WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2020 WAIRC 00390
CORAM	**:**	INDUSTRIAL MAGISTRATE M. FLYNN
HEARD	**:**	WEDNESDAY, 24 JULY 2019, THURSDAY, 25 JULY 2019
DELIVERED	**:**	THURSDAY, 2 JULY 2020
FILE NO.	**:**	M 166 OF 2018
BETWEEN	**:**	RAYMOND MOATE **CLAIMANT** AND I.P.C. PTY LTD (ACN 061 746 996) **RESPONDENT**

CatchWords	**:**	INDUSTRIAL LAW – *Fair Work Act 2009* (Cth) –Whether worker was an employee or an independent contractor – Whether employee was a casual employee – Whether employer entitled to set-off 'over-Award' payments to employee against statutory entitlements – Reg 2.03A *Fair Work Regulations 2009* (Cth) and whether a person is employed 'on the basis that the person is a casual employee' and whether an amount is 'clearly identifiable as an amount paid to compensate the person for not having one or more relevant NES entitlements' – Construction of a Deed of Release – Mistake, Unjust Enrichment and the *Property Law Act 1969* (WA), – ***Atkins Freight Services Pty Ltd v Fair Work Ombudsman*** [2017] FCA 1134 [38] and whether to exercise a discretion not to order an employer to pay an amount (otherwise) required to pay
Legislation	**:**	*Fair Work Act 2009* (Cth) *Fair Work Regulations 2009* (Cth) *Long Service Leave Act 1958* (WA) *Property Law Act 1969* (WA) *Industrial Relations Act 1979* (WA)
Instrument	**:**	*Manufacturing and Associated Industries and Occupations Award 2010* (Cth) *Metal Trades (General) Award* (WA)
Case(s) referred to in reasons:	**:**	***Atkins Freight Services Pty Ltd v Fair Work Ombudsman*** [2017] FCA 1134 ***Sharrock v Downer EDI Mining Pty Ltd*** [2018] WAIRC 377

Wright v Bechtel Construction (Australia) Pty Ltd [2018] WAIRC 887
Association of Professional Engineers, Scientists and Managers, Australia v Wollongong Coal Limited [2014] FCA 878
Gayle Balding, Workplace Ombudsman v Liquid Engineering 2003 Pty Ltd [2008] WAIRComm 350
Cuzzin Pty Ltd v Grnja [2014] SAIRC 36
Qube Ports Pty Ltd v Maritime Union of Australia [2018] FCAFC 72
Stagnitta v Bechtel Construction (Australia) Pty Ltd [2018] WAIRC 886
Association of Professional Engineers, Scientists and Managers Australia v Bulga Underground Operations Pty Ltd [2019] FCA 1960
United Construction Pty Ltd v Birighitti [2002] 82 WAIG 2409
United Construction Pty Ltd v Birighitti [2003] WASCA 24
David Kershaw v Sunvalley Australia Pty Ltd [2007] WAIRComm 520
Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd [2015] FCAFC 37
Al-Hakim v Toyoor Al Jannah Pty Ltd [2018] FCCA 3184
Marshall v Whittaker's Building Supply Co Ltd [1963] HCA 26
Botica v Top Cut TMS Holdings Pty Ltd (ACN 134 606 661) [2020] WAIRC 61
Hall (Inspector of Taxes) v Lorimer [1992] 1 WLR 939
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52
WorkPac Pty Ltd v Skene [2018] FCAFC 131
Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd [2013] WASCA 36
WorkPac Pty Ltd v Rossato [2020] FCAFC 84
Telum Civil (Qld) Pty Limited v Construction, Forestry, Mining and Energy Union [2013] FWCFB 2434
Fair Work Ombudsman v Devine Marine Group Pty Ltd [2014] FCA 1365
Bronze Hospitality Pty Ltd v Hansson (No 2) [2019] FCA 1680
James Turner Roofing Pty Ltd v Peters (2003) 132 IR 122
Fair Work Ombudsman v Transpetrol TM AS [2019] FCA 400
Linkhill Pty Ltd v Director FWBII [2015] FCAFC 99
Poletti v Ecob (No2) (1989) 31 IR 321
OShea v Heinemann Electric Pty Ltd (2008) FCR 475
Australian and New Zealand Banking Group Ltd v FSU [2001] FCA 1785
Williams v Macmahon Mining Services Pty Ltd (No.2) [2009] FMCA 763
Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd [2015] HCA 37
Carr v Blade Repairs Australia Pty Ltd (No 2) [2010] FCA 688
Grant v John Grant & Sons Proprietary Limited [1954] HCA 23

The Owners Corporation of Strata Plan 61390 v Multiplex Corporate Agency Pty Ltd (No 2) [2012] NSWSC 322
Shire of Toodyay v Merrick [2016] WASC 29
Butler v St John of God Health Care Inc [2008] WASCA 174
Scaffidi v Perpetual Trustees Victoria Ltd [2011] WASCA 159
Carr & Purves v Thomas [2009] NSWCA 208
Sutton v Zullo Enterprises Pty Limited [2000] 2 Qd R 196
Kowalski v Trustee, Mitsubishi Motors Australia Ltd Staff Superannuation Fund Pty Ltd [2003] FCAFC 18
Woodham v Roberts Limited [2010] TASSC 31
David Securities Pty Ltd v Commonwealth Bank of Australia [1992] HCA 48; (1992) 175 CLR 353
State of Western Australia v Hartmann-Nieto [2014] WADC 70

Result : To be confirmed

Representation:

Claimant : Mr A. White (of counsel) from Eureka Lawyers
Respondent : Mr J. Raftos (of counsel) from Moray & Agnew Lawyers

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REASONS FOR DECISION

1 The claimant, Mr Raymond Moate (Mr Moate), was engaged as a trades assistant by the respondent, I.P.C. Pty Ltd (the Company), for 25 years until July 2018. An issue in this case is the characterisation of the legal relationship between that Mr Moate and the Company over that period.

2 Mr Moate contends that he was an employee and that the Company contravened obligations to him created by the *Fair Work Act 2009* (Cth) (FW Act) on:

- accrual of annual leave;[1]
- payment of accrued annual leave;[2]
- personal leave;[3]
- payment on public holidays;[4]
- payment in lieu of notice on termination;[5]
- supply of the Fair Work Information Statement;[6]
- access to copies of the Award and the National Employment Standard (NES);[7]
- contributions to a superannuation fund;[8]
- payment for overtime;[9]
- payment of leave loading; [10]
- accrued long service leave;[11]
- keeping of employer records;[12] and
- pay slips.[13]

(together referred to as the 'FW Act Claims').

3 Mr Moate seeks orders under the FW Act for payment of amounts that the Company was required to pay[14] under the FW Act Claims concerning accrued annual leave ($22,961.12 and leave loading of $4,018.2), public holidays ($11,700), a payment in lieu of notice on termination ($4,940), overtime ($7,878) and long service leave ($20,550.4), a total of $72,047.72 (together referred to as 'the FW Act Amounts').

The FW Act Amounts	
Accrued annual leave	$22,961.12 leave loading of $4,018.2
Public holidays	$11,700
A payment in lieu of notice on termination	$4,940
Overtime	$7,878
Long service leave	$20,550.4
Total	**$72,047.72**

4 Mr Moate also seeks an order under the FW Act for the Company to pay pecuniary penalties for those contraventions.[15]

5 The Company denies that Mr Moate was an employee of the Company. It argues that he was an independent contractor from the commencement of his work for the Company in 1994 until 1 July 2015 (**Employee/Contractor Issue**) when his status changed to that of a casual employee (**Full-Time/Casual Issue**). The Company contends that it has discharged any and all its obligations under the FW Act arising from his status as an independent contractor and (subsequently) a casual employee.

6 The Company makes five alternative arguments. First, insofar as the Company is found to have any obligation concerning any of the FW Act Amounts, it seeks to set-off against that obligation, all amounts that the Company paid to Mr Moate (**The Set-Off Issue**).

7 Secondly, the Company calls in aid reg 2.03A of the *Fair Work Regulations 2009* (Cth) (FW Regulations), and contends that, commencing 1 July 2015, the payments it made to Mr Moate were 'clearly identifiable as an amount paid to compensate' him for the FW Act Amounts and those payments are to be taken into account in determining any amount payable to Mr Moate (**FW Regulations Offset Issue**).

8 Thirdly, the Company pleads the terms of a 'Deed of Release' (the DOR) executed by the parties in September 2018 as a 'a full and complete defence' to the FW Act Claims (**Deed of Release Issue**).

9 Fourthly, the Company relies upon the common law concerning mistaken payments and unjust enrichment, amplified by s 124 of the *Property Law Act 1969* (WA), to reduce any obligation to Mr Moate to the extent of past payments made to him in the mistaken belief of the Company that Mr Moate was not an employee (**Mistake and Unjust Enrichment Issue**).

10 Fifthly, the Company relies upon ***Atkins Freight Services Pty Ltd v Fair Work Ombudsman*** [2017] FCA 1134 [38] to contend that the Court should, given the circumstances of this case,

exercise a discretion conferred by the presence of the word 'may' in s 545(3) of the FW Act,[16] to decline to make an order to pay the FW Act Amounts (**FW Act Discretion Issue**).

11 The issues identified in the above paragraphs have been adopted as headings for each of the remaining sections of these reasons.

12 The FW Act Claims will be determined according to the law governing the jurisdiction, practice and procedure of the Industrial Magistrates Court of Western Australia (IMC) under the FW Act. The relevant law is identified in an endnote.[17]

13 *If* Mr Moate proves that, for the purposes of the FW Act, he was an employee of the Company, the Company is a '***national system employer***' and Mr Moate is a '***national system employee***' as those terms are defined in the FW Act. One consequence, *if* Mr Moate was an employee of the Company is that the Company had obligations under FW Act. Those obligations are contained in provisions of the FW Act identified as 'civil remedy provisions'. The civil remedy provisions relevant to the FW Act Claims are identified in the following paragraphs.

14 As a result of the provisions of the FW Act concerning National Employment Standards (NES), if Mr Moate was an employee of the Company, he was entitled to:

- accrual of annual leave (unless he was a casual employee);[18]
- payment of accrued annual leave (unless he was a casual employee);[19]
- personal leave (unless he was a casual employee);[20]
- payment on public holidays (unless he was a casual employee); and
- to be supplied a Fair Work Information Statement.[21]

15 As a result of s 323 of the FW Act, if Mr Moate was an employee of the Company, he was entitled to receive amounts payable in relation to 'the performance of work'. A statutory entitlement to long service leave has been held to be an amount payable in relation to the 'performance of work'.[22] One of the FW Act Claims is an allegation that Mr Moate was entitled to long service leave under the *Long Service Leave Act 1958* (WA) (LSL Act). The LSL Act provides that an '***employee***' (as defined) 'is entitled in accordance with … the … Act, to long service leave on ordinary pay in respect of continuous employment with one and the same employer'. Relevant to this case, the definition of '***employee***' in the LSL Act has been construed in accordance with the same principles that have been applied when construing the meaning of the term '***employee***' in the FW Act.[23] In short, if Mr Moate is found to be an employee for the purpose of the FW Act, he will also be an employee for the purposes of the LSL Act.

16 The Company was obliged, with respect to its employees, to keep employment records as proscribed[24] and copies of pay slips as proscribed.[25]

17 As a result of s 45 of the FW Act, the terms of the *Manufacturing and Associated Industries and Occupations Award 2010* (Cth) (the Award) are enforceable as 'civil remedy provisions' of the FW Act.[26] The admissions made by the Company in its Amended Response[27] are sufficient for me to be satisfied that:

- the Award covered the Company as a result of the Company engaging in maintenance services;[28]
- the Award covered Mr Moate as a result of him falling within the Award classification for an 'Engineering/Manufacturing Employee—Level II';[29] and

- the Award applied to the Company and to Mr Moate as a result of the operation of s 47(1) of the FW Act.

18 If Mr Moate was an employee, the Company was required to:

- facilitate access to copies of the Award and the NES;[30]
- make contributions to a superannuation fund;[31]
- make payments for overtime;[32] and
- pay an annual leave loading.[33]

19 Mr Moate was the only witness for his case. Mr David Carr (Mr Carr), who acquired and became the managing director of the Company in March 2016, was the only witness for the Company. Much of their evidence was uncontradicted and much was not inconsistent with the other. On those matters, I was satisfied as to the reliability of the evidence. It has been convenient to record my findings of fact in a narrative form and, where necessary, to identify and resolve any conflict in evidence.

Employee/Contractor Issue: The Facts

20 The Company provides maintenance contractor services and labour hire services to clients of the Company. The activities of the Company include: mechanical maintenance, steel fabrication, welding, sheet metal work, carpentry, plumbing, painting, scaffolding, and rigging. The Company engages in work at the site of a client as well as at the Company's own premises.

21 On a Friday in June 1994, Mr George Barnacle (Mr Barnacle), on behalf of the Company, informed Mr Moate he 'would have a job as a Trades Assistant' if he attended the premises of the Company in Kwinana on the following Monday. Mr Moate duly attended and, save for short periods when, by agreement, he did not work, Mr Moate performed the role of a Trades Assistant as directed by a manager of the Company each weekday for the following 24 years. He did not work: on a small number of days between 1994 to 1996 when no work was available; a brief period in January 2016; and brief periods each year when, by agreement, Mr Moate went on a holiday. Commencing in 1999, Mr Moate was required to wear a uniform supplied by the Company. The uniform included a shirt with the words, 'IPC Industrial Maintenance' displayed.

22 In the period 1994 to 2007, Mr Moate often worked at client sites. Commencing in 2007, Mr Moate began to spend more time working at the premises of the Company in Rockingham. From this time, he prepared vehicles for operating each day. He maintained the Company's stocks of consumables of items such as gloves and welding rods. He tested electrical equipment and inspected lifting equipment for signs of defects. For this purpose, the Company paid for Mr Moate to undertake training in electrical testing. Mr Moate performed other tasks: operating a forklift, courier driving of Company items; testing fire equipment; and yard maintenance. For the purpose of operating the fork lift, the Company paid for Mr Moate to undertake training and testing leading to the issue of a license.

23 Save for some deliveries undertaken in own vehicle (before 2013), the Company supplied to Mr Moate all of the tools and equipment that he needed to do his work. Commencing in 2013, Mr Moate used a Company owned vehicle as required.

24 Mr Moate was paid for his work upon his invoice to the Company until July 2015. This arrangement was suggested by Mr Barnacle to Mr Moate when Mr Moate commenced to work for the Company. Mr Barnacle told Mr Moate that there were taxation advantages to Mr Moate and referred Mr Moate to a particular tax consultant, also used by the Company. Initially, the

invoice to the Company was from a partnership comprising Mr Moate and his wife. However, by 1 July 2000, the process for payment of Mr Moate's invoices reflected the contents of a document entitled 'Contractors Beware' supplied to Mr Moate by the Company in early 2000. The process is described in the following paragraph.

25 Mr Moate applied for an Australian Business Number (ABN) on the basis that he was a 'sole trader'. He registered for Goods and Services Tax (GST) with the Australian Taxation Office. The Company supplied Mr Moate with:

- a blank timesheet referring to the 'Employees Responsibility to Ensure Their Own Time Sheet is submitted on Time' (Company Timesheet);
- a document entitled 'Pay Rates Hourly Rates' (Company Pay Rates Document) which included rates of pay under a heading 'Trade Assistant'; and
- a document entitled 'Tax Invoice' (Sample Invoice) containing printing including 'Invoice for Services … For Vehicles, Materials and Labour' and space for hand-written additions of the date, hours worked, rates of pay and GST.

26 Mr Moate recorded the hours that he worked each day on the Company Timesheet in columns headed 'ST', 'T.5' and 'DT'. Each week, Mr Moate delivered a completed invoice (following the Sample Invoice format) and a completed Company Timesheet to the Company, and was paid accordingly. Mr Moate completed the invoice with handwriting to reflect:

- the date for the week that he worked;
- the total hours recorded in the Company Timesheet for the work week;
- the rates of pay in the Company Pay Rates Document corresponding respectively with columns in the Company Timesheet: ST (100%), T.5 (150%) and DT (200%); and
- the GST at a rate of 10%.

27 Occasionally, a different Company Pay Rates Document was issued to Mr Moate for use when he was engaged in a different role, for example working at the site of client of the Company on a shutdown. Occasionally, the Company informed Mr Moate of an error in a completed Company Timesheet or a completed Sample Invoice and Mr Moate would correct the error.

28 Commencing in July 2015, Mr Moate ceased to present an invoice to the Company. Subsequent arrangements for his payment are discussed below under the heading, '**Full-Time/Casual Issue: The Facts**'.

29 The Company made monthly payments to a superannuation account maintained by MLC Nominees Pty Ltd in the name of Mr Moate. MLC Nominees Pty Ltd recorded the '[p]lan name' as 'I P C Pty Ltd' and, in a letter to Mr Moate in July 2014 recorded, for the purpose of informing him about insurance entitlements that the 'basis of [his] employment' was 'Permanent Full Time'.

30 The Company made insurance premium payments to a workers compensation insurer on account of Mr Moate. From time to time, Mr Moate lodged a claim with the insurer for benefits under the policy.

31 Mr Moate's usual working hours were between 7.00 am and 3.30 pm (excluding a half-hour lunch break) between Monday and Friday (excluding public holidays). The result was that Mr Moate usually worked forty hours per week (excluding the lunch break). This pattern of working hours is reflected in a sample of Company Timesheets that are in evidence stating the

hours worked each day (2015 to 2017)[34] and in the schedule prepared by the Company stating the hours worked each week in the period 4 July 2012 to 28 June 2015 (Hours/Payments Schedule).[35] The documents also confirm the evidence of Mr Moate that he did not work on public holidays and, on occasion, he worked less than or in excess of 40 hours each week. The evidence of Mr Carr to the effect that, *generally*, the work of trades assistants was not regular or predictable and subject to fluctuations,[36] may have been accurate for workers attending client sites. However, my examination of the Hours/Payment Schedule reveals that Mr Moate's weekly working hours were regular and predictable insofar as he worked for between 31 and 50 hours per week for 110 weeks in that three year period.[37]

32 Mr Moate was not paid for any day that he did not work. Accordingly, he was not paid while on a holiday or when unable to work because of illness or for public holidays. Requests for leave on account of a holiday were made by Mr Moate to the Company's manager who would approve or refuse the request. The only significant fluctuation in work hours revealed by the Hours/Payments Schedule, apart from overtime hours, was 20 weeks in which hours worked is recorded as '0'. Any hours in excess of 40 hours were invoiced by Mr Moate (up to July 2015), in accordance with the overtime rates in the Company Pay Rates Document, at 150% or 200%.

33 The Company records, searched for the purposes of this litigation, were found to include a document dated 7 February 2013 entitled, 'IPC Pty Ltd Pre Employment – Sub Contractor Agreement to Waive Rights to Benefits' (February 2013 Waiver Document).[38] The document states that the undersigned sub-contractor waives rights to any benefits given by the Company to 'regular employees' including 'annual leave' and 'all non salary benefits which might otherwise be found to accrue to the Sub Contractor by virtue of their services' to the Company. Mr Moate's evidence in chief was that the signature on the February 2013 Waiver Document was not his usual signature and, although it is possible that he signed the document, he has no recollection of sighting or signing the document. In cross-examination, Mr Moate recognised his own writing on the document in the form of his hand-printed name and his hand-written initials. He stated that, although his usual practice was to read a document before signing it, he had no memory of the February 2013 Waiver Document.

34 I am satisfied that Mr Moate signed (by placing his initials upon) the February 2013 Waiver Document on or around 7 February 2013. The state of the evidence does not enable me to make any findings on the circumstances of Mr Moate's signing of the document. The Company has not satisfied me that Mr Moate was made aware of the contents or significance of the document before he signed it. Mr Moate has not adduced evidence of any conduct of the Company that would constitute fraud or would be a basis for a remedy in equity.

35 Mr Carr gave evidence to the effect that in 2013 business in similar circumstances to the Company, motivated by concern about any payroll tax obligations, were arranging for contractors to execute documents to confirm the status of the worker as a contractor. The evidence of Mr Carr may be accepted; it is plausible and uncontradicted. However, evidence of those practices is not a reliable basis for making findings on the circumstances of the signing of the February 2013 Waiver Document.

36 Prior to working for the Company, Mr Moate had only ever worked as an employee. He was uncertain as to Mr Barnacles reason's for suggesting (in 1994) a 'partnership and invoice' arrangement. However, it became apparent to Mr Moate that the invoice arrangement offered advantages in the form of reduced or delayed tax payments and disadvantages in not having paid annual leave or paid sick leave.[39]

Employee/Contractor Issue: Submissions

37 In a written outline of submissions filed before the trial Mr Moate summarises the law on the distinction between an employee and an independent contractor in a manner that is not inconsistent with my summary below. Emphasis is placed upon a statement in the joint judgment of North and Bromberg JJ in ***Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd*** [2015] FCAFC 37 [183] to the effect that, prima facie, unskilled workers are unlikely to be engaged in their own business. Mr Moate submits that the prima facie position has not been displaced. He identifies (separately) the factors said to be tending toward an independent contractor relationship and those said to be tending toward an employment relationship before concluding that the result favours an employment relationship. In (oral) closing submissions, similar submissions are made by counsel for Mr Moate.[40] It was also said that an inference may be drawn from the content of the February 2013 Waiver Document adverting to the waiver of employee rights, that the Company knew or suspected that Mr Moate was an employee.

38 In a written outline of submissions filed before the trial and in oral closing submissions, the Company adopts authority to the effect that a 'multifactor test which looks at the totality of the relationship' is to be applied in determining whether a person is an employee and an independent contractor.[41] The Company emphasises the following factors:

- the parties own characterisation of their relationship, including in the February 2013 Waiver Document i.e. Mr Moate was stated to be a sub-contractor;
- Mr Moate issued invoices and collected GST; and
- the fact that there were 20 weeks in the period 8 July 2013 – 18 May 2015 in which Mr Moate, for whatever reason, did not work.

Employee/Contractor Issue: Analysis

39 The FW Act Claims are dependent upon Mr Moate being categorised as an '***employee***' as defined in the FW Act. An '***employee***' is defined to mean a '***national system employee***'.[42] The phrase '***national system employee***' is defined to be 'an individual so far as he or she is employed, or usually employed' by a '***national system employer***' (for instance 'a constitutional corporation, so far as it employs, or usually employs, an individual').[43]

40 The absence of a statutory definition of '***employee***' in the FW Act has resulted in the Courts drawing upon the distinction, well known at common law and having origins in the law on vicarious liability,[44] between an employee and an independent contractor when determining whether a 'worker' is an '***employee***' for the purposes of the FW Act. I reviewed the law on this distinction in ***Botica v Top Cut TMS Holdings Pty Ltd (ACN 134 606 661)*** [2020] WAIRC 61 [32]. I adopt my summary of the law in that case and summarise the principles relevant to the disposition of this case (quotations and citations omitted) as follows:

(a) An employee is a party to a contract of service supplying labour to an employer. An independent contractor is a party to a contract of services supplying labour to a client. The distinction between the two is 'rooted fundamentally in the difference between a person who serves his employer in his, the employer's business, and a person who carries on a trade or business of his own'.

(b) There is no one defining factor which places a person into the category of employee or independent contractor. The totality of the relationship between the parties must be evaluated.

(c) The degree of control which a business may exercise over a worker has, in times past, been a significant factor in determining the nature of the relationship. However, 'control' is only one of several factors to be assessed when evaluating the totality of the relationship.

(d) The focus of the inquiry is upon 'the real substance, practical reality or true nature of the relationship in question'.

(e) The parties cannot alter the truth of their relationship by putting an incorrect label on it. A party's self-characterisation may contradict the true nature of the relationship. However, if a relationship is ambiguous, the parties' own characterisation may assist to remove that ambiguity.

(f) Regulatory compliance with regimes associated with a worker being an employee (for example PAYG taxation, superannuation deductions, paid annual leave et cetera) or with a contractor (for example GST collection) may speak to the relationship. However, caution is required; such compliance may reflect erroneous self-categorisation.

(g) A worker's substantial investment in capital equipment or deployment of a specialist skill suggests that the worker is a contractor. Other indicia of the worker being a contractor include:

- working for more than one business;
- the worker having his or her own premises;
- the worker's role being non-exclusive, i.e. the worker arranging for others to supply the same work;
- the worker having generated goodwill which is capable of being sold; and
- the worker being engaged to complete a discrete task or being engaged for a discrete time period.

(h) Indicia of the worker being an employee include:

- the worker using capital of the business to do non-specialist or unskilled tasks;
- the work being done solely for one business at the premises of that business;
- the worker's role is exclusive, i.e. the work must be done by the worker and by no one else;
- the worker is contributing to the goodwill of the business by representing the business in dealings with third parties, for example, wearing a uniform; and
- the engagement of the worker is for an indefinite period of time.

(i) The extent to which the activities of a worker exhibit the characteristics of a business is a matter of significance in determining the question of whether a worker is an employee or a contractor. A proper evaluation of those factors can only be assessed in the context of a worker's specific involvement with the business in question. Adopting the approach of Mummery J in ***Hall (Inspector of Taxes) v Lorimer*** [1992] 1 WLR 939, 944:

> *This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making*

> *an informed, considered, qualitative appreciation of the whole. It is a matter of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another.*

41 The submissions of the parties reveal agreement on the presence of one factor that often tends to favour characterisation of a worker as an independent contractor. Mr Moate arranged his affairs with the result that his financial dealings with the Company and his compliance with corporate and taxation law regimes exhibited the hallmarks of a person in business on his own account. Mr Moate was paid by the Company on an invoice that he delivered to the Company. The invoice amount included a sum for GST. He obtained an ABN and was registered with the Australian Taxation Office for GST. However, these arrangements were a consequence of Mr Moate accepting a suggestion by the Company in 1994. At that time Mr Moate was referred to the Company's own adviser for assistance. In 2000, Mr Moate also adopted information and documentation supplied to him by the Company to ensure compliance with the (newly introduced) GST scheme.

42 Mr Moate's passivity over this period is striking. This is not a case where Mr Moate's financial and taxation arrangements were a consequence of a decision by Mr Moate to set up a business. They were a consequence of Mr Moate following advice of the Company. The 'hallmarks of a person in business', in the circumstances of this case, may equally be viewed as a consequence of the Company and Mr Moate erroneously self-categorising Mr Moate as a person in business on his account.

43 Mr Moate did not work for 20 weeks in the period 8 July 2013 to 18 May 2015. To be sure, few employees enjoy a per annum average of 10 weeks *paid* annual leave. However, it is important to note that Mr Moate's leave was *unpaid.* He applied for and was granted leave by a manager in the Company. When not on leave, Mr Moate's work followed a regular and predictable pattern described above. Mr Moate worked between 31 and 50 hours per week in each of 110 weeks during this same period.

44 Taken as a whole, Mr Moate's pattern of work and arrangements for leave more closely resembled an employment relationship than a relationship between a business and an independent contractor.

45 It is necessary to consider the significance of the February 2013 Waiver Document. I note my finding above that Mr Moate signed the February 2013 Waiver Document. A person who signs a document which is known and intended to affect legal relations is bound by those terms and it is immaterial that the person did not read the document: ***Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd & Ors*** [2004] HCA 52 [45]-[57]. If the February 2013 Waiver Document was propounded by the Company as effecting a *change* in legal relations, with the result that Mr Moate became a contractor by reason of his signature, his signature on the document would assume legal significance. However, the document is not in the form of a deed. There is no consideration for the creation of any contract. Underpinning the principle in ***Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*** is the need to ensure that each party to 'every-day business transactions' (and third parties) are entitled to assume the other party will 'protect … [themselves] by abstaining from signing the document unless … satisfied with it'. Mr Moate cannot be assumed to be alert to the need to protect himself when asked to sign a document that purports to confirm his existing legal relations with the Company. He is not bound by the contents of the document.

46 Although the February 2013 Waiver Document is not binding on Mr Moate, it is not irrelevant. I infer that it was prepared by the Company. It tends to confirm that the Company considered Mr Moate to be an independent contractor. Although I am not satisfied that Mr Moate had turned his mind to the contents of the document, the inference to be drawn from Mr Moate's years of experience of being paid upon delivery of his invoice and not being paid when taking leave because of illness or holidays is that he considered himself to be an independent contractor.

47 The common understanding of the parties as to the nature of their relationship is a factor of significance in a case where there is ambiguity in the relationship. In my view, the 'overall effect' of the 'accumulation of detail' described in my findings of fact (above) is a relationship between the parties that admits of no ambiguity. The following facts all speak to Mr Moate being an employee of the Company. Mr Moate was an unskilled worker who performed tasks as directed by a manager of the Company each working day, usually commencing at 7.00 am and finishing at 3.30 pm. He was paid each week based on an hourly rate nominated by the Company. For each hour that he worked in excess of eight hours in a working day, his hourly rate increased, i.e. he was paid overtime. From the perspective of third parties (including clients of the Company), Mr Moate served and represented the Company. He wore the uniform of the Company. Neither party contemplated Mr Moate sub-contracting (or selling) to a third party the 'right' to work for the Company. The parties cannot, by use of an incorrect label in the February 2013 Waiver Document, alter the true nature of their relationship as employer and employee.

48 I am satisfied that Mr Moate was an '***employee***' under the FW Act for the whole of the claim period before 1 July 2015. Specifically, I am satisfied that, before 1 July 2015, Mr Moate was 'an employee other than a casual employee' for the purposes of the FW Act Claims.

Full-Time/Casual Issue: The Facts

49 Commencing in July 2015, Mr Moate ceased to present an invoice to the Company and commenced being paid by the Company at weekly intervals.

50 This change arose after Mr Moate signed a 'Tax File Number declaration form' on 1 July 2015, describing himself as a 'casual employee' and identifying the Company as 'the payer' (1 July 2015 Tax Declaration). Ms Lisa Norton (Ms Norton) of the Company had prepared and requested Mr Moate sign the 1 July 2015 Tax Declaration.

51 On or around the same day, Ms Norton prepared a letter from the Company dated 1 July 2015 with a subject heading, 'IPC Employment Agreement' (1 July 2015 Company Letter).[45] The letter states that, unless Mr Moate signed an enclosed waiver of the right 'to change … [his] current employment status as a casual employee' to a permanent employee (July 2015 Waiver Document) his hourly rate of pay would 'be adjusted to include applicable employee entitlements minus the present 25% casual loading'. The July 2015 Waiver Document contains two options and an instruction to 'tick only one box as required':

(a) waiving the right to elect to change employment from casual to permanent;

(b) 'change [his] current status from a casual employee to a permanent … employee and have [his] pay rate calculated accordingly'.

52 Mr Moate did not recall sighting or signing the 1 July 2015 Company Letter or the July 2015 Waiver Document, However, I am satisfied that on or around 1 July 2015 he was handed those documents by Ms Norton and ticked box (1) and signed the July 2015 Waiver Document. This finding is supported by Mr Moate's evidence identifying his signature on the July 2015 Waiver

Document and his evidence of speaking to Ms Norton. The resulting (signed) July 2015 Waiver Document is also consistent with the (signed) 1 July 2015 Tax Declaration insofar as each identify Mr Moate as a 'casual employee'.

53 There is a dispute about the circumstances of Mr Moate's signing the July 2015 Waiver Document.

54 Mr Moate said that, without notice, he was approached by Ms Norton and asked to sign documents. He said that he had no specific recollection of the content of the 1 July 2015 Company Letter and the July 2015 Waiver Document. He said that he was told that 'due to taxation reasons' he was unable to continue working for the Company as a contractor. Ms Norton presented documents for his signature and told him that, unless the documents were signed indicating his agreement to become a 'casual employee', he would *not* be able to continue working for the Company. Mr Moate said that he was angry and upset at the suggestion that, after working for the Company for in excess of 20 years, he was being told that his relationship with the Company could end immediately. Mr Moate said that he was fearful of not finding work elsewhere and agreed to become a casual employee after Ms Norton told him that, as a casual employee, his rate of pay would not change from its current rate.

55 The Company submits that Mr Moate's evidence of a 'threat' by Ms Norton to end his relationship with the Company was implausible and inconsistent with the content of each of 1 July 2015 Company Letter and the July 2015 Waiver Document making express reference to Mr Moate having the freedom to choose between continuing to work for the Company as either a permanent employee or a casual employee. Mr Carr gave evidence that the records of the Company reveal that 'about ten longer term casual staff' of the Company were sent a letter in similar terms to the 1 July 2015 Company Letter.

56 I am satisfied as to the veracity and reliability of the evidence of Mr Moate on the circumstances of his signing the July 2015 Waiver Document. Mr Moate gave cogent and plausible evidence of being offered a choice to sign documents recording his status as a 'casual' or to cease work. He was resilient and consistent when cross-examined on the issue. The Company initiated the drafting of the February 2013 Waiver Document revealing the Company preference for a legal relationship with Mr Moate that was terminable at the will of the Company. Mr Moate's account of the conversation is consistent with the fact that the Company and Mr Moate each considered Mr Moate to be contractor, notwithstanding the content of the 1 July 2015 Company Letter asserting that Mr Moate was a casual employee. Mr Moate's evidence was uncontradicted by any other witness.

57 I am satisfied that Ms Norton presented documents for Mr Moate's signature and told him that, unless the documents were signed indicating his agreement to become a 'casual employee', he would *not* be able to continue working for the Company. I am satisfied that, mindful of the risk that he would be unable to secure alternative work elsewhere and upon being assured by Ms Norton that his pay rate would not change, Mr Moate signed each of the 1 July 2015 Tax Declaration and the July 2015 Waiver Document, indicating his assent to the status of 'casual employee'. I am satisfied that, but for Ms Norton's statement as to Mr Moate not being able to continue working for the Company, he would not have signed the July 2015 Waiver Document.

58 I am not satisfied that Mr Moate read the 1 July 2015 Company Letter or the July 2015 Waiver Document before he signed the latter. Consequently, I am not satisfied that Mr Moate turned his mind to the distinction between a casual employee and a permanent employee made in those documents. From the perspective of Mr Moate, he would continue with the same work for the same pay and on the same conditions (including no annual leave or sick leave). At the request of

Ms Norton, he had signed documents agreeing to the status of 'casual employee' in order to continue working for the Company.

59 Mr Moate continued to complete and deliver the weekly Company timesheet which were used by the Company as the basis for calculating the amount that he was paid. The timesheet was identical to the one delivered before 1 July 2015 save that a reference to 'the Employees Responsibility to Ensure Their Own Time Sheet is submitted' is omitted. A payslip was prepared by the Company with respect to each payment. The payslips in evidence state: a deduction from 'gross income' on account of 'PAYG' resulting in an amount of 'net pay'; and an amount identified as 'employer paid superannuation contributions'. Mr Moate was paid for each hour that he worked. The Company prepared a 'PAYG payment summary' commencing each financial year ending June 2016. The document identified Mr Moate as the 'payee' and stated the gross payments and the tax withheld by the Company. None of the documents referred to in this paragraph use the terms 'loading' or 'casual'.

60 The hourly rate paid by the Company reflected a calculation done by the Company *each* year of a base rate paid for eight hours or less each day comprising an hourly rate set:

(a) by reference to classification level 13 in the *Metal Trades (General) Award* (WA) made under the *Industrial Relations Act 1979* (WA) (IR Act);

(b) plus a loading of 25% described in the records of the Company as a 'casual loading'; and

(c) a fixed amount (between $1.51 - $3.55) described in the records of the Company as 'IPC Additional Increment Above Award'.[46]

61 The resulting base rate for the year ended 30 June 2016 was $28.56[47] and for subsequent years was: $26.50 (2017);[48] $26 (2018); and $26 (2019). The hourly rate increased by 150% for 8 - 10 hours worked each day and 200% for additional hours. A document was prepared and maintained as a reference for accounting staff of the Company (Rate of Hourly Pay Document). It was never available to Mr Moate.

62 Mr Moate believed that he was a casual employee from 1 July 2015 and, I infer, knew that the Company was obliged to pay him a loading compared to a non-casual employee. However, there is no evidence that Mr Moate knew or was informed that any amount of his remuneration was referrable to 'a casual loading'. He was not aware of the Company's calculations set out in the previous paragraph, except the 'hourly rate of pay' as a final figure. Mr Moate was content with the fact that his rate of pay did not change after 1 July 2015.

63 There was no change to the content or the pattern of Mr Moate's work after 1 July 2015. His work hours and workdays continued to be 7.00 am to 3.30 pm, Monday to Friday (excluding public holidays). As a result, he usually worked (and was paid for) forty hours per week. This pattern of work is reflected in the records of the Company stating the hours worked by Mr Moate on each day in the period 2015 - 2018[49] and summarised in a table prepared by Mr Carr.[50] The table records the hours worked for each of 160 weeks between 5 July 2015 and 22 July 2018. It reveals:

(a) 118 weeks (73% of 160 weeks) of between 30 and 50 hours per week, comprising 83 weeks of exactly 40 hours, 25 weeks of between 30 and 39 hours and 10 weeks of between 41 and 50 hours.

(b) 31 weeks (19% of 160 weeks) of exactly zero hours, the majority of which comprise 'blocks' of 4 - 7 weeks commencing around Christmas of each year and 'blocks' of two weeks in July of each year.

(c) 6 weeks (3% of 160 weeks) of working 29 hours or less.

(d) 5 weeks of working 51 hours or more.

64 There was no change to other aspects of Mr Moate's relationship to the Company after 1 July 2015:

- he was not paid for any day that he did not work, including public holidays;
- requests for leave were made by Mr Moate to a Company manager who would approve or refuse the request; and
- the Company made monthly payments to a superannuation account of Mr Moate.

Full-Time/Casual Issue: Submissions

65 Mr Moate's case is that he was a full-time employee of the Company for the *whole* of the period the subject of the FW Act Claims i.e. from 27 September 2012 to 19 July 2018. Mr Moate specifically denies the creation of a casual employment relationship commencing in July 2015 (and continuing to July 2018).

66 Mr Moate observes that the terms 'casual employee' and 'casual employment' are not defined in the FW Act and adopts observations of the Full Federal Court in ***WorkPac Pty Ltd v Skene*** [2018] FCAFC 131 [172] - [173] (***Skene***) to the effect that what distinguishes a casual employee from a full-time or part-time employee is that a casual employee has no firm advance commitment from an employer of continuing indefinite work according to an agreed pattern of work and that 'irregular work patterns, uncertainty, discontinuity, intermittency of work and unpredictability' are indicia of casual employment.[51] He identifies the evidence relied upon in support of a conclusion that that the Company gave Mr Moate a firm advance commitment to continuing and indefinite work including Mr Moate's regular and predictable hours of work and the process undertaken in advance of non-working periods of 'leave'. It was conceded that Mr Moate and the Company may have each believed that Mr Moate was a casual employee. However, it was also noted that payments by the Company to Mr Moate did not include any amount referable to a casual loading.

67 The Company's case is that, commencing in July 2015, Mr Moate ceased being an independent contractor and commenced work as a casual employee of the Company. In particular, it is alleged that, as a result of cl 14 of the Award,[52] Mr Moate's entitlements under the Award are to be determined on the basis that Mr Moate is to be characterised as a 'casual employee, other than an irregular casual employee with … [the Company] in the role of a trades assistant'.[53]

68 The Company adopts ***Skene***'s case as the relevant authority and submits that the following facts suggest Mr Moate was a casual employee:

(a) Mr Moate signed the July 2005 Waiver Document;

(b) Mr Moate was paid 'as a casual employee inclusive of a casual loading';

(c) there was no firm advance commitment of work;

(d) Mr Moate was 'only paid for casual hours worked'; and

(e) Mr Moate advised the Company in advance of periods that he was unavailable for work.[54]

69 Emphasis is placed on the evidence that the Company paid (and Mr Moate accepted) a casual loading. It is noted that Mr Moate was not paid when on holidays, on public holidays, when he was sick or when he did not work. It is noted that internal documents of the Company identified Mr Moate by the term 'casual'.

Full-Time/Casual Issue: Analysis

70 The FW Act Claims with respect to annual leave,[55] personal leave,[56] and payment on public holidays require Mr Moate to prove that he was 'an employee other than a casual employee'. The meaning of the expression 'casual employee' in the FW Act was considered in ***Skene***. Relevant to the meaning of 'casual employee' in the FW Act, are the following propositions from the case (omitting citations and including references to paragraph numbers of ***Skene***):

(a) The vast majority of employees fall into one of three categories – full-time, part-time or casual [170]. The expression 'casual employee' in the FW Act is to be construed in light of the legal meaning of the expression 'adjusted by any indications drawn from the FW Act' [154].

(b) 'The characteristic that distinguishes full-time and part-time employment is that those employments are on-going … [O]n-going employment is employment for an indefinite term subject to rights of termination … It is characterised by a commitment by the employer, subject to rights of termination, to provide the employee with continuous and indefinite employment according to an agreed pattern of ordinary time … A corresponding commitment to provide service is given by the employee' [171].

(c) The characteristic that distinguishes casual employment is the absence of a 'firm advance commitment from the employer to continuing and indefinite work according to an agreed pattern of work. Nor does a casual employee provide a reciprocal commitment to the employer' [172].

(d) 'The key indicators of an absence of the requisite firm advance commitment will be irregularity, uncertainty, unpredictability, intermittency and discontinuity in the pattern of work of the employee in question. Those features will commonly reflect the fact that, whilst employed, the availability of work for the employee is short-term and not-ongoing and that the employer's need for further work to be performed by the employee in the future is not reasonably predictable'. Examination of the particular circumstances of an employee's pattern of work is necessary to determine the significance of the pattern; a regular pattern of work may not, in particular circumstances, evidence an advance commitment by an employer [173] - [176], [182].

(e) Whether an employer's 'requisite *advance commitment* … is absent or present must be objectively assessed including by reference to the surrounding circumstances created by both the contractual terms and the regulatory regime … applicable to the employment' [181] (emphasis added). '[T]he real substance, practical reality and true nature of that relationship will need to be assessed' [180].

(f) The characterisation of employment by the employer or the employee (or both) are 'matters to be taken into account in determining the true character of the employment … The payment by the employer and the acceptance by the employee of a casual loading … speaks to the intent of the parties to create casual employment' and will be relevant

to the characterisation of the relationship. The engagement or remuneration of an employee on an hourly basis will also be relevant in assessing the relationship of the parties. However, if examination of the real substance, practical reality and true nature of that relationship reveals an objectively demonstrated firm advance commitment to continuing and indefinite work by the employer, self-characterisation as 'a casual' or payment of a 'casual loading' or engagement on an hourly basis will not alter the true characterisation of the relationship as one of full-time or part-time employment. Payment of a casual loading and payment of hourly rates are not a determinative factors [180], [182], [184], [186] - [188].

(g) Employment arrangements may change over time. Casual employment may become full-time or part-time. '[R]epetition of a particular working arrangement may become so predictable and expected that, at some point, it may be possible to say that what began as … [casual employment] has become, upon the tacit understanding of the parties, a regular ongoing engagement' [179].

71 It is necessary to consider the significance of the 1 July 2015 Company Letter, the July 2015 Waiver Document and the 1 July 2015 Tax Declaration.

72 There are two difficulties with attributing those documents (individually or collectively) with especial significance to the case for the Company.

73 First, my finding that Mr Moate signed the July 2015 Waiver Document after Ms Norton told him that without his written agreement to becoming a 'casual employee', the Company would cease to offer him further work, is evidence of illegitimate pressure applied by the Company to Mr Moate. Ms Norton's statement was not a threat of an unlawful act; the Company was free to (lawfully) terminate any legal arrangement by which it engaged Mr Moate to work for the Company. However, there was no justifiable connection between the pressure being applied ('no more work at the Company') and the demand for a particular form of employment relationship ('unless you sign as a casual'). The illegitimate pressure applied by Ms Norton induced Mr Moate to sign the July 2015 Waiver Document. It was the reason for his signature on the document. Ordinarily, Mr Moate's signature on the July 2015 Waiver Document would have the result that he is bound by the terms of the document, irrespective of whether he had read the document.[57] However, the findings in this paragraph amount to a finding of economic duress on the part of the Company.[58] In those circumstances it is necessary to consider whether Mr Moate was given sufficient notice of the contents of the document and a reasonable opportunity to consider his position before signing the document. I am satisfied that Mr Moate was denied a reasonable opportunity to properly consider the July 2015 Waiver Document as a result of the short time period that elapsed between Ms Norton requiring him to sign the document and Mr Moate signing the document.

74 Secondly, the case for the Company is that the contents of the 1 July 2015 Company Letter and the July 2015 Waiver Document are *incorrect* insofar as they record that Mr Moate had the status of a casual employee for at least six months before 1 July 2015,[59] and are *correct* insofar as they record an offer of either permanent full-time employment *or* continuing casual employment. Two matters of significance follow. First, the employment offer is inextricably linked to the 'incorrect' information. The documents explain that the very reason (raison d'être) for the employment offer being made is that Mr Moate is currently a casual employee. The Company's denial (in this case) of this premise casts doubt on whether the parties reached agreement as to the status of Mr Moate's employment relationship by reason of Mr Moate consenting to the July 2015 Waiver Document. Secondly, the case for the Company is that it is necessary to go

outside the contents of the 1 July 2015 Company Letter and the July 2015 Waiver Document to *correctly* identify the terms of the contract of employment between the parties. This is not a case for application of the parol evidence rule; it is necessary to consider evidence of the surrounding circumstances of the transaction to ascertain and interpret the terms of any contract between the parties.

75 I turn to features of the employment relationship between Mr Moate and the Company commencing on 1 July 2015 and continuing for 160 weeks.

76 The striking feature of Mr Moate's pattern of work is the regularity and predictability of his work. In my findings, I record the fact that in 73% of the 160 weeks he worked between 30 and 50 hours each week, usually between 7.00 am and 3.30 pm, Monday to Friday. In 19% of the 160 weeks he did not work at all. However, that period is largely comprised of blocks of 'time off' in each December/January and each July. I note Mr Moate's evidence on his periods of unpaid leave negotiated with his manager. In fact, the pattern of work just described is strikingly similar to the pattern that existed for the three years before 1 July 2015.

77 Also observable from the documents in evidence and in conformity with his oral evidence is the fact that Mr Moate's work with the Company commencing on 1 July 2015 was certain and continuous. In 95% of the 160 weeks, there was either an agreement for Mr Moate to take leave (which was unpaid) or he presented at the premises of the Company at the same time on each work day and performed tasks as directed until 3.30 pm or later (when he was paid overtime).

78 The Company considered Mr Moate to be a casual employee. Mr Moate considered himself to be a casual employee by reason of conversations with Ms Norton and the fact that he had signed the July 2015 Waiver Document.

79 Mr Moate's remuneration, to his knowledge, was calculated by the Company by reference to the hours that he worked and an hourly rate of pay. Mr Moate, to his knowledge, was not paid for any time that he did not work.

80 The Company calculated Mr Moate's hourly rate of pay on the basis of an 'award' rate plus a 'casual loading' of 25% plus an additional increment. Mr Moate was aware that, as a casual employee, the Company was obliged to pay him a loading. Mr Moate did not know whether the Company discharged this obligation. He knew that, compared to rate of pay as an independent contractor before 1 July 2015, his rate of pay as a 'casual employee' did not change. However, he did not know and did not make inquiries concerning the difference between his pre-1 July 2015 rate of pay as an independent contractor and relevant Award rates of pay of employees and casual employees that applied from 1 July 2015.

81 The features of the employment relationship in the previous paragraph suggest to me that the practical reality of the relationship between the parties was a firm advance commitment by the Company to continuing and indefinite work by the Company in accordance with an agreed pattern and a reciprocal commitment by Mr Moate to provide his labour (indefinitely and continuously) to the Company.

82 This conclusion is reached notwithstanding that the Company paid Mr Moate by the hour, considered Mr Moate to be a casual employee and calculated his remuneration to include a casual loading. The fact that Mr Moate was paid by the hour is an objective fact that supports the view of the relationship as one of casual employment. However, the shared belief of the parties that Mr Moate was a casual employee is coloured by the circumstances of economic duress surrounding the signing of the July 2015 Waiver Document. The fact that the Company paid a casual loading supports the characterisation of Mr Moate as a casual employee. However, this

fact was not known to Mr Moate in that he was not privy to the manner in which the obligation to pay a casual loading was being discharged. When regard is given to the length of time over which Mr Moate's pattern of work exhibited all of the indicia of full-time employment, the fact that Mr Moate was paid by the hour and that the Company paid a casual loading does not alter the true characterisation of Mr Moate as a full-time employee of the Company.

83 The decision of the Full Court of the Federal Court in ***WorkPac Pty Ltd v Rossato*** [2020] FCAFC 84 (***Rossato***)was delivered *after* the trial of this claim and *before* the publication of these reasons. An issue in ***Rossato*** was the meaning of 'casual employee' as it appears in the phrase 'other than casual employee' in the FW Act. My provisional view is that:

(a) ***Rossato*** was resolved on the basis of the construction of the terms found in series of (wholly) written contracts[60] and may be distinguished from this case where the terms of the contract of employment are not wholly in writing.

(b) In ***Rossato*** it was noted that ***Skene*** endorsed a 'totality of the relationship' approach to characterisation of the employment relationship as casual (or otherwise) that permits consideration of post-contractual conduct of the parties. Bromberg J expressly affirmed this aspect of the reasoning in ***Skene***.[61] White J (with whom Wheelahan J agreed on this point) refused an invitation to find this reasoning in ***Skene*** to be wrong.[62]

84 If my provisional view is correct, it is not necessary to revisit my conclusions above as a result of ***Rossato***. Upon publication of these reasons, the parties will be given an opportunity to make submissions on the point. If necessary, I will reconsider these reasons.

Full-Time/Casual Issue: Award Definition Of 'Casual'

85 For the purpose of so much of the FW Act Claims as involve an allegation of a contravention of the Award, it is also necessary to consider the Award definition of 'casual employee'.

86 The Award does *not* define 'casual employee' in the same way as the FW Act. Clause 14.1 of the Award provides that a 'casual employee is one engaged and paid as such'. Clause 14.4 of the Award provides a mechanism by which a person who has been a casual employee (other than an irregular casual employee) for at least six months has the right to convert their contract of employment to full-time or part-time employment. An irregular casual employee is a person who has been engaged to perform work on an occasional basis.[63] Specifically, under cl 14.4(b), an employer must give written notice of the casual employees right to convert and, under cl 14.4(d), the employee may respond with written notice seeking to elect to convert to full-time or part-time employment, which request must not be unreasonably refused.

87 The Company submitted that the 1 July 2015 Company Letter may be viewed as the Company giving Mr Moate notice of his right to convert under cl 14.4(b) of the Award and that the July 2015 Waiver Document is evidence of Mr Moate informing the Company that he does not wish to convert to full-time employment. The submission of the Company correctly identifies that the 1 July 2015 Company Letter appears to have been drafted with an eye to cl 14.4(b) of the Award. However, this fact does not assist the Company with the logically prior question, i.e. whether, under the Award, Mr Moate was a casual employee at the time he received the notice. This requires the application of cl 14.1 of the Award which, as noted above, provides that a 'casual employee is one engaged and paid as such'.

88 Relevant to the meaning of 'casual employee' when that term appears in a modern award or an instrument made under statute are the following propositions from ***Skene*** (omitting citations and including references to paragraph numbers of ***Skene***):

(a) There is no uniformly understood meaning of the phrase 'casual employee' when the phrase is used in awards made under a federal statute [117], [142].

(b) A clause in a modern award stating that 'a casual employee is one engaged and paid as such' is capable of two meanings. It may refer to the way in which the parties identified their arrangement at its commencement. Alternatively, it can be a reference to the objective characterisation of the engagement having regard to all the circumstances. Neither meaning has general application to all modern awards; each case requires consideration of the particular provisions of the award in question. To the extent that the decision in ***Telum Civil (Qld) Pty Limited v Construction, Forestry, Mining and Energy Union*** [2013] FWCFB 2434 suggests otherwise, it should not be followed [135] - [137].

(c) A clause in an enterprise agreement that the employer 'will inform each employee of the status and terms of their engagement' casts an obligation upon the employer to inform the employee of what is believed or intended by the employer at the time of engagement as to the nature of the employment relationship. The content of the information is not dispositive of the status of the employment relationship [220] - [221].

89 In favour of the Company, I will assume that cl 14.1 (a 'casual employee is one engaged and paid as such') means that a person will be a casual employee under the Award when, at the commencement of employment, the parties have identified their relationship as one of casual employment. The assumption is supported by the views of White J on the same clause of the same award expressed in ***Fair Work Ombudsman v Devine Marine Group Pty Ltd*** [2014] FCA 1365 [136].

90 Clause 14.1 must be read with cl 14.3 casting an obligation upon the Company, when engaging a casual, to inform the employee of the fact of employment as a casual, the classification level, rate of pay and 'the likely number of hours required'. The only evidence of the manner in which the parties have identified their relationship is the 1 July 2015 Company Letter, the July 2015 Waiver Document and the evidence of Mr Moate on his conversations with Ms Norton concerning those documents.

91 The documents refer to a prior relationship of casual employment that is assumed to be on-going as at 1 July 2015. The documents do not assist with evidence of how the parties identified themselves at the time of commencement of their employment relationship. They do not refer to a classification level or a rate of pay or a likely number of hours. Mr Moate agreed to the suggestion of Ms Norton that he 'move' from his current status of 'independent contractor' to a status of 'casual employee' of the Company. However, given my finding of economic duress associated with that process, it is not evidence of the parties (freely) identifying their relationship as one of casual employment. In the absence of evidence of any self-identification, it is appropriate to apply the same indicia as relied upon for the FW Act with the result that, for the purpose of determination of so much of the FW Act Claims concerning the Award, Mr Moate is to be characterised as a full-time employee.

Employee/Contractor Issue And Full-Time/Casual Issue: A Summary

92 I have made findings that Mr Moate was 'an employee other than a casual employee' under the FW Act for the whole of the period the subject of the FW Act Claims and, relevant to his claims alleging a contravention of the Award, that Mr Moate was not a 'casual employee' as defined by the Award.

93 In reaching this conclusion, it has been convenient to consider the separate arguments raised by the Company and to examine the evidence by reference to two distinct time periods, before and after July 2015. However, it is also appropriate to note that, reviewing the evidence over the whole period that is subject to the FW Act Claims confirms the characterisation of the relationship between the parties as an employer/employee with a commitment by the Company to provide continuous and indefinite employment to Mr Moate in accord with an agreed pattern of work.[64] I have noted that, apart from Mr Moate no longer delivering an invoice and (presumably) paying his own income tax, little changed in July 2015 in the relationship between the Company and Mr Moate. He continued to perform the duties of a trades assistant, as directed, between 7.00 am and 3.30 pm on each work day, except for days when he reached agreement with the Company to have (unpaid) leave.

94 In the introduction of these reasons, I noted that Mr Moate seeks an order for payment of the FW Act Amounts, alleging that the Company had contravened civil remedy provisions of the FW Act concerning accrued annual leave, public holidays, a payment in lieu of notice on termination, overtime and long service. As a result of my finding that Mr Moate was 'an employee other than a casual employee' under the FW Act and was not 'a casual employee' for the purposes of the Award for the whole period that is subject to the FW Act Claims, it is necessary to determine whether the Company has contravened the civil remedy provisions concerning those matters. It is also necessary to determine whether any amounts are payable by the Company in respect of those matters.

95 In addition to the issues raised by the Company in response to the FW Act Claims (noted in the introduction and considered below), by its (Amended) Response to Mr Moates (Amended) Statement of Claim, the Company asserts a general denial of the contraventions alleged and a general denial that any amounts remain payable as a result of any contraventions.[65] The Company specifically denies allegations concerning the hours worked by Mr Moate and the long service leave entitlements of Mr Moate. The Company admits that, as a consequence of not believing Mr Moate to be an employee, it did not maintain employee records or provide pay slips for the period before July 2015.

96 Notwithstanding the general and specific denials of the Company, it did not introduce any evidence to contradict the direct (or inferential) evidence of Mr Moate consistent with the FW Act Claims.

97 The effect of the evidence of Mr Moate was that he was *not* paid: $22,961.12 as accrued annual leave (and leave loading of $4,018.2), notwithstanding having accrued leave of four weeks per annum over the claim period; $11,700 for 60 days of public holidays over the claim period; $4,940 in lieu of five weeks' notice on termination; $7,878 as overtime, notwithstanding that he worked two hours per week of overtime each week of the claim period; $20,550.4 in long service leave, notwithstanding 24 years of continuous service before the termination of his employment.

98 I am satisfied, on the basis of the evidence of Mr Moate noted in the preceding paragraph, that the Company has contravened the civil remedy provisions relevant to those matters and that the amounts identified in that paragraph are payable by the Company to Mr Moate. Subject to what follows in the remainder of these reasons, orders will be made for the payment of those amounts.

99 I am also satisfied that, subject to what follows in the remainder of these reasons, the Company has also contravened civil remedy provisions as alleged by Mr Moate concerning:

- accrual of annual leave;[66]
- personal leave;[67]

- supply of the Fair Work Information Statement;[68]
- access to copies of the Award and the NES;[69]
- contributions to a superannuation fund (to the extent of underpayment of relevant entitlements);[70]
- keeping of employer records;[71] and
- pay slips.[72]

The Set-Off Issue

100 The Company submits that the amount of each weekly payment to Mr Moate in excess of the amount required by the Award is to be applied in reduction of any obligation it has for FW Act Amounts claimed for annual leave, leave loading and long service leave. I note that the Company does *not* seek to set off any payments to Mr Moate against the FW Act Amounts claimed for public holidays, notice in lieu of termination or overtime.[73] The Company asserts a principle that contractual payments that are more beneficial than minimum award entitlements may be called in aid to escape liability for non-payment of award benefits, citing examples of the application of the principle: ***James Turner Roofing Pty Ltd v Peters*** (2003) 132 IR 122 (***James Turner Roofing***) and ***Fair Work Ombudsman v Transpetrol TM AS*** [2019] FCA 400. Evidence of a mutual understanding that weekly payments to Mr Moate were 'all in' payments is highlighted by the Company, including the content of the February 2013 Waiver Document. Calculations are undertaken and, after setting off a total of $86,796.11 in over-award payments made over the six year period of the claim, the Company submits that no amount remains payable in respect of annual leave, leave loading and long service leave.[74]

101 Mr Moate submits that the case of ***James Turner Roofing*** must be considered in light of a factual finding that the employer payments to the employee in that case were expressly stated to be 'all in' payment and relies upon a similar observation of ***James Turner Roofing*** made by Bromberg and North JJ in ***Linkhill Pty Ltd v Director FWBII*** [2015] FCAFC 99 [96], [98] (***Linkhill***).[75] Mr Moate disputes that amounts paid to him were 'were paid in lieu of employment entitlements'. He notes that payments before 1 July 2015 were the subject of invoices that made no reference to the purpose of the payments. He notes that payments after 1 July 2015 were the subject of payslips and no reference is made to any 'loading' notwithstanding reg 3.46 of FW Regulations requiring any loading to specified.

102 The principles to be applied where an employer claims that a payment to an employee is to be set-off against an obligation to the employee under the FW Act, including an obligation under a modern award (FW Act Obligation) are as follows:[76]

(a) An employer's payment to an employee may be applied in *satisfaction* of the FW Act Obligation, if (before payment) the employer designates the payment to be for the purpose of satisfying the obligation, i.e., the employer *appropriates* the payment: **Irving** [12.42].

(b) There must be a 'clear correlation' between, on the one hand, the employer's purpose in making the relevant payment and, on the other hand, the purpose of the relevant FW Act Obligation: **Irving** [12.42] - [12.43], [12.46]; ***Linkhill*** [84].

(c) Appropriation by an employer in satisfaction of a FW Act Obligation may arise from: an agreement between the parties *or* from 'a unilateral act by the employer prior to payment': **Irving** [12.42].

(d) Agreement. If the parties have agreed that an employer's payment is to be appropriated for an agreed purpose, the payment is to be applied in satisfaction of FW Act Obligation that clearly correlate to the agreed purpose; the payment will not be applied in satisfaction of obligations that do not correlate to the agreed purpose: **Irving** [12.46]; ***Poletti v Ecob (No2)*** (1989) 31 IR 321.

(e) 'Unilateral act by the employer prior to payment'. If the intention of the employer in making a payment is to appropriate the payment in satisfaction of a purpose that closely correlates to the purpose of the relevant FW Act Obligation, the payment is to be applied in satisfaction of that obligation: **Irving** [12.46]; ***Linkhill*** [98]. The appropriation must be communicated to the employee. The intention of the employer is ascertained objectively by inference from facts known to both parties; the subjective intention of the employer is irrelevant: ***OShea v Heinemann Electric Pty Ltd*** (2008) FCR 475 [49]. A statement in a payslip that an amount is paid to satisfy specified FW Act Obligation is evidence of an intention to appropriate the payment stated in the payslip to the identified obligation: **Irving** [12.52]. However, labels used by the parties are not determinative: **Irving** [12.53]; ***Australian and New Zealand Banking Group Ltd v FSU*** [2001] FCA 1785 [55]) 'The intention may be inferred from the circumstances in which the payment was made': **Irving** [12.52]; ***Fair Work Ombudsman v Transpetrol TM AS*** [2019] FCA 400. The subject matter of the contractual obligation to make the payment must closely correlate to the FW Act Obligation, although it is not necessary that the same terminology be used in the contract as the obligation in the FW Act: **Irving** [12.46]; ***Linkhill*** [98]; ***Australian and New Zealand Banking Group Ltd v FSU*** [2001] FCA 1785 [52].

(f) The purpose of an employer in making a payment to an employee on the basis of a set rate for each hour that is worked will need to be assessed. The whole of an amount paid by an employer may be credited against all FW Act Obligation if (and only if) the purpose of the payment by the employer is found, as a fact, to 'cover all the monetary obligations arising in the employment relationship whatever they may be': ***James Turner Roofing*** [24], [43]; ***Linkhill*** [96] - [98]. In ***James Turner Roofing*** such a purpose was inferred by the parties' agreement to an 'all in' hourly rate. By way of contrast with an 'all in' rate, an inference commonly be drawn from the employer's payment of a 'flat hourly rate' is that each payment satisfies the FW Act Obligation to pay for each hour worked and was not for another purpose: ***Linkhill*** [97]. Similarly, a failure to follow a proscribed procedure for variation of a FW Act Obligation may permit an inference that an employer payment is not in satisfaction of the obligation: **Irving** [12.49] - [12.50].

103 It necessary to consider whether, with respect to each and every weekly payment by the Company to Mr Moate, there was an agreement as the purpose of the payment or an appropriation by the Company. In particular, whether any agreement or appropriation was for a purpose that correlates to the FW Act Claims concerning annual leave, leave loading, and long service leave.

104 The first relevant weekly payment by the Company was for the week ending 30 September 2012. I have noted that the Company had supplied to Mr Moate: the Company Timesheet, the Company Pay Rates Document and the Sample Invoice. Mr Moate completed his hours of work in the Company Timesheet, separating each hour in excess of 40 hours into a separate column on account of 'time and a half' and 'double-time'. Mr Moate used his Company Timesheet and the

Company Pay Rates Document to complete and submit to the Company an invoice (in the form of the Sample Invoice) 'for services provided' and stated to be 'for vehicle, materials and labour' before identifying the number of hours claimed and an hourly rate, separating the hours claimed in excess of 40 hours where an hourly rate 'time and a half' or 'double-time' is stated. A 'sub-total' of the resulting total amount claimed is stated and, with an amount stated as 'GST', an invoice 'Total' is recorded. The Company paid Mr Moate the 'Total' amount on the invoice.

105 These facts reveal an agreement between the Company and Mr Moate that the whole of the amount paid by the Company to Mr Moate each week is for the purpose of discharging contractual obligations of the Company to pay Mr Moate for each hour of his work, including a contractual obligation to pay at an agreed higher rate for each hour worked in excess of 40 hours. This conclusion is an irresistible inference from the content (and flow) of the Company Timesheet, the Company Pay Rates Document and the Sample Invoice. The agreed purpose of the payment, so characterised, correlates with FW Act Obligation with respect to payment for hours worked and payment for overtime *only*, and do not correlate with the FW Act Amounts concerning annual leave, leave loading or long service leave. The absence of reference in communications between the parties on any matter resembling annual leave or long service is significant.

106 The next communication involving the parties is the February 2013 Waiver Document. I have noted that Mr Moate signed (by placing his initials upon) the February 2013 Waiver Document on or around 7 February 2013 in circumstances that are unknown. The Company has not satisfied me that Mr Moate considered the contents of the document before he signed it. Mr Moate has not adduced evidence of any conduct of the Company that suggests his signature was procured by fraud or in circumstances that would otherwise result in a claim for equitable relief.

107 The Company is entitled, unilaterally, to apply payments in satisfaction of obligations to Mr Moate. The appropriation must be communicated to Mr Moate. The issue in this case is whether, in supplying the February 2013 Waiver Document to Mr Moate, the Company communicated an intention to appropriate future payments. It is not necessary for the Company to have proven that Mr Moate was aware or is deemed to be aware of the contents of the document; it is sufficient to prove communication to Mr Moate.

108 The document relevantly states:

> *IPC Pty Ltd Pre Employment – Sub Contractor Agreement to Waive Rights to Benefits*
>
> *I hereby as a Sub Contractor waive and forgo the right to receive any benefits given by IPC Pty Ltd to its regular employees, including but not limited to, health benefits, annual leave or sickness benefits etc.*
>
> *This waiver is applicable to all non salary benefits which might otherwise be found to accrue to the Sub Contractor by virtue of their services to IPC Pty Ltd …*
>
> *This waiver is effective independently of the Sub Contractors status as adjudged for taxation purposes or for any other purpose.*
>
> …
>
> *I have read the above letter and agree to its provisions.*
>
> [Signature]

109 The contents of the February 2013 Waiver Document are relied upon by the Company as an appropriation of future payments to Mr Moate against all and any (future) statutory obligations of the Company that correlate to a 'benefit given by [the Company] to its regular employees'.

The Company submits that 'regular employees' enjoy annual leave, leave loading and long service leave and, accordingly, 'all in' payments to Mr Moate may be set off against his FW Act Claims in respect of those matters.

110 The February 2013 Waiver Document is a unilateral act of the Company. It is inconsistent with the subsisting contractual obligation of the Company to make payments to Mr Moate for the singular purpose of compensating him for each hour of his work. Further, if the February 2013 Waiver Document is said to evidence the appropriation of a Company payment in satisfaction of Mr Moate's FW Act Claims, it is not possible to identify the portion of the payment being appropriated against those claims. There is no evidence of Mr Moate being able to calculate the amount being paid to a comparable 'regular employees' compared to the amount paid to himself *and* referable to annual leave, leave loading and long service leave.

111 It may also be observed that the LSL Act does not permit an employee to forgo an entitlement to leave unless there is an agreement which has the effect of the employee being 'given an *adequate benefit* in lieu of the entitlement'[77] (emphasis added). In the absence of an express or implied reference in the February 2013 Waiver Document to long service leave entitlements, I would not draw an inference that the Company intended that future payments of the Company to Mr Moate be applied in discharge of any entitlements of Mr Moate under the LSL Act. Payments to Mr Moate may not be applied in set off against Mr Moate's long service leave entitlements.

112 The next communication involving the parties is the 1 July 2015 Company Letter together with the July 2015 Waiver Document. I have set out the contents of these documents and made findings on the circumstances of Mr Moate signing the document above under the heading, '**Full-Time/Casual Issue: The Facts**'. Those circumstances, amounting to economic duress upon Mr Moate, preclude the Company from relying upon those documents to evidence an agreement with Mr Moate that payments be appropriated for an agreed purpose.

113 However, I have also noted that the Company and Mr Moate each considered that Mr Moate to be 'casual employee' commencing 1 July 2015. Mr Moate ceased to submit an invoice. He signed the 1 July 2015 Tax Declaration describing himself as a 'casual employee'. The hours on his submitted Company Timesheet were multiplied by an hourly rate set by the Company and paid to him each week (less tax remitted). The hourly rate was set at regular intervals by the Company. A weekly payslip was prepared by the Company with respect to each payment. The payslip made no reference to the purpose of the payment. The inference to be drawn from these facts, known to both the Company and Mr Moate, is that, commencing 1 July 2015, the Company intended to appropriate the weekly payments to Mr Moate for the purpose of discharging the contractual obligation to pay Mr Moate for each hour of his work for the Company and for no other purpose.

114 I would not draw the inference from the fact (assumed by both parties) that payments to Mr Moate were now being paid to him as a 'casual employee', that the purpose of the Company in making each weekly payment included statutory obligations relating to annual leave, leave loading and long service leave. Of significance are the contents of the Company Timesheet prepared by Mr Moate each week, the contents of the weekly payslip and the amounts stated as paid to Mr Moate. These documents contain express reference to the Company making payments for hours worked, ordinary hours, overtime, superannuation and taxation and an exact correlation between the calculations. No other purpose is identified.

115 It may be accepted that it is commonly understood in workplaces, and was understood by Mr Moate that, compared to other employees, a casual employee is paid a premium rate and does

not enjoy entitlements such as annual leave. It may also be accepted that the Rate of Hourly Pay Document is evidence that the Company subjectively intended that the sums referred to in that document as the casual loading of 25% and the 'increment' compensate Mr Moate for annual leave. However, the contents (and the process behind the creation of) the Rate of Hourly Pay Document was not known to Mr Moate. It was known only to the Company. Each week the Company communicated to Mr Moate (via a payslip) that he was being compensated for the hours that he worked as ordinary time and overtime. I would not infer from the shared belief that Mr Moate was a 'casual employee' that the Company was also communicating to him that he was being paid for the whole of the 'loss of a basket of amenities and entitlements, including not only annual leave, sick leave and public holidays, but also personal, parenting and long service leave, [and] redundancy pay'.[78]

116 For the reasons set out above, I have concluded that there was no agreement or unilateral act communicated to Mr Moate that appropriated payments to him in discharge of obligations that closely correlate with the FW Act Amounts claimed in respect of annual leave, leave loading or long service leave.

117 I have noted that the decision of the Full Court of the Federal Court in ***Rossato*** was delivered *after* the trial of this claim. In ***Rossato***, the employer made payments to an employee on the basis that the employee was a casual employee (at the rate provided for in the relevant enterprise agreement). The Court held that the employee was, in fact, 'other than a casual employee' for the purposes of the FW Act, resulting in the employee having monetary entitlements under the statute for annual leave, personal/carer's leave and public holidays. An issue in the case was the employer's claim that the employee's FW Act monetary entitlements should be reduced (i.e. set-off) by an amount reflecting the difference between the 'casual employee rate' paid to the employee and the 'permanent employee rate' provided for in the enterprise agreement. My provisional view is that:

(a) The principles to be applied when an employer seeks to set-off payments made to an employee in discharge of entitlements provided for in the FW Act, identified in each judgment of ***Rossato*** is consistent with my summary of the principles in paragraph [102] above concerning set-off, firstly, by an *agreement* and, secondly, by a unilateral act by the employer (i.e. by *designation*).[79] The Court rejected the contention that a third category of set off exists where the purpose of an employer's payment is irrelevant.[80]

(b) There is nothing in the discussion of the *application* of the principles concerning set-off in ***Rossato*** that would suggest a different outcome to my conclusions above.[81]

118 Again, if my provisional view is correct, it is not necessary to revisit my conclusions above as a result of ***Rossato***. However, parties will be given an opportunity to make submissions on the point.

FW Regulations Offset Issue

119 The Company calls in aid reg 2.03A of the FW Regulations (Reg 2.03A), and contends that, commencing 1 July 2015, it paid to Mr Moate amounts that were 'clearly identifiable as an amount paid to compensate' him for NES entitlements, namely, accrued annual leave, public holidays, and payment in lieu of notice on termination. Reg 2.03A has no application to any claim by Mr Moate for an entitlement that is not an entitlement under the NES. It follows that Reg 2.03A has no application to the FW Act Amounts claimed for long service leave, leave loading and overtime.

120 The effect of Reg 2.03A, is that, if four conditions are satisfied, a stated consequence will follow, namely '[t]o avoid doubt, the [Company] may make a claim to have the loading amount taken into account in determining' the amount payable to Mr Moate 'in lieu of one or more relevant NES entitlements'.

121 The first condition is that Mr Moate must have been 'employed by the [Company] on the basis that [he] is a casual employee' (Reg 2.03A(1)(a)). I conclude that this condition is satisfied. In my reasons on '**The Set-Off Issue**', I noted that, commencing 1 July 2015, the Company and Mr Moate each considered Mr Moate to be a 'casual employee'. I have also noted, in my reasons on the '**Full-Time/Casual Issue**' that illegitimate pressure induced Mr Moate to sign the July 2015 Waiver Document. At issue is whether Mr Moate was employed *on the basis of being a casual employee*, in circumstances where both parties incorrectly identify Mr Moate to be a casual employee and where one reason for their belief is the July 2015 Waiver Document. Assuming, in favour of Mr Moate, that the expression 'on the basis that' requires the employee to be *aware* of the employer's characterisation of the employment as 'casual', then Mr Moate was aware of that fact. The fact that both the Company and Mr Moate were mistaken as to the characterisation is not significant given that the purpose of the Reg 2.03A, evident from the third condition, is to address a situation where the Company (at least) was mistaken. The fact that the Company contributed to Mr Moate's mistaken self-characterisation by illegitimate pressure is irrelevant, given the terms of Reg 2.03A. A note to Reg 2.03A provides that the 'regulation is intended to apply if the person has been mistakenly classified as a casual employee'.[82]

122 The second condition is that the Company must pay to Mr Moate an amount 'that is clearly identifiable as an amount paid to compensate [Mr Moate] for not having one or more relevant NES entitlements during a period' of employment. I am not satisfied that this condition is satisfied. The 'clearly identifiable amount' is termed 'the ***loading amount***' (Reg 2.03A(1)(b)) and the period of employment during which Mr Moate did not have an NES entitlement is termed 'the ***employment period***'. The Company relies upon the contents of the 1 July 2015 Company Letter and the Rate of Hourly Pay Document as evidence of having paid to Mr Moate amounts that are 'clearly identifiable … to compensate' Mr Moate for accrued annual leave, unpaid public holidays and payment in lieu of notice on termination i.e. NES entitlements. My view is that, in context, the word 'identifiable' means identifiable by the employer *and* the employee. The ordinary meaning of 'identifiable' is 'able to be recognised'.[83] I accept that an employer alone *may* be able to identify, by facts unknown to the employee at the time of the payment, the components of a payment to an employee and the purpose of each component. However, the second condition appears in Reg 2.03A(1)(b) which speaks of a payment from an employer to an employee as *compensation* for an NES *entitlement*. It is implausible that a regulation would create a scheme by which compensation for an entitlement was occurring without notice to the party who was thereby losing the entitlement. A note to the regulation provides examples of 'correspondence, pay slips, [and] contracts' of 'where it may be clearly identifiable that an amount is paid to compensate' for an NES entitlement. For the reasons stated above on the '**Full-Time/Casual Issue**', I am not satisfied that the contents of the 1 July 2015 Company Letter or the Rate of Hourly Pay Document were ever communicated to Mr Moate. Those documents cannot be relied upon by the Company. I also note above that the weekly payslips do not identify annual leave, public holidays, payment in lieu of notice of termination or any NES entitlements claimed by Mr Moate.

123 If I am wrong in concluding that the second condition requires the Company to communicate matters to Mr Moate, I also record my view that the Company has not 'clearly identified' the amounts said to be compensation. The 1 July 2015 Company Letter speaks of 'applicable

employee entitlements' as a full-time employee and a 'present 25% casual loading'. The letter identifies a quantum of compensation at 25% of the hourly rate paid to Mr Moate by the Company. However, I am not satisfied that the words 'applicable employee entitlements' are sufficiently descriptive of the NES entitlement to annual leave, payment on public holiday or payment in lieu of notice of termination so as to clearly identify the entitlements which are the subject of compensation. The Rate of Hourly Pay Document identifies a 'casual loading' of 25% and a flat rate as an 'additional increment'. I am not satisfied as to the identification of the object of the compensation. Nothing appears in the Rate of Hourly Pay Document to identify or distinguish between annual leave, public holidays or a payment in lieu of notice of termination.

124 In the result, I am not satisfied that Reg 2.03A results in any further amount that has been paid by the Company to Mr Moate being taken account in lieu of any claim by him. For completeness, I will consider the third and fourth conditions.

125 The third condition is that Mr Moate must in fact have been 'an employee other than a casual employee' during the employment period. This condition is satisfied as a result of my findings above under the heading, '**Full-Time/Casual Issue**'.

126 I have noted that the decision of the Full Court of the Federal Court in ***Rossato*** was delivered *after* the trial of this claim. An issue in ***Rossato*** was whether the employer was able to invoke Reg 2.03A given the terms of the fourth condition, namely, that the employee must have made 'a claim to be paid an amount in lieu of one or more of the relevant NES entitlements'. My provisional view is that:

(a) The Full Court held that an employee claim for *the* NES entitlement is to be distinguished from an employee claim for *an amount in lieu of* the NES entitlement and that a claim of the former type does not satisfy the fourth condition.[84]

(b) Mr Moate's claims concerning annual leave, public holidays and payment in lieu of notice of termination are claims for *the* amount of the NES entitlement applicable to each of those matters. His claims are not for an amount or amounts in lieu of those entitlements. ***Rossato*** is to be applied with the result that the Company is unable to rely upon Reg 2.03A.

(c) The majority of the Full Court held that Reg 2.03A was to be construed so as not to affect the substantive law to be applied when considering an employer's claim to set-off.[85] I note my conclusion above that the Company is not entitled to set-off any payments made to Mr Moate in satisfaction the FW Act Amounts.

127 Again, if my provisional view is correct, it is not necessary to revisit my (alternative) conclusions above on the effect of the first and second conditions of Reg 2.03A. However, the parties will be given an opportunity to make submissions on the point.

Deed Of Release Issue

128 On 12 September 2018, shortly after a conciliation conference for the purpose of proceedings between the parties in the Fair Work Commission (FWC), Mr Moate and Mr Carr each signed a document entitled 'Deed of Release' (the DOR). The Company relies upon clauses of the DOR stating that Mr Moate releases and discharges the Company from all 'Claims' (Clause 3 Claim Release) and that the Company may plead the DOR as a full and complete defence by the Company (Clause 5 Bar). The word 'Claims' is defined and expressly excludes a claim for 'employment entitlements' (Clause 1 Claims Definition).

129 On 19 July 2018, while working at the premises of the Company, Mr Moate suffered a stroke and ceased working. On 20 July 2018, he attended work and was informed by Mr Carr that, for safety reasons, the Company would not countenance him working before 30 days had elapsed after his stroke. On 13 August 2018, Mr Moate attended work and supplied a medical certificate stating that he was (now) fit to return to work. Mr Carr told Mr Moate that no work was available and, in any event, Mr Carr was concerned about the attitude of Mr Moate to the health and safety obligations of the Company.

130 On 14 August 2018, Mr Moate commenced proceedings against the Company in the FWC by filing an Unfair dismissal application (FWC Claim). In the application form, Mr Moate records:

- the date of his dismissal as 13 August 2018 when he '[v]isited the office to hand in return to work medical certificate and was told' not to come back as he was 'a liability';
- he seeks '[a] return to work' order as the outcome of his application;
- the reasons for his dismissal were 'a stroke at work' and a subsequent medical clearance; and
- the reasons he considered the dismissal to be unfair included:
    - working 'for the [C]ompany as a contractor full time 40 hours a week since 1994';
    - 'Changed to casual employee 40 hours a week (and) no change';
    - 'Have had no entitlements – such as sick days, holidays or annual leave';
    - 'No prior discussions regarding effective ability to carry out duties'; and
    - 'Any holidays were pre approved and unpaid'.

131 The Company responded to the FWC Claim by filing an Employer Response to Unfair Dismissal Application. In that form, signed by an operations manager of the Company, Mr Michael Markus, the Company records:

- Mr Moate was employed as a casual employee (Trades Assistant) from 1 July 2015 and prior to this date was a subcontractor.
- the Company had a 'jurisdictional objection' to the application, namely that Mr Moate, a casual employee, had not been dismissed; no work available for his capabilities.

132 A conciliation conference was convened by the FWC on 10 September 2018. Mr Moate self-represented. The Company was represented by Mr Carr. After communications between Mr Moate's solicitors and Mr Carr, the DOR, drafted by Mr Moate's solicitors, was signed by Mr Moate and Mr Carr (as the 'authorised representative' of the Company).

133 Mr Carr accepted the offer of Mr Moate's solicitors to draft the DOR. The DOR comprises two pages and is divided into headings for 'Parties', 'Recitals', and 'Agreed Terms'. The Recitals and relevant extracts from the Agreed Terms are as follows:

> ***Recitals***
>
> *A. Moate commenced employment with IPC in September 1994 as a Trades Assistant (**Employment**).*
>
> *B. The Employment was terminated with effect from 17 July 2018 (**Termination**).*
>
> *C. Moate commenced an application against IPC in the Fair Work Commission (Matter No. U2018/8399) in respect of the Termination (**Proceedings**).*

D. Without admission of liability, the Parties have agreed to settle the Proceedings in accordance with the terms of this Deed.

Agreed Terms

1. Definitions

In this Deed:

Claim(s) *means the Proceedings and any other claims in relation to the Termination, but does not include any claim for workers' compensation, superannuation or employment entitlements.*

Parties *means the parties to this Deed, being Moate and IPC.*

…

[Clause 2. Settlement … The parties agree that … IPC will pay to Moate … $3,500.00 as an employment termination payment (**Settlement Sum**)]

3. Release and discharge

(a) In consideration of the Settlement Sum, Moate unconditionally releases and discharges IPC from all Claims.

(b) In consideration of this Deed and the Discontinuance, IPC unconditionally releases and discharges Moate from all claims arising from his employment with IPC.

….

5. General

5.1 Bar to Proceedings

(a) This Deed may be pleaded as a full and complete defence by IPC, including as a bar to any Claim or action commenced, continued or taken by or on behalf of Moate.

(b) This Deed may be pleaded as a full and complete defence by Moate, including as a bar to any claim or action commenced, continued or taken by or on behalf of IPC arising from Moate's employment with IPC.

134 Mr Carr read the DOR before he signed it and noticed a reference to 'all claims'. On signing the DOR, Mr Carr believed that it precluded Mr Moate from making any future claims against the Company, including claims of the nature of those made in this case, in which the Originating Claim was filed 15 days after he signed the DOR.[86]

135 The parties are in agreement on the principles to be applied in construction of the DOR. Mr Moate emphasises that the meaning of the DOR is to be determined by the objectively determined intention of the parties and that the ordinary meaning of the text of the DOR is the primary reference point for ascertaining the objective intention of the parties.[87] Mr Moate also (correctly) observes that, absent the genuine compromise of litigation on foot or in contemplation, parties cannot contract out of statutory obligations including obligations arising from instruments made under the FW Act.[88] The Company (correctly) observes that in a case where ambiguity exists, an agreement may be construed *contra proferentem* i.e. against the party who formulated the document.[89]

136 I would make the following additional observations, specifically concerning construction of an instrument said to contain an agreement precluding one party from pursuing what may otherwise be an available cause of action:

(a) At law, the meaning of the words of a release are determined by the objectively ascertained intention of the parties; what would a reasonable bystander understand the deed to mean? The intention of the parties is ascertained from the terms of the deed itself and from proper evidence of the objective intention of the parties. One consequence is that the *general* words of a release must be interpreted in light of the subject matter of the dispute known to both parties.[90] The subject matter is often identified in the recitals of the deed itself.

(b) Equity restrains a party from unconscientious reliance upon legal rights. A party will not be permitted to rely upon the general words of a release to escape obligations outside the true purpose of the transaction as ascertained from the nature of the instrument and the surrounding circumstances. Those circumstances include the state of knowledge of the respective parties concerning the existence, character and extent of the liability in question and the *actual intention of the releasor*.[91]

(c) The significance of evidence of the actual intention of the releasor will vary depending on the circumstances of the case.[92] For example, the actual intention of a releasor is of less significance where a release that has been negotiated between sophisticated and well-advised incorporated entities, and where the terms of the deed all point objectively to a mutual intention that the release should operate in accordance with its terms. On the other hand, non-awareness by the releasor coupled with knowledge by the releasee of the circumstances that may give rise to a claim, may be sufficient to invoke the equitable principle. Much will depend on the quality of the releasee's knowledge - whether it is specific or general and whether in some way that knowledge should be seen as affecting the conscience of the releasee.

(d) The equitable principle only has a role to play when it appears from the terms or the context or other admissible evidence, that the enforcement of the legal right would, by a literal application of the general words of a release, be against conscience.[93] It would not be against conscience if the Court is satisfied that the parties intended the general words of a release should operate to encompass all conceivable further disputes, whether disclosed or not and whether within the knowledge of a party or both parties, or outside of it.

137 The Company makes three submissions. Those submissions, Mr Moate's response and my analysis follow.

Deed Of Release Issue: A 'Complete Defence To Any Action Taken By' Mr Moate

138 The Company submits that the Clause 5 Bar concerns two distinct matters: (1) 'any Claim' (Clause 5 Claim Bar); *and* (2) 'any … action commenced, continued or taken by or on behalf of' Mr Moate (Clause 5 Any Action Bar). This dichotomy lays the foundation for a submission that the 'ordinary and commonly understood meaning' of the text of the Clause 5 Any Action Bar include Mr Moate's claims for payment of an amount of money (for entitlements) and claims for pecuniary penalties arising from the FW Act Claims. It follows, says the Company, that the Clause 5 Any Action Bar operates as a 'covenant not to sue' with the consequence that Mr Moate's case must be dismissed.

139 In Response, Mr Moate submits that the Clause 5 Bar must be construed in conformity with Clause 3 Claim Release. Reference to made to the heading of cl 5, 'General', suggesting that cl 5 adds nothing to the rights and obligations of the parties contained in cl 3.

140 I disagree with Mr Moate's submission that, properly construed, the Clause 5 Bar adds nothing to the Clause 3 Claim Release. The origin and significance of the distinction between a 'release and discharge', a 'covenant not to sue' and a 'plea in bar' is discussed by the Court of Appeal in ***Scaffidi v Perpetual Trustees Victoria Ltd*** [2011] WASCA 159 [14] - [25] (Newnes JA, Murphy JA and Mazza JA). The discussion reveals the significance, pre-Judicature Acts, of a 'covenant not to sue' and a 'plea in bar' as a means of avoiding a multiplicity of proceedings. It is also necessary, where joint obligations of multiple promisors exist, to distinguish between a *release* granted by a promisee, extinguishing the obligations of *all* promisors of a joint obligation, and a *covenant not to sue* or a *plea in bar,* precluding a claim against only a promisor named in the deed.[94] A deed containing both a release and a plea in bar will typically identify the subject matter of release and the subject matter of the plea in bar in identical terms. However, there is no reason in principle not to enforce a plea in bar that is not expressed in the same terms as a release.[95]

141 The Clause 5 Any Action Bar, expressed to be a defence to 'any … action taken by' Mr Moate must, in the first instance, be construed from the perspective of the reasonable bystander. The '**Recitals**' of the DOR make clear that the Mr Moate and the Company have agreed, by the DOR, to settle his application in the FWC in respect of the (recent) termination of his employment.

142 Mr Moate's application to the FWC is the subject of pt 3 - 2 of the FW Act. The FWC may order 'reinstatement, or the payment of compensation [of not more than six months' salary] … if: (a) the FWC is satisfied that the [applicant] was protected from unfair dismissal … and (b) the [applicant] has been unfairly dismissed'.[96] A causal employee is protected from unfair dismissal if he or she had been employed for at least six months on a regular and systematic basis and, during that period, had a reasonable expectation of employment on the same basis.[97] Unless a dismissal is 'harsh, unjust or unreasonable', taking account specified criteria, it will not be an 'unfair dismissal'.[98] The criteria include whether there was a valid reason for the dismissal related to the applicant's capacity or conduct.[99]

143 It is apparent that Mr Moate was seeking an order for reinstatement in circumstances where he considered that it was 'harsh, unjust or unreasonable' that the Company refused to continue to offer him further work given his long history of work for the Company including periods, in his words, as a contractor and as a casual employee. It is also apparent that the Company proposed to defend the application on the basis that Mr Moate had not been dismissed; he was a casual employee and no further work was available.

144 My view is that the text of the Clause 5 Any Action Bar must be construed against a background of both parties being aware that Mr Moate applied in the FWC for an order for reinstatement and where the forms filed by each party are consistent with the subject matter of the dispute in the FWC, being an assessment of the motives of the Company for not offering further work to Mr Moate after he had a stroke in July 2018. This background and the content of the '**Recitals**', compels a conclusion that, objectively, the intention of the parties was that the Clause 5 Any Action Bar operated as a plea in bar available to the Company for any further claim made by Mr Moate for a remedy arising from the circumstances leading to the end of his employment. So construed, except for the FW Act Claims for payment in lieu of notice on termination discussed below, the Clause 5 Any Action Bar does not operate as a plea in bar to any of the FW Act Claims.

145 My view is that, on balance, equitable considerations do not result in any different conclusion.

146 The Company's reliance upon a literal meaning of the general words found in the Clause 5 Any Action Bar *is* supported by the actual intention of Mr Carr that the DOR end all claims against the Company. Mr Carr's belief, and claims to equitable intervention, is lent credence by four further facts. First, it is a feature of the DOR that cl 3.1(b) and cl 5.1(b) release Mr Moate from *all claims* against *him* arising from his employment with the Company. There is a lack of mutuality in the content of the releases contained in the DOR. Secondly, the draftsperson of the DOR has utilised a drafting device that, if not to be deplored, is to be avoided. The meaning of a word, 'claim', changes depending upon whether it is capitalised i.e. appears as 'Claim' or 'claim'. The result is apt to mislead a lay reader of the document. Thirdly, having regard to the fact that only 15 days elapsed between the making of the DOR and the filing of this claim, I infer that Mr Moate had knowledge of the fact that the DOR did not apply to a catalogue of specific claims he wished to make. Fourthly, the DOR was drafted by solicitors acting for Mr Moate.

147 The DOR is short. The exclusion of 'employment entitlements' from the definition of '**Claim(s)**' in cl 1 invited careful attention to the text of cl 3 and cl 5. Mr Carr is an experienced manager and the Company is the operator of a substantial business. There is no evidence of any conduct by Mr Moate or his solicitors that denied the Company the opportunity to carefully consider the DOR or to obtain legal advice about the contents of the instrument. In my view, these factors are sufficient to answer any claims by the Company to equitable considerations bearing upon the construction of the Clause 5 Any Action Bar.

148 It may also be observed that this is not a case where a party seeks to 'read down' a general clause to avoid unconscientious reliance upon legal rights. The Company invokes equitable considerations to 'read widely' a general clause in order to avoid the consequences of the (alleged) unconscientious pursuit of legal rights. If it be a good argument, it would be necessary to demonstrate words or conduct of Mr Moate that imputed an intention to him to release the Company from all employment related disputes. The evidence does not support this conclusion.

Deed Of Release Issue: A Complete Defence To Any 'Claim(s)' By Mr Moate

149 The Company submits that the Clause 3 Claim Release and the Clause 5 Claim Bar, answers *all* of Mr Moate's claims because the application and response filed in the FWC proceedings traverse matters that are subject of the FW Act Claims. The argument draws upon the fact that the Clause 1 Claims Definition identifies the '**Proceedings**' by reference to Mr Moate's application against the Company in the FWC and notes that Mr Moate's application identifies a history of work as a contractor and casual employee.

150 In response, Mr Moate argues that the documents filed in the FWC proceedings reveal a dispute about matters within the jurisdiction of the FWC and *not* a dispute about matters the subject of the FW Act Claims. Mr Moate also asserts that none of his claims concern termination; each 'relates exclusively to [his] entitlements accrued in the course of [his] employment'. Reference is made to the 'repeated' use of the word 'entitlement' in the FW Act provisions concerning the NES and modern awards in connection with the fact that the definition of '**Claim(s)**' is expressly stated not to include 'employment entitlements'.

151 The Clause 1 Claims Definition contains the word 'and'. It is a conjunctive definition. The Company has a complete defence to claims in relation to the '**Proceedings**' (as defined) *and* in relation to the '**Termination**' (as defined).

152 The word '**Proceedings**' is defined in the '**Recitals**' to mean the proceedings commenced by Mr Moate's application in the FWC in respect of the termination of his employment on

17 July 2018. For the purpose of construing the meaning of the Clause 5 Action Bar (undertaken above), I placed weight upon Recital D stating that 'the Parties have agreed to settle *the Proceedings*' (emphasis added). I observed that the subject matter of those proceedings was whether an order for reinstatement should be made having regard to the motives and conduct of the Company. The content of the forms filed by the parties in the FWC must be viewed in the context of the Mr Moate's recent stroke and the remedy that he was seeking i.e. reinstatement. So identified, the release of the Company from a claim which is the subject matter of 'the Proceedings' does not release the Company from a claim to any of the FW Act Claims; i.e. claims concerning the following:

- accrual of annual leave;
- payment of accrued annual leave;
- personal leave, payment on public holidays;
- payment in lieu of notice on termination;
- supply of the Fair Work Information Statement;
- access to copies of the Award and the NES;
- contributions to a superannuation fund;
- payment for overtime;
- accrued long service leave;
- keeping of employer records; and
- pay slips.

153 The word '**Termination**' is defined in the '**Recitals**' to mean the termination of Mr Moate's employment, commencing in September 1994, 'with effect from 17 July 2018'. It follows that, subject to an exception concerning 'employment entitlements', the Company has been released from so much of the FW Act Claims that relate to the termination of Mr Moate's employment.

154 I agree with the submission of the Company that Mr Moate's claim for a payment in lieu of notice on termination (Notice in Lieu Claim) is a claim that relates to the termination of his employment. The quantum of the FW Act entitlement is a function of the length of employment. However, there is no entitlement unless and until an employer purports to terminate employment.[100] There is a necessary and close nexus between Mr Moate's Notice in Lieu Claim and the termination of his employment. Unless Mr Moate's Notice in Lieu Claim is an 'employment entitlement' (discussed below), the Company has been released from this claim by the Clause 3 Claim Release and the Clause 5 Claim Bar.

155 For the same reasons stated with respect to the Clause 5 Any Action Bar, my view is that equitable considerations do not result in any different conclusion to the Company's contentions above.

Deed Of Release Issue: No Release Of Claims For 'Employment Entitlements'

156 The Company submits that Mr Moate's claim for pecuniary penalty orders, interest and costs are not claims for 'employment entitlements' and contend that it has been released from so much of the content of the FW Act Claims that relate to those matters. The submission misconstrues the effect of the Clause 1 Claims Definition.

157 The clause does *not* provide for the release of the Company from *all claims* other than claims for employment entitlements. The Company is released from *identified claims* unless the identified claim includes a claim 'for workers' compensation, superannuation or employment entitlements'. The *identified claims,* arising from the '**Proceedings**' and from the '**Termination**', are discussed above.

158 Subject to my observation in the following paragraph about Mr Moate's Notice in Lieu Claim, the Company has not been released from claims for pecuniary penalty orders (and interest and costs) in connection with each of the FW Act Claims. Mr Moate's claims for those pecuniary penalty orders (and interest and costs) falls outside the meaning of the words, '**Proceedings**' and '**Termination**' in the DOR.

159 However, as noted above, Mr Moate's Notice in Lieu Claim is barred unless it is an 'employment entitlement' for the purposes of the Clause 1 Claims Definition. Contrary to the submission of Mr Moate, I see no reason to import the meaning of 'entitlement' from the FW Act into the DOR in circumstances where the DOR itself makes no reference to the FW Act. The word 'entitlement' is a word of general import. Its ordinary meaning would include any right that is recognised by law.[101] Such a right may be derived from private law (i.e. contract) or public law (i.e. statute). Mr Moate's Notice in Lieu Claim is derived from statute. It is a right that is contingent of an employment relationship.

160 The considerations in the previous paragraph favour a literal construction of the phrase 'employment entitlements' that does *not* release the Company from the FW Act Notice in Lieu Claim. However, the surrounding circumstances of the creation of the DOR, including the actual intention of Mr Carr (noted above) and the knowledge of Mr Moate that the making of his Notice in Lieu Claim was imminent, assume significance when construing the generally expressed exception of 'any claim for … employment entitlements'. Those factors favour a purposive construction of the phrase 'employment entitlements' as being coloured by reference to 'the Termination' in the preceding phrase of the same definition. My view is that, given the circumstances of the creation of the DOR, it would be unconscientious to construe 'employment entitlements' so as to include Mr Moate's Notice in Lieu Claim.

161 It follows that the Company has been released from Mr Moate's Notice in Lieu Claim by the Clause 3 Claim Release and the Clause 5 Claim Bar in so far as Mr Moate seeks an amount payable by the Company, i.e. an order for payment of $4,940 in lieu of five weeks' notice on termination. Different considerations apply to Mr Moate's claim for a pecuniary penalty order for the same contravention.

162 I disagree with Mr Moate's submission that an employer and an employee are unable to compromise litigation concerning statutory entitlements provided by the FW Act on terms that include a promise by the employee not to apply for a pecuniary penalty order.

163 Once a Court is seized with the task of exercising a discretion conferred by statute, including the fixing of a penalty, the parties to litigation cannot, by agreement, fetter the manner in which the discretion is exercised. However, statutory public rights may be waived or compromised by parties compromising litigation that is on foot or in contemplation.[102] In such a case, the Court is not seized with any task. It is accepted that a Court will not enforce an agreement that is contrary to public policy. For obvious reasons, an agreement not to report a criminal offence to authorities may be contrary to public policy, although even in this instance much depends on the circumstances of the case.[103] Different public policy considerations arise from an agreement between an employer and an employee to compromise litigation on terms that include a covenant not to make an application for a pecuniary penalty order under the FW Act. The agreement does

not concern a criminal offence. It is not binding upon persons who are not party to the agreement.[104] Section 539 of the FW Act identifies persons who may make application for pecuniary penalty order including employer organisations, employee organisations and the Fair Work Inspector.

164 The Clause 1 Claims Definition, read with cl 5, is a bar on 'claims' by Mr Moate. The ordinary meaning of 'claims' includes an application for a pecuniary penalty order under the FW Act, including an application for a pecuniary penalty order for contravention s 117(2) of the FW Act concerning payment in lieu of notice on termination. The DOR does not preclude Mr Moate from making a complaint to a Fair Work Inspector. The DOR may not preclude an employee organisation from making an application for a pecuniary penalty order for the same contravention. There is no reason in public policy not to give effect to the DOR with the result that the Clause 5 Claim Bar operates as a complete defence by the Company to so much of the FW Act Claims that concern a pecuniary penalty order for a contravention of s 117(2) of the FW Act.

Mistake And Unjust Enrichment Issue

165 The Company rely upon the decision of the High Court in ***David Securities Pty Ltd v Commonwealth Bank of Australia*** [1992] HCA 48; (1992) 175 CLR 353, to argue that there is 'a prima facie entitlement to recover moneys paid when a mistake of fact or law'. It is argued that the application of this restitutionary principle results in the recovery of:

- the *whole* of the payments by the Company to Mr Moate in any period that he was paid, mistakenly, as a contractor when he was, in fact, an employee; and
- 25% of the payments by the Company to Mr Moate in any period when he was paid, mistakenly, as a casual employee when he was, in fact, an employee.

166 There can be no recovery of a payment unless Mr Moate has been unjustly enriched. The question of whether his retention of the payments would be unjust is not determined by a 'subjective evaluation of what is fair or unconscionable'.[105]

167 The Company faces a jurisdictional hurdle. The IMC does not have jurisdiction to make an order for the recovery of mistaken payments. The IMC is created by s 81 of the IR Act. It exercises the jurisdiction conferred by s 81A and s 81AA of the IR Act (and other Western Australian statutes). Nothing in the IR Act (or any other Western Australian statute) confers jurisdiction on the IMC to make an order for the restitution of a mistaken payment.

168 The IMC also exercises the jurisdiction conferred by the FW Act. The jurisdiction of the IMC under that statute was reviewed in ***Stagnitta v Bechtel Construction (Australia) Pty Ltd*** [2018] WAIRC 886 [59]. In that case, the exercise of the undoubted jurisdiction of the IMC to make orders for payment of amounts that the employer was required to pay under the FW Act (s 545) and to make orders for the payment of pecuniary penalty orders (s 546), required a determination of the rights and obligations of the parties, in terms of s 12 of the FW Act, 'under a contract between an employee and an employer'. In those cases, the FW Act required application of the equitable doctrine of rectification to determine the rights and obligations of parties to a contract. None of the FW Act Claims in this case require reference to s 12 of the FW Act or any provision of the FW Act that requires the application of restitutionary principles.

169 In view of my conclusion that the IMC does not have jurisdiction to entertain the claim for recovery of mistaken payments, it is not necessary to consider this issue further. However, I offer the following provisional observations on the significance of the decision of the Full Court of

the Federal Court in ***Rossato***. I have noted that, in that case, remuneration of the employee were calculated by the employer on the basis of a casual employment relationship and that the Full Court held the relationship to be 'other than a casual employee' for the purposes of the FW Act. An issue in ***Rossato*** was whether the employer was able to invoke restitutionary principles concerning, firstly, recovery of payments made by mistake (Mistake Principle) and, secondly, a failure of consideration (Consideration Principle), to recover any portion of the remuneration paid to the employee. My provisional view is that:

(a) The Court held that the Mistake Principle has no application to an employer payment made pursuant to a contract that is not void for mistake or has not been validly rescinded.[106]

(b) The Company did not, in the alternative, contend that any contract with Mr Moate was void for mistake or had been rescinded. In any event, there is no evidence of a mistake of the type, at law, that would render any contract with Mr Moate to be void and there is no evidence of the Company exercising any right to rescind any contract.

(c) No different result to (b) applies as a result of s 124 of the *Property Law Act 1969* (WA). The effect of the section is to do no more than to render any distinction between a mistake of law and a mistake of fact irrelevant for the purpose of the application of the law of restitution. The section does not preclude the recipient of a payment pointing to a subsisting contractual obligation in answer to a claim for restitution of a mistaken payment ('relief shall not be denied *by reason only* that the mistake is one of law' or fact (emphasis added).

(d) The Court held that the Consideration Principle did not apply in circumstances where the employer payments were made pursuant to a contractual obligation, in that case, to make payments upon the performance of work by the employee.[107]

(e) The application of the Consideration Principle to any contract between the Company and Mr Moate is not determined by asking what the Company believed to be the subject matter of the contract.[108] The issue is determined by asking what was the 'state of affairs contemplated as the basis or reason for the payment'.[109] So expressed, it is apparent that the basis of the payments made by the Company to Mr Moate were payments, at an agreed hourly rate, for each hour of labour that he worked for the Company. Mr Moate laboured for each hour that he was paid. Each payment by the Company were made for good consideration. The employment case relied upon by the Company, ***State of Western Australia v Hartmann-Nieto*** [2014] WADC 70, is an example of an employer making a payment to an employee for no consideration.

FW Act Discretion Issue

170 Section 545(3) of the FW Act states that the 'court *may* order an employer to pay an amount to … an employee … if the court is satisfied that the employer was required to the amount under' the Act (or an instrument under the Act) and 'the employer has contravened a civil remedy provision by failing to pay the amount'. In ***Atkins Freight Services Pty Ltd v Fair Work Ombudsman*** [2017] FCA 1134 (***Atkins Freight Services***), White J considered whether, in the circumstances of that case, the Court ought decline to make an order notwithstanding that, in contravention of a civil remedy provision, an employer had failed to pay an amount required under the Act. Consideration was given to exercise of the discretion to decline to make an order after the Fair Work Ombudsman accepted that the Court had a discretion as to whether to make

an order.[110] A contrary view is arguable.[111] However, I will also proceed on the basis that a discretion exists.

171 In ***Atkins Freight Services*** a deed of settlement between and employer and an employee provided for the payment of $10,000 by an employer to an employee and for the employee's release of 'claims for wages arising out of employment' against the employer. Subsequently, the employee's entitlements under an instrument under the FW Act were found to be $23,769 for matters including meal allowances, overnight expenses, shift allowances, overtime, public holiday and holiday rates. The employer contended that, by reason of the deed of settlement, the Court should, in the exercise of its discretion conferred by s 545(3) of the FW Act, decline to make any order.

172 The reasoning in ***Atkins Freight Services*** proceeded from the premise that if an employee voluntarily compromised a claim to statutory entitlements, there may be a 'proper basis for the exercise of the discretion … not to make an order for underpayment, at least to the extent of the underpayment'.[112] However, White J declined to exercise the discretion on the facts of the case, stating that the principle by which statutory entitlements may be compromised by a deed of settlement requires careful application to ensure that 'the general principle that parties cannot contract out of award obligations' is not easily subverted.[113] There was no evidential foundation from the context of the deed to support a conclusion that the deed of settlement was intended to compromise claims to entitlements under the FW Act. Nor did the text of the deed of settlement support such a conclusion. The deed provided for payment of a lump sum without reference to particular award entitlements. The deed released the employer from claims for 'wages' and not from 'allowances' or 'expenses' the subject of the subsequent proceedings under the FW Act.

173 The Company submitted that the circumstances surrounding the making of the DOR were relevant to the exercise of the discretion conferred by s 544(3). ***Atkins Freight Services*** does not assist the Company with this argument. My analysis of the '**Deed of Release Issue**' required construction of the DOR and consideration of the application of its terms to the FW Act Claims. The Company was unsuccessful except insofar as I concluded that the Clause 5 Claim Bar resulted in a complete defence to Mr Moate's claims for $4,940, being the amount payable under s 117(2) of the FW Act as a payment in lieu of notice on termination, and for a pecuniary penalty order for the same contravention. The methodology I employed was consistent with the reasoning in ***Atkins Freight Services*** outlined in the previous paragraph. There is no reason to re-visit those conclusions by reason of the existence of a discretion conferred by s 545(3) of the FW Act.

174 It was also suggested by the Company that other factors be given weight when considering the exercise of the discretion conferred by the section: Mr Moate 'willingly and knowingly accepting the arrangements for a long period of time'; by those arrangements, Mr Moate was paid 'more than … a permanent employee'. One or both of those factors is often present in cases where an order for payment of entitlements under the FW Act follows from an incorrect characterisation of what is found to be an employment relationship. I am not aware of any authority relying upon the presence of those factors as a reason to decline to make an order under s 545(3) of the FW Act. In the result, I am not persuaded that there is any proper reason to decline to exercise the discretion conferred by s 545(3) of the FW Act.

Conclusion

175 Employee/Contractor Issue and Full-Time/Casual Issue: Mr Moate was 'an employee other than a casual employee' for the purposes of the FW Act Claims. He was not, as argued by the

Company, a contractor in the period before 1 July 2015 and a casual employee in the period after 1 July 2015.

176 The Set-Off Issue: The Company is not entitled to set off any amounts that it paid to Mr Moate that are in excess of the amounts proscribed by the Award.

177 FW Regulations Offset Issue: No amount paid to Mr Moate was clearly identifiable as compensation for accrued annual leave, unpaid public holidays or a payment in lieu of notice on termination. Reg 2.03A does not apply to reduce any obligation of the Company for those FW Act Amounts.

178 Deed of Release Issue: The DOR operates as a complete defence to Mr Moate's claim for an order for payment of $4,940 in lieu of five weeks' notice on termination, made under s 117(2) of the FW Act, *and* his claim for a pecuniary penalty order for contravention of the same provision.

179 Mistake and Unjust Enrichment Issue: The IMC does not have jurisdiction to determine a claim for restitution.

180 FW Act Discretion Issue: There is no reason to decline to exercise the discretion conferred by s 545(3) of the FW Act to make an order that the Company pay amounts to Mr Moate that it was required to pay, and in contravention of a civil remedy provision, failed to pay.

181 In result, I am satisfied that Mr Moate was an employee of the Company and that it is liable for contravention of the following civil remedy provisions of the FW Act:

- accrual of annual leave;[114]
- payment of accrued annual leave ($22,961.12);[115]
- personal leave;[116]
- payment on public holidays ($11,700);[117]
- supply of the Fair Work Information Statement;[118]
- access to copies of the Award and the NES;[119]
- contributions to a superannuation fund;[120]
- payment for overtime ($7,878);[121]
- payment of leave loading ($4018.20);[122]
- accrued long service leave ($20,550.40);[123]
- keeping of employer records;[124] and
- and pay slips.[125]

182 A hearing will be convened for the purpose of fixing a penalty for the contravention of those provisions. I am not satisfied, having regard to the DOR, that the Company is liable for any contravention of the civil remedy provision on payment in lieu of notice on termination.[126]

M FLYNN
INDUSTRIAL MAGISTRATE

[1] FW Act s 44 and s 87(2) (National Employment Standard).
[2] FW Act s 44 and s 90(2) (National Employment Standard).
[3] FW Act s 44 and s 96(2) (National Employment Standard).
[4] FW Act s 44 and s 116 (National Employment Standard).
[5] FW Act s 44 and s 117(2) (National Employment Standard).
[6] FW Act s 44 and s 125 (National Employment Standard).
[7] FW Act s 45 and the Award cl 5.
[8] FW Act s 45 and the Award cl 35.2.
[9] FW Act s 45 and the Award cl 40.1.
[10] FW Act s 45 and the Award cl 42.5.
[11] FW Act s 323 on amounts payable in relation 'to the performance of work' when read with *Long Service Leave Act 1958* (WA) (LSL Act) s 8(2) on accrued long service leave.
[12] FW Act s 535.
[13] FW Act s 536.
[14] FW Act s 545(3).
[15] FW Act s 546(1).
[16] FW Act s 545(3):

> *An eligible State or Territory court may order an employer to pay an amount to, or on behalf of, an employee of the employer if the court is satisfied that:*
>
> *(a) the employer was required to pay the amount under this Act or a fair work instrument; and*
>
> (b) *the employer has contravened a civil remedy provision by failing to pay the amount* (emphasis added).

[17] Jurisdiction, Practice and Procedure of the Industrial Magistrates Court (IMC) under the FW Act

1. The IMC, 'a court constituted by an industrial magistrate' is an '***eligible State or Territory court***' for the purposes of the FW Act: see definitions of '***magistrates court***' and '***eligible State or Territory court***' in s 12 of the FW Act.

2. The jurisdiction of the IMC under the FW Act is primarily defined by three provisions:

   (1) Section 539 of the FW Act identifies the civil remedy provisions of the FW Act which may be the subject of an application to an eligible State or Territory court;

   (2) Section 545(3) of the FW Act describe the criteria for an eligible State or Territory court to make an order for an employer to pay an amount to an employee upon the contravention of a civil remedy provision; and

   (3) Section 546(1) of the FW Act provides for the making of a pecuniary penalty order upon the court being satisfied of a contravention of a civil remedy provision.

3. Civil remedy provisions cast obligations upon '***national system employers***' to '***national system employees***' in:

   - The *National Employment Standards* (NES) (pt 2 - 2);
   - A *modern award* that applies to and covers the parties (pt 2 - 3);
   - An *enterprise agreement* that applies to and covers the parties (pt 2 - 4);
   - A *national minimum wage orde*r (where neither a modern award nor an enterprise agreement applies to the employee i.e. an award/agreement free employee) (pt 2 - 6);
   - Section 323(1) providing that 'an employer must pay an employee amounts payable to the employee in relation to the performance of work …in full';
   - Part 3 - 6, Div 3 providing for 'employer obligations in relation to employee records and pay slips'.

4. A '***national system employer***' is defined in s 14(1) of the FW Act to include 'a constitutional corporation so far as it employs an individual' and a '***national system employee***' is defined in s 13 of the FW Act to be 'an individual so far as he or she is employed by a national system employee'.

5. **Section 539 of the FW Act** identifies, from among the several civil remedy provisions of the FW Act , the particular civil remedy provisions for which application may be made to an eligible State or Territory court 'for orders in relation to a contravention of the provision'. The provision also identifies, for each civil remedy provision,

the person with standing to make application to the relevant court and, expressed in penalty units, the maximum penalty for a contravention.

6. **Section 545(3) of the FW Act** provides that an eligible State or Territory court 'may order an employer to pay an amount to an employee if the court is satisfied' of two criteria. First, the failure to pay the relevant amount must be a contravention of a civil remedy provision. Secondly, the employer must have an obligation, 'under the Act (for example, a NES) or under a fair work instrument' (i.e. a modern award or an enterprise agreement) to pay the relevant amount.

7. The meaning of 'under the Act' as it appears in s 545(3) was the subject of examination in ***Sharrock v Downer EDI Mining Pty Ltd*** [2018] WAIRC 377 and ***Wright v Bechtel Construction (Australia) Pty Ltd*** [2018] WAIRC 887 [38] with the result that where the claim concerns an allegation of the civil remedy provision created by s 323(1) of the FW Act ('an employer must pay an employee amounts payable to the employee in relation to the performance of work …in full'), the claimant must identify *another* provision under the act that creates an obligation to pay the amount. For example, s 542(1) of the FW Act provides that 'a safety net contractual entitlement' has effect as an entitlement of an employee under the FW Act. A 'safety net contractual entitlement' is defined in s 12 of the FW Act to mean an entitlement under a contract between an employee and an employer that relates to any of the subject matters described in s 61(2) (which deals with the NES); or s 139(1) (which deals with modern awards). It should be noted that 'neither the particular terms of a minimum standard, nor the necessity to engage the terms of a particular modern award , are necessary to the existence of the statutory obligation which now exists to observe the terms of a safety net contractual obligation': see ***Association of Professional Engineers, Scientists and Managers, Australia v Wollongong Coal Limited*** [2014] FCA 878 [19] per Buchanan J, especially at [22].

8. Rules of Evidence: Section 551 of the FW Act provides that 'a court must apply the rules of evidence and procedure for civil matters when hearing proceedings relating to a contravention'. It has been held that the effect of the provision is that an '***eligible State or Territory Court***' is required to apply the rules of evidence found in the common law and relevant state legislation when a claim concerns the contravention of a civil remedy provision of the FW Act : ***Gayle Balding, Workplace Ombudsman v Liquid Engineering 2003 Pty Ltd*** [2008] WAIRComm 350; ***Cuzzin Pty Ltd v Grnja*** [2014] SAIRC 36 [14]. In ***Qube Ports Pty Ltd v Maritime Union of Australia*** [2018] FCAFC 72 [94] - [108] White J (with whom Mortimer and Bromwich JJ agreed) undertook a comprehensive analysis of the issue in the context of contravention proceedings before a state court of South Australia, the former Industrial Relations Court of South Australia. In a schedule to the judgment in ***Stagnitta v Bechtel Construction (Australia) Pty Ltd*** [2018] WAIRC 886, the IMC gave reasons for concluding that the law of evidence applied by a state court of general jurisdiction when exercising jurisdiction in non-criminal matters including the *Evidence Act 1906* (WA), was to be applied by the IMC when determining a claim alleging the contravention of a civil remedy provision of the FW Act and seeking the imposition of a penalty.

9. The onus of proving a claim is on the claimant and the standard of proof required to discharge this onus is proof 'on the balance of probabilities'. When, in these reasons, I state that 'I am satisfied of fact or matter', I am saying that I am satisfied on the balance of probabilities of that fact or matter.

[18] FW Act s 44 and s 87(2) (National Employment Standard).
[19] FW Act s 44 and s 90(2) (National Employment Standard).
[20] FW Act s 44 and s 96(2) (National Employment Standard).
[21] FW Act s 44 and s 125 (National Employment Standard).
[22] ***Association of Professional Engineers, Scientists and Managers Australia v Bulga Underground Operations Pty Ltd*** [2019] FCA 1960 (Wigney J) [116] - [117].
[23] ***United Construction Pty Ltd v Birighitti*** [2002] 82 WAIG 2409; ***United Construction Pty Ltd v Birighitti*** [2003] WASCA 24; ***David Kershaw v Sunvalley Australia Pty Ltd*** [2007] WAIRComm 520.
[24] FW Act s 535.
[25] FW Act s 536.
[26] FW Act s 45.
[27] Pursuant to orders made on 7 February 2019
[28] Amended Response at [3] and cl 4.9 of the Award.
[29] Amended Response at [4] and cl 4.1 of the Award.
[30] FW Act s 45 and the Award, cl 5:

Access to the award and the National Employment Standards

The employer must ensure that copies of this award and the NES are available to all employees to whom they apply either on a noticeboard which is conveniently located at or near the workplace or through electronic means, whichever makes them more accessible.

[31] FW Act s 45 and the Award cl 35.2:

Employer contributions

An employer must make such superannuation contributions to a superannuation fund for the benefit of an employee as will avoid the employer being required to pay the superannuation guarantee charge under superannuation legislation with respect to that employee.

[32] FW Act s 45 and the Award cl 40.1:

Payment for working overtime

(a) Except as provided for in clauses 40.1(d),40.1(e),40.8 and 40.9,for all work done outside ordinary hours on any day or shift, as defined in clauses 36.2,36.3 and 36.4,the overtime rate is time and a half for the first three hours and double time thereafter until the completion of the overtime work. For a continuous shiftworker the rate for working overtime is double time.

*(b) For the purposes of clause 40—Overtime, **ordinary hours** means the hours worked in an enterprise, fixed in accordance with clause 36—Ordinary hours of work and rostering.*

(c) The hourly rate, when computing overtime, is determined by dividing the appropriate weekly rate by 38, even in cases when an employee works more than 38 ordinary hours in a week.

…

(f) In computing overtime each day's work stands alone.

[33] FW Act s 45 and the Award, cl 42.5 providing for a leave loading of 17.5%.
[34] Witness Statement of David Carr, 145.
[35] Witness Statement of David Carr, 60.
[36] Witness Statement of David Carr [7].
[37] Witness Statement of David Carr, 60 may be summarised:

0 hours:	20 weeks;
1 - 10 hours:	1 week;
11 - 20 hours:	3 weeks;
21 - 30 hours:	3 weeks;
31 - 40 hours:	97 weeks;
41 - 50 hours:	13 weeks;
51 - 60 hours:	3 weeks;
61 - 70 hours:	5 weeks;
71 - 80 hours:	2 weeks;
81+ hours:	1 weeks.

[38] Witness Statement of David Carr [25] and [26](c).
[39] Transcript, 22.
[40] Transcript, 81.
[41] Transcript,107.
[42] FW Act s 60.
[43] FW Act s 13 and s 14.
[44] ***Al-Hakim v Toyoor Al Jannah Pty Ltd*** [2018] FCCA 3184 [62], referring to ***Marshall v Whittaker's Building Supply Co Ltd*** [1963] HCA 26 [5].
[45] Witness Statement of Raymond Moate, 44 - 45. The full text of the letter includes,

Our records have identified that you have now been employed for a series of consecutive periods over the last six months by IPC Pty Ltd. As a result we would like to make you aware that you have the right to elect whether or not you wish to continue in your present employment status as a casual employee or convert your employment to either a permanent fulltime or part time employee. If you elect to change the status of your employment from a. casual

employee to a full time or part time employee, your hourly rate of pay will be adjusted accordingly to include applicable employee entitlements minus the present 25% casual loading.

[46] Witness Statement of David Carr, 144.
[47] In fact, the base rate was $28.56 until 8 November 2015 and thereafter $26.50 in circumstances described by Mr Carr: see the Transcript, 65.
[48] The base rate was $26.50 until 30 April 2017 and thereafter $26.00: Transcript, 66.
[49] Witness Statement of David Carr, 145 - 156 (timesheets); 157 - 164 (Company records allocating Mr Moate hours for costing purposes); 171 - 234 (payslips); 68 - 79 (Company records headed 'R Moate Hours Breakdown')
[50] Witness Statement of David Carr, 238 (for the purpose of advancing the argument of the Company with respect to the Set-Off Issue)
[51] Claimant's Outline of Submissions filed 18 July 2019 (Claimant's Written Submissions) [32].
[52] Clause 14 of the Award states:

Casual employment

14.1. A casual employee is one engaged and paid as such. A casual employee for working ordinary time must be paid an hourly rate calculated on the basis of one thirty-eighth of the minimum weekly wage prescribed in clause 24.1(a) for the work being performed plus a casual loading of 25%. The loading constitutes part of the casual employee's all purpose rate.

14.2. On each occasion a casual employee is required to attend work the employee must be paid for a minimum of four hours work. In order to meet their personal circumstances a casual employee may request and the employer may agree to an engagement for less than the minimum of four hours.

14.3. An employer when engaging a casual must inform the employee that they are employed as a casual, stating by whom the employee is employed, the classification level and rate of pay and the likely number of hours required.

14.4. Casual conversion to full-time or part-time employment

(a) A casual employee, other than an irregular casual employee, who has been engaged by a particular employer for a sequence of periods of employment under this award during a period of six months, thereafter has the right to elect to have their contract of employment converted to full-time or part-time employment if the employment is to continue beyond the conversion process.

(b) Every employer of such an employee must give the employee notice in writing of the provisions of clause 14.4 within four weeks of the employee having attained such period of six months. The employee retains their right of election under clause 14.4 if the employer fails to comply with clause 14.4(b).

(c) Any such casual employee who does not within four weeks of receiving written notice elect to convert their contract of employment to full-time or part-time employment is deemed to have elected against any such conversion.

(d) Any casual employee who has a right to elect under clause 14.4(a), on receiving notice under clause 14.4(b) or after the expiry of the time for giving such notice, may give four weeks notice in writing to the employer that they seek to elect to convert their contract of employment to full-time or part-time employment, and within four weeks of receiving such notice the employer must consent to or refuse the election but must not unreasonably so refuse.

(e) Once a casual employee has elected to become and been converted to a full-time or part-time employee, the employee may only revert to casual employment by written agreement with the employer.

(f) If a casual employee has elected to have their contract of employment converted to full-time or part-time employment in accordance with clause 14.4(d),the employer and employee must, subject to clause 14.4(d),discuss and agree on:

(i) which form of employment the employee will convert to, being full-time or part-time; and

(ii) if it is agreed that the employee will become a part-time employee, the number of hours and the pattern of hours that will be worked, as set out in clause 13—Part-time employment.

(g) An employee who has worked on a full-time basis throughout the period of casual employment has the right to elect to convert their contract of employment to full-time employment and an employee who has worked on a part-time basis during the period of casual employment has the right to elect to convert their

contract of employment to part-time employment, on the basis of the same number of hours and times of work as previously worked, unless other arrangements are agreed on between the employer and employee.

(h) Following such agreement being reached, the employee converts to full-time or part-time employment.

(i) Where, in accordance with clause 14.4(d) an employer refuses an election to convert, the reasons for doing so must be fully stated to and discussed with the employee concerned and a genuine attempt made to reach agreement.

(j) Subject to clause 8.3,by agreement between the employer and the majority of the employees in the relevant workplace or a section or sections of it, or with the casual employee concerned, the employer may apply clause 14.4(a) as if the reference to six months is a reference to 12 months, but only in respect of a currently engaged individual employee or group of employees. Any such agreement reached must be kept by the employer as a time and wages record. Any such agreement reached with an individual employee may only be reached within the two months prior to the period of six months referred to in clause 14.4(a).

(k) For the purposes of clause 14.4, an irregular casual employee is one who has been engaged to perform work on an occasional or non-systematic or irregular basis.

14.5. An employee must not be engaged and re-engaged to avoid any obligation under this award.

[53] Amended Response [6].
[54] Outline of Submissions of the First Respondent filed 17 July 2019 (Respondent's Written Submissions) [22].
[55] FW Act s 44 and s 87(2) (National Employment Standard).
[56] FW Act s 44 and s 96(2) (National Employment Standard).
[57] ***Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd & Ors*** [2004] HCA 52 [45] - [57].
[58] See ***Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd*** [2013] WASCA 36 [24] - [26] (McLure P):

> *There are two material facts of the cause of action in economic duress being (1) that illegitimate pressure was applied which (2) induced the victim to enter into the contract (or make a non-contractual payment); the illegitimate pressure does not have to be the sole reason for the victim entering into the contract, it is sufficient if it is one of the reasons … If the pressure is lawful, it may be illegitimate if there is no reasonable or justifiable connection between the pressure being applied and the demand which that pressure supports.*

[59] The case for the Company is that Mr Moate was an independent contractor before 1 July 2015. Indeed, my finding (above) is that notwithstanding that the Company and Mr Moate each considered Mr Moate to be an independent contractor, he was, as a matter of law, an employee of the Company before 1 July 2015.
[60] Bromberg J [207]; White J (with whom Wheelahan agreed on this point) [588].
[61] Bromberg J [51].
[62] White J (with whom Wheelahan agreed on this point) [630].
[63] Award, Article 14.4(k).
[64] ***Bronze Hospitality Pty Ltd v Hansson (No 2)*** [2019] FCA 1680 [36] - [37].
[65] Amended Response [15] - [16].
[66] FW Act s 44 and s 87(2) (National Employment Standard).
[67] FW Act s 44 and s 96(2) (National Employment Standard).
[68] FW Act s 44 and s 125 (National Employment Standard).
[69] FW Act s 45 and the Award, cl 5.
[70] FW Act s 45 and the Award, cl 35.2.
[71] FW Act s 535.
[72] FW Act s 536.
[73] Respondents Outline of Submissions, Attachment, Table G.
[74] Respondents Outline of Submissions, Attachment, Table G.
[75] Claimants Outline of Submissions [50]. The submissions also address the FW Regulations Offset Issue.
[76] The following summary draws upon the description of the law and cases cited in M Irving, *The Contract of Employment* (LexisNexis Butterworths, 2nd ed, 2019) (**Irving**) [12.38].
[77] LSL Act s 5.
[78] ***Williams v Macmahon Mining Services Pty Ltd (No.2)*** [2009] FMCA 763 [85].
[79] Bromberg J [216] - [222]; White J [865] - [871]; Wheelahan J [986] - [1003].
[80] White J [872] - [886] (with whom Bromberg J agreed on this point:[223]); Wheelahan J [1008].

[81] Bromberg J [225] agreed with Wheelahan J on the issue of whether there was a close correlation between the *purpose* the employer payments and the employee's statutory entitlements and made additional observations at [226] - [262]; White J at [913] - [937]; Wheelahan J [1009] - [1021].
[82] Note 1 to Reg 2.03A(1).
[83] Macquarie Concise Dictionary (Macquarie Library, 6th ed, 2013).
[84] White J [944] with whom Bromberg J (at [262]) and Wheelahan J (at [1022]) agreed on this point.
[85] Wheelahan J [1022] with whom Bromberg J agreed on this point (at [262]).
[86] Transcript, 69 - 70.
[87] ***Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*** [2015] HCA 37 [46], [49], [50].
[88] ***Atkins Freight Services Pty Ltd v Fair Work Ombudsman*** [2017] FCA 1134 [54]
[89] ***Carr v Blade Repairs Australia Pty Ltd (No 2)*** [2010] FCA 688 [45];
[90] ***Grant v John Grant & Sons Proprietary Limited*** [1954] HCA 23, 123 - 124; ***The Owners Corporation of Strata Plan 61390 v Multiplex Corporate Agency Pty Ltd (No 2)*** [2012] NSWSC 322 [23] - [25]; ***Shire of Toodyay v Merrick*** [2016] WASC 29 [66].
[91] ***Grant v John Grant & Sons Proprietary Limited*** [1954] HCA 23, 130; ***The Owners Corporation of Strata Plan 61390 v Multiplex Corporate Agency Pty Ltd (No 2)*** [2012] NSWSC 322 [27] - [29]; ***Butler v St John of God Health Care Inc*** [2008] WASCA 174 [3] - [4]; ***Shire of Toodyay v Merrick*** [2016] WASC 29, [66].
[92] ***The Owners Corporation of Strata Plan 61390 v Multiplex Corporate Agency Pty Ltd (No 2)*** [2012] NSWSC 322 [33] - [35].
[93] ***Grant v John Grant & Sons Proprietary Limited*** [1954] HCA 23, 129; ***The Owners Corporation of Strata Plan 61390 v Multiplex Corporate Agency Pty Ltd (No 2)*** [2012] NSWSC 322 [30].
[94] See also: ***Carr & Purves v Thomas*** [2009] NSWCA 208 [33] - [37].
[95] Note the following observation in ***Shire of Toodyay v Merrick*** [2016] WASC 29, [72]:

> *It may be that different considerations will apply to the agreement not to sue and the bar, as opposed to the release* [67]. *However, given that the principle in Grant is based in equity, it is arguable that if a release cannot be enforced in equity on the basis that it would be unconscientious to do so, an agreement not to sue and a bar to the same effect would not be enforced for the same reason.*

[96] FW Act s 390(1).
[97] FW Act s 384(2).
[98] FW Act s 385 and s 387.
[99] FW Act s 387(a).
[100] FW Act s 117(3).
[101] ***Sutton v Zullo Enterprises Pty Limited*** [2000] 2 Qd R 196, 204 (McPherson JA)
[102] ***Kowalski v Trustee, Mitsubishi Motors Australia Ltd Staff Superannuation Fund Pty Ltd*** [2003] FCAFC 18 [17].
[103] ***Woodham v Roberts Limited*** [2010] TASSC 31.
[104] ***Atkins Freight Services Pty Ltd v Fair Work Ombudsman*** [2017] FCA 1134 [32].
[105] ***David Securities Pty Ltd v Commonwealth Bank of Australia*** [1992] HCA 48 [46].
[106] Wheelahan J [959]-[966] with whom Bromberg J agreed on this point (at [265]); White J at [777] - [794]. White J gave alternative reasons for rejecting the employer's claim based on the Mistake Principle: [728] - [764].
[107] Wheelahan J at [978] - [981] with whom Bromberg J agreed on this point (at [265]); White J at [765] - [775].
[108] ***David Securities Pty Ltd v Commonwealth Bank of Australia*** [1992] HCA 48 at [48]
[109] ***David Securities Pty Ltd v Commonwealth Bank of Australia*** [1992] HCA 48 at [53]
[110] ***Atkins Freight Services*** [38]
[111] DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis, 9th ed, 2019), 393 - 396.
[112] ***Atkins Freight Services*** [38].
[113] ***Atkins Freight Services*** [52].
[114] FW Act s 44 and s 87(2) (National Employment Standard).
[115] FW Act s 44 and s 90(2) (National Employment Standard).
[116] FW Act s 44 and s 96(2) (National Employment Standard).
[117] FW Act s 44 and s 116 (National Employment Standard).
[118] FW Act s 44 and s 125 (National Employment Standard).
[119] FW Act s 45 and the Award, cl 5.
[120] FW Act s 45 and the Award, cl 35.2.
[121] FW Act s 45 and the Award, cl 40.1.
[122] FW Act s 45 and the Award, cl 42.5.
[123] FW Act s 323 on amounts payable in relation 'to the performance of work' when read with s 8(2) of LSL Act on accrued long service leave.

[124] FW Act s 535.
[125] FW Act s 536.
[126] FW Act s 44 and s 117(2) (National Employment Standard).