete each of those assignments.

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[15] (2001) 115 FCR 78, 89 [38] (emphasis added).
[16] *Hamzy* 89 [38].
[17] (1996) 73 IR 420.
[18] *Hamzy* 89 [37] line 13.
[19] *Hamzy* 89 [37] line 16.

[19] Although the assignments were not of a fixed length, the first three NOCEs stated to Mr Rossato that they would each run for a substantial length of time: "6 months", "154 days" and so forth.[20] These long periods are inconsistent with ad hoc or on-demand employment. Later NOCEs did nothing to indicate that the assignments would be any shorter than the previous ones.

[20] Whilst on each assignment, WorkPac's "system" (to use language from *Hollis*), as reflected in the NOCEs,[21] was that workers were required to work according to a regular roster. White J correctly found this was a term of Mr Rossato's employment. But even if it were not a contractual term, Mr Petersen submits that the existence of the system itself is a
10 powerful indicator that this was not an "on demand" or casual employment arrangement.

[21] At [17] of its Submissions, WorkPac relies on the fact that Mr Rossato's last three contracts stipulated that his hours might vary, and gave him the right to cancel shifts. However Mr Petersen submits that on their proper constructions, these clauses are consistent with non-casual employment.

[22] On its proper construction, the varying hours stipulation merely communicated that the roster pattern might change in future, or that Mr Rossato might be required to work overtime beyond rostered hours. It did not mean that WorkPac was at liberty to depart from a regular work pattern and instead impose ad hoc, arbitrary and "on demand" working on Mr Rossato. And WorkPac did not advance any evidence that it had done so for any worker during the
20 years that Mr Rossato worked for WorkPac. As set out below, the facts of the industry concerned, and the particular work required, show that this could never have been a practical option. If it were otherwise, WorkPac could be expected to have sought to advance some evidence that it could be, if not was, done.

[23] Similarly, the right to cancel shifts must be read carefully in light of Mr Rossato's overarching obligation to complete his whole assignment. The clause merely provides for an ad hoc situation in which Mr Rossato might for particular reasons need to cancel one or more specific shifts; an obvious example is illness. The clause could not have meant, having regard to all of the other features of the employment system (which were well-known to both parties, by that time) that Mr Rossato was free simply not to attend for work, at his discretion, on any
30 day or for any length of time.

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[20] Decision at CAB 53 [100], CAB 66 [153], CAB 69 [171].
[21] See, eg, First NOCE: AFM 232.38 ("Daily Working Hours"), 232.45 ("Please Note").

[24] There are two powerful circumstances which dictate these conclusions. The first is that the mine operator's business, and hence WorkPac's business, depended on having a stable workforce at each mine. It would be entirely uncommercial to think that WorkPac and its clients would accept a situation in which employees could cancel shifts at the last moment, leaving the mine short-staffed.

[25] Conversely, it would be entirely uncommercial for Mr Rossato to accept truly "on demand" work. First, if WorkPac could cancel a shift just before it started, he might be stranded at home with no income for the day, and no opportunity to earn income from other sources. Worse, he might be stranded at the mine site, not only with no work to do, but also at
10 times liable to pay for his accommodation there.[22] Second, an ad hoc work pattern would involve constant driving back and forth between home and the mine (a 2 or 4 hour round trip, depending on the site).[23]

[26] Third, rather than having a dedicated "off swing", the only way in which Mr Rossato could care for his partner (who had lung disease)[24] or take holidays as he wished[25] would be by refusing one or more shifts. But doing so always entails the risk that further shifts will not be offered. A younger worker might tolerate such insecurity, but Mr Rossato was approximately 55 years of age when he started working for WorkPac. He relied on the income he earned from WorkPac to provide for himself and his partner (who did not work) until he would become eligible for the pension at approximately age 66.[26] WorkPac was well aware
20 of Mr Rossato's age,[27] and the fact that he had no other employment.[28]

[27] Although the somewhat artificial way in which the proceeding was initiated, and its conduct below by an Agreed Statement of Facts,[29] did not permit full evidence to be given of Mr Rossato's circumstances, the stark realities set out above, taken from the Agreed Statement of Facts, suffice to show the corresponding artificiality of the construction of the contracts now pressed by WorkPac. In summary, Mr Petersen contends that a realistic and commercial construction of the contracts shows that truly "on demand" employment was not in contemplation by either party, let alone expressly agreed.

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[22] From February 2016, he paid $35 per week to stay at the Newlands mine: [6.42] at AFM 21.
[23] See Decision at CAB 163 [543] and CAB 66 [151].
[24] Agreed fact [7.16(c)] at AFM 809.
[25] Agreed fact [7.20] at AFM 810.
[26] Agreed fact [7.21(b)(i)] at AFM 811.
[27] See, eg, the communications recorded at AFM 126.48; AFM 351.17.
[28] As he claimed the tax-free threshold in respect of his WorkPac job: AFM 126.15 (entry for 22 July 2014). See *Taxation Administration Act 1953* (Cth) sch 1 s 15-50.
[29] Plus an Addendum, which appears at AFM 805.

[28] At [22] of its Submissions, WorkPac criticises White J's reliance on unspoken undertakings. While White J may have been in error to attribute the idea of unspoken undertakings to Professor Freedland's book,[30] it was entirely orthodox for White J to seek to construe the contract, and characterise the employment relationship, by reference to important matters unspoken but known to both parties.

[29] In any event, the issue is a distraction, since it appears from [576] of the judgment that ultimately White J based his conclusions on the words of the contracts and did not need to rely on any unspoken matters. Accordingly, the attack at [22] of WorkPac's Submissions appears misconceived.

10 **Ground 2: Casual employment under the Enterprise Agreement**

[30] Paragraph [30] of WorkPac's Submissions asserts to the effect that looking at the actual circumstances in which Mr Rossato worked for WorkPac to ascertain the correct characterisation of the employment relationship between them is a denial of reality. It is only possible to frame the issue in that way because WorkPac seeks to fix the characterisation of the true nature of Mr Rossato's employment once and for all by the label attached to it in each of the NOCEs, despite the disavowal of that proposition at [28] of the Submissions. This requires disregarding what actually happened during his employment, which so far from denying reality might reasonably be described as the reality of the employment, or in the words of *Hamzy,* the system of work and the work practices of the employer .

20 **[31]** The likelihood is that the drafters of the Enterprise Agreement would have wished to pick up the statutory meaning of "casual", not least to avoid the confusion and complexity which might arise if there were two instruments (the Act and the Enterprise Agreement) regulating the same subject-matters, using the same language ("casual"), but with different meanings intended.

[32] Indeed, that the Act prevails over inconsistent agreements[31] supplies a strong reason for industrial parties to use statutory language and concepts. Consider clause 6.5.1 of the Enterprise Agreement, which provides that no notice of dismissal is required for "Casual FTMs". If "Casual FTM" means a *Hamzy* casual (one who works "on demand"), the clause is conventional and consistent with the Act: *Hamzy* casuals have no statutory rights to notice of
30 dismissal.[32] However, if "Casual FTM" means any employee labelled as such, then clause

[30] Decision at CAB 170 [572]. Cf the quotation at CAB 143 [446].
[31] Act ss 55, 56.
[32] Act ss 117, 123(1)(c).

6.5.1 cannot be given literal effect as against employees who might be labelled casual in an NOCE but who do **not** work on-demand, because of the paramount force of the Act. A construction of the Enterprise Agreement which is productive of confusion, disputation, and invalidity might well be labelled a "denial of reality".

Ground 3: 'Double-dipping'

[33] Mr Petersen contends that Ground 3 does not arise because, as set out at [5] above, Mr Rossato did not receive a casual loading. Therefore there was no 'double dipping'.

[34] Even if Mr Rossato's contract is artificially construed and deconstructed as WorkPac seeks to do, so as to conclude it promised him the casual loading under the Enterprise
10 Agreement (of $6.03 per hour on commencement, or 12% of Mr Rossato's pay,[33] not 25%), with the balance of the moneys paid as ordinary wages, Mr Petersen submits that WorkPac is still caught by s 90(2) of the Act, in part or in whole, for the following reasons.

"Set off"

[35] First, given that the Enterprise Agreement allocates[34] only 44% of the casual loading to annual leave,[35] there is no basis for the Court to conclude that Mr Rossato had agreed to WorkPac applying the whole loading in satisfaction of any future s 90(2) obligation. The more likely construction of events is that the parties did not advert to s 90(2). If that is correct, there was no agreement on this issue.

[36] Secondly, even if there were an agreement that some or all of the casual loading could
20 be notionally applied to annual leave by WorkPac, Mr Petersen contends that such an agreement would be unlawful and unenforceable, as it would amount to a "cashing out" of the s 90 entitlement, which is prohibited by s 92 of the Act.

[37] Thirdly, in the absence of any valid agreement between the parties about the purpose of payments, Mr Petersent submits that the application of the ratio in *Poletti v Ecob (No 2)*[36] to the labelling of the payments on Mr Rossato's payslips as "wages" prevents WorkPac now asserting that the payment was, in fact, a pre-payment of its s 90(2) obligation.

[33] Comparing the $49/hr flat wage paid to Mr Rossato under the First NOCE to the $6.03/hr casual loading paid to Base Rate Casual FTMs under the Enterprise Agreement at that time: cl 6.4.5 [AFM 51] & sch 2 [AFM 88].
[34] Clause 6.4.6 [AFM 51].
[35] 11 of the 25 percentage points: cl 6.4.6(a) [AFM 51].
[36] (1989) 31 IR 321, 333.2.

[38] Further, even if this *ex post facto* re-labelling were permitted under the general law, again it would be prohibited by s 92 as an unlawful "cashing out" of the s 90(2) obligation.

[39] Although [40] of its Submissions is not clear, WorkPac apparently seeks to side-step these difficulties by arguing that a just result would be for a court to use its discretion under s 545 of the Act to reduce the "compensation" payable to Mr Rossato to avoid "double dipping". But Mr Rossato (who is not the plaintiff) never claimed compensation pursuant to s 545, nor did WorkPac. What occurred was that Mr Rossato claimed a sum certain prior to WorkPac issuing,[37] and WorkPac sought to defeat that demand by seeking a declaration that it owed Mr Rossato nothing. Thus it is too late to raise a suggestion that this Court should make some sort of adjustment, presumably to a declaration in favour of Mr Rossato, using s 545.

[40] It may be that WorkPac refers to s 545 solely by way of analogy to support the proposition that the Act does not countenance double dipping. If so, the reference is unnecessary because on the proper construction of what has occurred, in particular the absence of an identified or identifiable amount by way of loading, double dipping does not arise.

<u>Failure of consideration</u>

[41] Assuming for present purposes that a casual loading was paid, the interrelated questions for the Court are whether is it was a distinct and severable payment, and whether there was a total failure of the consideration which Mr Rossato offered in exchange for the payment.

[42] This case is not like *Roxborough*. In that case, the tobacco retailer agreed to pay the wholesaler a commercially agreed sum for tobacco products. In addition, it agreed to pay a separately itemised tobacco licence fee, which was **only** charged because both parties mistakenly thought it was required to be paid by statute.[38]

[43] In contrast, in this case, WorkPac cannot show that **both** parties contemplated the casual loading as an add-on to their contractual bargain, such that if the Enterprise Agreement had not been thought to require a $6 loading, then of course they would have each agreed to strike the initial bargain at $43 per hour instead of $49, also noting that in this revised

[37] Letter from Franklin Athansellis Cullin, [5(b)] at AFM 800.

[38] *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 526 [17] (Gleeson CJ, Gaudron & Hayne JJ).

bargain, Mr Rossato (who was nearing retirement age) would also receive lower superannuation payments.

[44] The case was conducted below at WorkPac's initiative[39] on an Agreed Statement of Facts, supplemented by further agreed facts. The agreed facts contained no evidence to show that it employed **any** comparable employees at the rate of $43 per hour, at the time it first employed Mr Rossato. The inference is that $43 was insufficiently high, at that time, to induce employees to work long hours, at a remote work site, performing operations work of a potentially dangerous[40] kind, even if leave entitlements were to be provided.

[45] Indeed, the Full Court was told (without objection) that the market rate paid to
10 permanent employees for comparable work was around $75 per hour at the relevant time.[41]

[46] It follows that the parties treated the consolidated wage of $49 per hour as the wages–work bargain which was struck; they did not treat the bargain as $43 per hour plus a separate and compulsory $6 loading. It is notable that no loading was ever quantified in the contracts (cf *Roxborough*) nor itemised on the payslips. It is also notable that at no stage has WorkPac ever sought to rectify or disavow the contracts.

[47] Once it is appreciated that any now-asserted casual loading was just part of the total agreed remuneration, it follows there was no failure of consideration, let alone a total failure. The consideration for the promised wage was Mr Rossato's work, or his promise to work, under contracts which have now been wholly performed. Either way, when he performed the
20 work, he earned the wage. WorkPac should not be permitted to claw back part of the wage, simply because it now realises, although unlike its case below it no longer expressly claims so, that it made a mistake of law about its obligations under s 90(2) of the Act.

<u>Regulation 2.03A</u>

[48] Contrary to WorkPac's Submissions at [50]-[52], the Full Court was correct to hold that reg 2.03A did not apply or, if it did, that it did not provide WorkPac with any new rights of "set off". Further, any rights which reg 2.03A sought to grant which were inconsistent with Mr Rossato's rights under s 90(2) of the Act would be ultra vires.

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[39] See Decision at CAB 27 [3]-[5].
[40] Fatigue and heat were seen as particular risks when operating machinery outdoors: see, eg, CAB 193, 202. See also CAB 124 lines 19, 25, 27 & 46; 260-73; 310-17
[41] Rossato's written opening submissions at trial (11 April 2019) [22] (First Respondent's Book of Further Materials, 13).

Part VI: SUBMISSIONS ON NOTICES OF CONTENTION

Totality of relationship approach

[49] Mr Rossato and the CFMMEU contend[42] that the Full Court should have held that Mr Rossato was a non-casual employee not solely by examining the terms of his contracts, but rather by examining the totality of the relationship between him and WorkPac.

[50] It appears that the court below did consider matters beyond the written contracts, particularly the roster pattern which Mr Rossato worked.[43] Mr Petersen relies on the submissions at [8] to [29] above in relation to this ground.

The contracts were varied

10 **[51]** Alternatively, if the written contracts are the sole guide to Mr Rossato's casual status, and if the original contracts did not require Mr Rossato to work according to the rosters, then Mr Petersen supports the contentions of Mr Rossato and the CFMMEU[44] that the Full Court should have inferred that those original contracts were varied when the mine operator assigned Mr Rossato to a permanent crew which worked, as a body, according to the permanent roster.

No separate casual loading

[52] Mr Rossato contends that the Full Court should have held that none of Mr Rossato's contracts contained a separately identified casual loading. Mr Petersen supports that contention and is content to rely on paragraphs [6] and [46] above and on the written
20 submissions to be advanced by Mr Rossato.

Cashing out of leave entitlements unlawful

[53] Mr Petersen supports Mr Rossato and the CFMMEU in contending that the Full Court should have found that s 92 precludes WorkPac from treating any asserted "casual loading" as a pre-payment of its monetary obligations pursuant to s 90(2). Mr Petersen refers to [34] above, and is otherwise content to rely on the submissions of those parties.

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[42] Mr Rossato's Notice of Contention [2] at CAB 304; CFMMEU's Notice of Contention [1] at CAB 306.
[43] See White J at CAB 171-3 [580]-[586].
[44] Mr Rossato's Notice of Contention [3] at CAB 304; CFMMEU Notice of Contention [2] at CAB 307.

Defences to restitution

[54] Mr Rossato contends that the Full Court should have held that he has valid defences to any claim in restitution.[45] Mr Petersen supports that position.

Part VIII: TIME ESTIMATE

[55] The Fourth Respondent estimates that 30 minutes will be required for his oral argument.

Dated: 18 February 2021

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[45] Mr Rossato's Notice of Contention [5] at CAB 304.

ANNEXURE

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

1. *Fair Work Act 2009* (Cth) (current) — ss 55, 56, 90, 92, 117, 123, 545

2. *Taxation Administration Act 1953* (Cth) (current) — sch 1 s 15-50