# FEDERAL COURT OF AUSTRALIA

## WorkPac Pty Ltd v Skene [2018] FCAFC 131

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| Appeal from: | *Skene v Workpac Pty Ltd* [2016] FCCA 3035<br>*Skene v WorkPac Pty Ltd (No 2)* [2017] FCCA 525 |
| File numbers: | QUD 157 of 2017<br>QUD 195 of 2017 |
| Judges: | **TRACEY, BROMBERG AND RANGIAH JJ** |
| Date of judgment: | 16 August 2018 |
| Catchwords: | **INDUSTRIAL LAW** – National Employment Standards – entitlement to annual leave in Div 6 of Pt 2-2 of the *Fair Work Act 2009* (Cth) ("FW Act") – s 86 of the FW Act which provides that Div 6 "applies to employees, other than casual employees" – meaning of casual employee in s 86 of the FW Act – whether employee's claim for annual leave excluded because the employee was a casual employee within the meaning of s 86 –whether "casual employee" has its legal meaning or an asserted specialised industrial meaning, namely, a person designated to be such an employee by the applicable industrial instrument – discussion of meaning of the term "casual employee" – discussion of whether there is a uniformly understood specialised meaning of the expression "casual employee" referable to the use of that term in industrial awards – where asserted specialised meaning would provide incomplete meaning to the expression "casual employee" because does not address "award/agreement free employees" – whether undefined single expression intended to have a dual or compound meaning – discussion of the statutory context and purpose of paid annual leave as provided for under the National Employment Standards – discussion of the historical statutory application and judicial consideration of the term "casual employee" – whether the term "casual employee" has acquired a legal meaning - discussion of the interaction between the National Employment Standards and a modern award or an enterprise agreement – consideration of the expression "long term casual employee" as defined in s 12 of the FW Act – whether employment "on a regular… basis" means constancy of work or regularity of hiring – whether regular employment is necessarily inconsistent with the characterisation of the employment as casual – discussion of the indicia of casual employment – whether indicia |

identified by the authorities excluded by the statutory context of Div 6 of Pt 2-2 of the FW Act – casual employment distinguishable from full-time and part-time employment – whether nature of the employment as casual employment is to be objectively assessed to take account of its real or true character – significance of the absence of an advance commitment to continuing and indefinite work to the characterisation of an employment as casual employment – whether the payment of a casual loading or employment by the hour or on an hour's notice determinative of casual employment

**INDUSTRIAL LAW** – employee employed under transitional instrument ("Agreement") – whether employee entitled to annual leave under the Agreement – whether employee excluded from entitlement to annual leave under the Agreement because a casual employee – meaning of casual employee under the Agreement – whether by providing that the employer shall inform the employee of the status of his or her engagement the Agreement provides that a casual employee is a person designated to be such by the employer – alternatively whether casual employee intended to have its ordinary legal meaning – applicable principles for the interpretation of industrial agreements

**INDUSTRIAL LAW** – pecuniary penalties for failure to provide entitlements to annual leave under the FW Act and under an industrial agreement – where contravention not deliberate - whether pecuniary penalty appropriate because the contravener had failed to closely consider the legality of the employment arrangements made – whether primary judge's finding that close consideration had been given was erroneous – appellate correction of sentence where a mistake as to a material fact

**STATUTORY INTERPRETATION** – statutory interpretation of the term "casual employee" in s 86 of the FW Act – principles regarding the interpretation of an undefined term – whether an undefined single expression was intended to have a dual or compound meaning – presumption that where words have acquired a legal meaning they are read with that meaning unless a contrary intention clearly appears – presumption that the same term appearing in different parts of a statute should be given the same meaning – presumption that where the Parliament repeats words which have been judicially construed it is intended that the words bear the meaning already attributed to them – whether Parliament intended that the words "casual employee" in s 86 be used in their ordinary sense, their legal sense or a specialised non-legal or technical

sense

Legislation:

*Acts Interpretation Act 2001* (Cth)

*Fair Work Act 2009* (Cth), Pt 2-2, Div 6 of Pt 2-2, ss 12, 44(1), 55, 56, 57, 61, 62(1), 63(1). 64(1), 65(1B), 86, 87, 114

*Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)

*Workplace Relations Act 1996* (Cth), ss 185, 227, 232, 235

*Workplace Relations Regulations 1989* (Cth), Reg 30B(1)(d)

Cases cited:

*ACT Visiting Medical Officers Association v Australian Industrial Relations Commission* (2006) 232 ALR 69

*ACE Insurance Ltd v Trifunovski* (2011) 200 FCR 532

*ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 146

*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27

*Amcor Limited v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241

*Attorney-General (NSW) v Brewery Employee's Union of New South Wales* (1908) 6 CLR 469

*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68

*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The Laverton North and Cheltenham Premises Case)* [2018] FCAFC 88

*Autoclenz Ltd v Belcher* [2011] 4 All ER 745

*Baini v The Queen* (2012) 246 CLR 469

*Bernardino v Abbott* [2004] NSWSC 430

*Cetin v Ripon Pty Ltd (t/as Parkview Hotel)* (2003) 127 IR 205

*City of Wanneroo v Holmes* (1989) 30 IR 362

*Collector of Customs v Bell Basic Industries Ltd* (1988) 20 FCR 146

*Comcare v Post Logistics Australasia Pty Limited* (2012) 207 FCR 178

*CPSU, Community & Public Sector Union v State of Victoria* (2000) 95 IR 54

*Craig Williamson Pty Ltd v Barrowcliff* [1915] VLR 450

*Dalgety Farmers Ltd t/as Grazcos v Bruce* (1995) 12 NSWCCR 36

*Damevski v Giudice* (2003) 133 FCR 438

*Doyle v Sydney Steel Company Limited* (1936) 56 CLR 545

*Electrolux Home Products Pty Limited v Australian Workers' Union* (2004) 221 CLR 309

*Fair Work Ombudsman v Devine Marine Group Pty Ltd* [2014] FCA 1365

*Fair Work Ombudsman v Hu (No 2)* [2018] FCA 1034

*Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] FCAFC 37

*Fair Work Ombudsman v South Jin Pty Ltd* [2015] FCA 1456

*Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd* (1985) 3 NSWLR 475

*Geo A Bond & Co Ltd (in liq) v McKenzie* [1929] AR(NSW) 498

*Haley v Public Transport Corporation of Victoria* (1998) 119 IR 242

*Hamzy v Tricon International Restaurants trading as KFC* (2001) 115 FCR 78

*Hewlett Packard Australia Pty Ltd v GE Capital Finance Pty Ltd* (2003) 135 FCR 206

*Hollis v Vabu Pty Ltd* (2001) 207 CLR 21

*Informax International Pty Ltd v Clarius Group Limited* (2012) 207 FCR 298

*Kucks v CSR Limited* (1996) 66 IR 182

*Ledger v Stay Upright Pty Ltd* [2016] FCA 659

*MacMahon Mining Services Pty Ltd v Williams* [2010] FCA 1321

*McClelland v Northern Ireland General Health Services Board* [1957] 1 WLR 594

*Melrose Farm Pty Ltd (t/as Milesaway Tours) v Milward* (2008) 175 IR 455

*Minister for Immigration and Multicultural and Indigenous Affairs v SZAYW* (2005)145 FCR 523

*Personnel Contracting Pty Ltd (t/as Tricord Personnel) v Construction, Forestry, Mining and Energy Union of Workers* (2004) 141 IR 31

*Putland v Royans Wagga Pty Ltd* [2017] FCA 910

*R v Foster; Ex parte The Commonwealth Life (Amalgamated) Assurances Limited* (1952) 85 CLR 138

*Re 4 Yearly Review of Modern Awards – Casual Employment and Part-time Employment* (2017) 269 IR 125

*Re 4 Yearly Review of Modern Awards – Penalty Rates* (2017) 265 IR 1

*Re Alcan Australia Limited; Ex Parte Federation of Industrial Manufacturing and Engineering Employees*

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| | (1994) 181 CLR 96<br>*Re Secure Employment Test Case* (2006) 150 IR 1<br>*Reed v Blue Line Cruisers Limited* (1996) 73 IR 420<br>*Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611<br>*Secretary, Department of Social Security v Copping* [1987] 73 ALR 343<br>*Shop Distributive and Allied Employees' Association v Woolworths SA Pty Ltd* [2011] FCAFC 67<br>*Shugg v Commissioner for Road Transport & Tramways* (NSW) (1937) 57 CLR 485<br>*Skene v Workpac Pty Ltd* [2016] FCCA 3035<br>*Skene v WorkPac Pty Ltd (No 2)* [2017] FCCA 525.<br>*SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34<br>*Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531<br>*Telum Civil (Qld) Pty Limited v Construction, Forestry, Mining and Energy Union* [2013] FWCFB 2434<br>*The State of Queensland (Queensland Health) v Chi Forest* (2008) 168 FCR 532<br>*Thiess v Collector of Customs* (2014) 250 CLR 664<br>*Thompson v Big Burt Pty Ltd (t/as Charles Hotel)* (2007) 168 IR 309<br>*Vidler v Federal Commissioner of Taxation* (2010) 183 FLR 440<br>*Williams v MacMahon Mining Services Pty Ltd* [2009] FMCA 511<br>*Yaraka Holdings Pty Limited v Ante Giljevic* (2006) 149 IR 339 |
| Date of hearing: | 26 May 2017, 31 October 2017 and 1 November 2017 |
| Registry: | Queensland |
| Division: | Fair Work Division |
| National Practice Area: | Employment & Industrial Relations |
| Category: | Catchwords |
| Number of paragraphs: | 241 |
| Counsel for WorkPac Pty Ltd: | Mr S Wood QC with Mr E Gisonda and Mr R Haddrick |
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| Solicitor for Paul Alexander Skene: | Slater & Gordon Lawyers |

# ORDERS

**QUD 157 of 2017**

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|---|---|
| **BETWEEN:** | **WORKPAC PTY LTD**<br>Appellant |
| **AND:** | **PAUL ALEXANDER SKENE**<br>Respondent |

| | |
|---|---|
| **JUDGES:** | **TRACEY, BROMBERG AND RANGIAH JJ** |
| **DATE OF ORDER:** | **16 AUGUST 2018** |

**THE COURT ORDERS THAT:**

1. The appeal is dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

# ORDERS

**QUD 195 of 2017**

| | |
|---|---|
| **BETWEEN:** | **PAUL ALEXANDER SKENE**<br>Appellant |
| **AND:** | **WORKPAC PTY LTD**<br>Respondent |

| | |
|---|---|
| **JUDGES:** | **TRACEY, BROMBERG AND RANGIAH JJ** |
| **DATE OF ORDER:** | **16 AUGUST 2018** |

**THE COURT ORDERS THAT:**

1. The appeal is allowed.
2. Orders 1 and 2 of the orders of the Federal Circuit Court of Australia made on 21 March 2017 be set aside.
3. The proceeding be remitted to the Federal Circuit Court of Australia for the determination, in accordance with the reasons of the Court, of:
   (a) the compensation payable to the appellant; and
   (b) any pecuniary penalties to be imposed on the respondent.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

# REASONS FOR JUDGMENT

## THE COURT:

1 There are two appeals that these reasons address.

2 Part 2–2 of the *Fair Work Act 2009* (Cth) (**"FW Act"**) contains the National Employment Standards. As the guide to Pt 2–2 (s 59) describes, the National Employment Standards are minimum standards that apply to the employment of "national system employees" (a term defined by s 13). Those standards may not be excluded by a modern award or enterprise agreement made under the FW Act (s 55(1)).

3 As s 61(2) specifies, the National Employment Standards relate to the following matters:

(a) maximum weekly hours (Div 3);

(b) requests for flexible working arrangements (Div 4);

(c) parental leave and related entitlements (Div 5);

(d) annual leave (Div 6);

(e) personal/carer's leave and compassionate leave (Div 7);

(f) community service leave (Div 8);

(g) long service leave (Div 9);

(h) public holidays (Div 10);

(i) notice of termination and redundancy pay (Div 11);

(j) Fair Work Information Statement (Div 12).

4 As is apparent, one of the National Employment Standards is annual leave, the content of which is dealt with in Div 6 of Pt 2–2.

5 Division 6 commences with s 86. The proper construction of s 86 is the central question that the appeal brought by WorkPac Pty Ltd ("**WorkPac**") raises. What is in issue is the meaning of the phrase "casual employees". Section 86 provides:

> This Division applies to employees, other than casual employees.

6 The effect of s 86 is to exclude casual employees from the entitlement to annual leave and the ancillary benefits provided by the National Employment Standards in Div 6 of Pt 2–2 of the FW Act.

7 A further source of entitlement to annual leave that is central to the issues raised by these appeals is the *WorkPac Pty Ltd Mining (Coal) Industry Workplace Agreement 2007* ("**Agreement**"). The Agreement was, at all material times, a transitional instrument under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) ("**FW (Transitional Provisions) Act**"). Clause 19.1 of the Agreement is headed "Annual Leave (Permanent FTMs)", FTM being an acronym for "Field Team Member" (cl 1.2.2). Clause 19.1 specifies the annual leave entitlement of a Permanent FTM. It is not in contest that the clause has no application to "Casual FTMs", being one of the categories that cl 5.5.1 of the Agreement states FTMs may be employed as. Whether or not Mr Paul Skene was employed as a "casual FTM" (ie a casual employee) under the Agreement is the central question raised by the appeal instituted by Mr Skene.

8 At all relevant times WorkPac operated a labour-hire business. It employed Mr Skene as a dump-truck operator from 17 April 2010 to 17 July 2010 and then again from 20 July 2010 to 17 April 2014 at coal mining operations in central Queensland.

9 In the proceedings before the primary judge, Mr Skene claimed that he was a permanent full-time employee of WorkPac and that he was entitled to annual leave and consequential entitlements, or payment in lieu of annual leave upon his employment coming to an end. Mr Skene contended that his entitlement to annual leave derived from cl 19.1.1 of the Agreement and also the National Employment Standards as provided for by ss 87 and 90 of the FW Act. Beyond compensation, Mr Skene sought the imposition of pecuniary penalties on WorkPac for contravention of the FW Act and the FW (Transitional Provisions) Act.

10 WorkPac contended that Mr Skene was a casual employee and not entitled to annual leave and the related entitlements he claimed, either under cl 19.1.1 of the Agreement or under the National Employment Standards.

11 The primary judge held that Mr Skene established an entitlement to be paid monies on termination in lieu of untaken annual leave under the National Employment Standards. The primary judge rejected Mr Skene's claim that he had an entitlement to monies in lieu of annual leave pursuant to cl 19.1.1 of the Agreement. The primary judge made orders that WorkPac pay to Mr Skene $21,054.69 by way of compensation and $6,735.03 by way of interest on that compensation. Otherwise, all outstanding applications were dismissed including Mr Skene's application that civil penalties be imposed on WorkPac.

12 WorkPac's Supplementary Notice of Appeal raises only one ground. That ground asserts that the primary judge erred in failing to find that Mr Skene was a casual employee for the purpose of s 86 of the FW Act. WorkPac seeks orders setting aside the primary judge's order that it pay compensation to Mr Skene and an order that Mr Skene's application be dismissed.

13 Mr Skene's Notice of Appeal raises three grounds. The first is that the primary judge erred in holding that Mr Skene was not a casual employee for the purpose of the Agreement. The second ground asserts a consequential error in the calculation of the compensation payable to Mr Skene because of the primary judge's failure to take account of the entitlements under cl 19.1.1 of the Agreement. Thirdly, Mr Skene challenges the primary judge's failure to impose a pecuniary penalty upon WorkPac.

14 Mr Skene seeks declarations that he was entitled to annual leave in accordance with cl 19.1.1 of the Agreement and that WorkPac failed to pay annual leave to him in accordance with the National Employment Standards and thereby contravened s 44 of the FW Act. Mr Skene seeks that the matter be remitted to the Federal Circuit Court for further consideration as to compensation and also the pecuniary penalties that should be imposed.

## THE JUDGMENT OF THE PRIMARY JUDGE

### The findings of the primary judge

15 The relevant facts are uncontroversial and the following account of them is largely taken from the reasons of the primary judge.

16 It is not contested that the Agreement commenced operation in December 2007. The parties to the Agreement are expressed to be WorkPac and its FTMs who are all of WorkPac's "on-hire employees" (cls 1.2.1 and 1.2.2).

17 Nor is it in contest that Pt 2–2 of the FW Act, containing the National Employment Standards, applied to WorkPac and to Mr Skene's employment with WorkPac (if s 86 was inapplicable).

18 In early April 2010, Mr Skene responded to an advertisement placed by WorkPac advertising a position as a truck driver at a coal mine in Central Queensland operated by Anglo Coal. Mr Skene was subsequently notified by WorkPac that his application for the advertised position was successful. He thereafter attended WorkPac's offices on 16 April 2010 and was given a "Notice of Offer of Casual Employment". Mr Skene executed a document entitled "Casual or

Fixed Term Employee Terms & Conditions of Employment" ("**Terms & Conditions of Employment Document**").

19 From 19 April through to 17 July 2010, Mr Skene was employed by WorkPac at Anglo Coal's mine as a dump-truck operator. His position was a "drive in, drive out position", meaning that he had to transport himself to and from his workplace at the mine. That was a six hour drive each way from his home in South East Queensland. Mr Skene worked on rotation so that he worked a number of days and then had a number of consecutive days at home.

20 The Terms & Conditions of the Employment Document executed by Mr Skene on 16 April 2010 relevantly included the following terms:

> 1. The terms and conditions covered in this document provide general information regarding your engagement with Workpac Pty Ltd. Your specific entitlements will be determined by the award or agreement that covers your employment and these may vary from engagement to engagement depending on the type of work you perform. To view a copy of the relevant award and agreement please speak to your Workpac Pty Ltd representative.
>
> This document, once signed, has the force of law as a contract and will apply to all assignments with any member of the WorkPac Group of Companies, whether existing at the time of signing this document or later added to the membership of the Group.
>
> …
>
> 2. INTERPRETATION
>
> In this agreement the terms below shall have the following meanings, unless their context otherwise requires:
>
> Employee: The individual employed on a Casual or Fixed Term basis by WorkPac as per the terms and conditions set out in this document, and the notice, to carry out work assignments under the direction or (sic) WorkPac's clients.
>
> Client: The company, partnership, individual or agent that WorkPac does business with and where the employee will carry out duties as requested on behalf of WorkPac. The client shall be responsible for issuing the employee with work, safety and induction instructions.
>
> 3. LOCATION
>
> This assignment applies for the engagement of the employee with any of WorkPac's clients. Location of the client's site and information for each separate assignment will be advised to the employee via the Notice of Offer of casual or Fixed Term Employment.
>
> These terms and conditions are to be read in conjunction with WorkPac's Notice of Offer of Casual or Fixed Term Employment.
>
> 4. DURATION OF AGREEMENT

> 4.1 The terms and conditions in this document commence on the date it is signed and continues in force until revoked by the employee or the employer.
>
> 4.2 The terms and conditions in this document apply to all assignments undertaken by the employee on behalf of WorkPac. The parties will not execute a new terms and conditions document for each separate assignment.
>
> 5. CASUAL OR FIXED TERM EMPLOYMENT ASSIGNMENTS WITH WORKPAC
>
> 5.1 Employment with WorkPac is on an assignment-by-assignment basis, with each assignment representing a discrete period of employment on a Casual or Fixed Term hourly basis.
>
> …
>
> 5.3 The employee may accept or reject any offer of an assignment.
>
> …
>
> 5.11 Casual employees will serve a 12 month probationary period and Fixed Term employees a 6 month probationary period.
>
> 5.12 A casual assignment with WorkPac may be terminated at any time by the giving of one (1) hours notice.
>
> …
>
> 7.8 Annual Leave
>
> All fixed term permanent employees shall accrue annual leave at the rate of four weeks for each completed year of service.
>
> …

21 In about June 2010, Mr Skene commenced searching for a "fly in, fly out" position at a suitable mine site. He found an advertisement for such a position placed by WorkPac. WorkPac sought a dump-truck operator to work at a coal mine operated by Rio Tinto Coal Australia Pty Ltd ("**Rio Tinto**") in Clermont, Central Queensland. Mr Skene telephoned WorkPac and spoke to WorkPac's recruitment co-ordinator Ms Nicole Gray. He was told that the position involved 12 hour shifts, on "a 7 days on, 7 days off" roster arrangement. He was also told by Ms Gray that after a probationary period of three months, he would be made a permanent employee. Mr Skene was advised that he would be paid a flat rate of $50 per hour and that flights and accommodation were "included". He was asked to email his resume. About a week later Ms Gray contacted Mr Skene and advised that he had been successful in obtaining the position. In this conversation, Mr Skene was again advised that his hours would be 12 hours per shift on "a 7 days on, 7 days off" continuous roster arrangement.

22 On or about 16 July 2010, Mr Skene attended WorkPac's offices where Ms Gray provided him with an information package. That package included a "Notice of Offer of Casual

Employment" dated 16 July 2010 ("**Notice of Offer**"). The Notice of Offer relevantly provided:

| | |
|---|---|
| Assignment for: | RIO TINTO – CLERMONT MINE |
| Assignment Address/Location: | Clermont Mine CLERMONT QLD 4721 |
| … | |
| Daily Working Hours: | 06:000am – 06:00pm<br>(This may vary and is a guide, any significant changes notify WorkPac) |
| … | |
| Please note: | Your ordinary hours of work shall be a standard work week of 38 hours. Additional reasonable hours may be worked in your rostered arrangements. |
| Length of Assignment: | 3 Months (This may vary and is a guide only.) |
| … | |
| Your Pay rate is a Flat Rate of: | $50.00 per hour |

23 Mr Skene commenced working at Rio Tinto's Clermont mine from 20 July 2010. At an induction performed by an employee of Rio Tinto he was informed that his hours of work would be 12.5 hours per shift on "a 7 days on, 7 days off continuous roster arrangement". He was assigned to "C Crew" which was comprised of employees of both WorkPac and Rio Tinto. The "C Crew roster" provided for the working of a day shift from 6.30am to 7.00pm and for night shifts from 6.30pm to 7.00am. On his commencement on 20 July 2010, Mr Skene was given a copy of his roster that covered a period ending in December 2010.

24 Mr Skene was provided with camp-style accommodation located at the mine. For the first two 7-day rotations he was given a different room each time. He was then assigned a permanent single room. Thereafter, on each occasion he flew to Clermont to work, he stayed in the same room. On days off his personal belongings were stored in boxes in his allocated room. Mr Skene was provided with flights and accommodation at no cost.

25 In January 2011, Rio Tinto provided Mr Skene with his roster commencing in January and covering the entirety of 2011. Similarly, in January 2012, Mr Skene was provided with a 12 month roster in advance.

26 Mr Skene worked in accordance with his roster. He worked for seven days straight on each day of the week (including Sundays). He also worked on public holidays if his roster called

for that. He did not work between 11 and 17 October 2011 and for three days during Christmas 2011.

27 Mr Skene was paid weekly by WorkPac. He was required to fill out a weekly time-sheet and he was paid for the hours he worked. He was paid for 62.5 hours in the first rostered week and 25 hours in the second rostered week of each two week period.

28 On 11 April 2012, Mr Skene's rate of pay was increased to $55 per hour.

29 On 15 April 2012, Mr Skene was stood down during a shift and not required to work the following day. He was paid for the time he was stood down. On 23 April 2012, he attended a meeting with the manager of WorkPac to discuss conduct allegations made against him. On that day, Mr Skene's employment with WorkPac was terminated. On 24 April 2012, he was removed from the Clermont mine and did not work for WorkPac again.

30 The primary judge found that for the entire period of his employment at the Clermont mine, Mr Skene performed the duties of a dump-truck operator working a pattern of seven shifts of 12.5 hours per shift, followed by seven days off in accordance with a pre-set roster provided by Rio Tinto. Throughout the duration of that employment, Mr Skene remained part of C Crew. He did not work any other shifts apart from those provided for by his rosters.

31 The primary judge found that Mr Skene did not take any paid annual leave during the period of his employment with WorkPac at the Clermont mine and that he took unpaid leave arranged with Rio Tinto between 11 and 17 October 2011.

32 On the termination of Mr Skene's employment with WorkPac, Mr Skene was not paid any monies in lieu of untaken annual leave.

33 There were further findings made by the primary judge recorded at [81] of his Honour's reasons. The primary judge found that, on the evidence, Mr Skene's employment at the Claremont mine was:

> (a) regular and predictable. His working arrangements and shifts were set 12 months in advance in accordance with a stable and organised roster;
>
> (b) his employment was continuous, save for one period of seven days that went unpaid but which was arranged with the respondent's client. For that purpose, Mr Skene was under the direction and control of the client, not the respondent (see cl.5.7 of the general terms and conditions);
>
> (c) his employment was facilitated by the fly in, fly out arrangement and the provision of accommodation at no cost to himself;

(d) the fly in, fly out arrangement was inconsistent with the notion that Mr Skene could elect to work on any day and not work for others without first making the necessary arrangements with the respondent's client;

(e) there was plainly an expectation that Mr Skene would be available, on an ongoing basis, to perform the duties required of him in accordance with his roster, until such time as the assignment was complete: cl.5.4 of the general terms and conditions; and

(f) the evidence suggests that the work undertaken by Mr Skene was not subject to significant fluctuation from one day, or one week, or one month, or one year to the next. The hours of work were regular and certain as revealed by Mr Skene's pay slips.

34 At [82] the primary judge recorded his finding that:

(a) Mr Skene was paid by the hour and accounted for his time through timesheets submitted on a weekly basis;

(b) His employment was determinable upon one hour's notice;

(c) His employer designated his employment as casual and Mr Skene seemingly was aware of and accepted that.

35 Additionally, at [84], the primary judge held that there was no evidence that employees of WorkPac at the Clermont mine would choose which days of their rostered periods they would work or not work and that Mr Skene had no choice in the daily working arrangements during the course of his employment at the Clermont mine, there being no opportunity for him to choose not to work any particular shift or hours offered to him by WorkPac.

36 At [85], the primary judge held that there had been no absence of "a firm advance commitment" as to the duration of Mr Skene's employment or the days (or hours) he would work. Those matters, the primary judge found, were clear and predicable and set 12 months in advance. At [54] the primary judge held that Mr Skene was not engaged "by the hour" consistently with the suggestion in cl 5.5.5 of the Agreement that casual employees would be engaged by the hour.

**The conclusions of the primary judge**

37 On the question of whether the National Employment Standards were applicable and in particular whether Mr Skene was, for the purposes of s 86 of the FW Act "other than a casual employee", the primary judge determined that that issue was to be resolved by reference to Mr Skene's status under his contract of employment with WorkPac. Relying largely on the matters recorded at [33]-[36] above, the primary judge concluded that the evidence weighed in favour of Mr Skene being characterised as "other than a casual employee". Accordingly, the primary judge held that, in his employment with WorkPac, Mr Skene was not "other than a casual employee" for the purposes of s 86 of the FW Act (at [85]).

38 For that reason, the primary judge concluded that Mr Skene was entitled to compensation for monies in lieu of annual leave in accordance with the National Employment Standards and in particular s 90(2) of the FW Act.

39 The primary judge took a different approach in relation to the Agreement. The primary judge considered (at [40]) that the contractual nature of Mr Skene's employment was of little moment to his claim based upon cl 19.1.1 of the Agreement. His Honour regarded any entitlements derived from the Agreement as being dependent upon the terms of the Agreement.

40 Relying principally on cl 5.5.6 of the Agreement which provided that at the time of engagement WorkPac will "inform each FTM of the status and terms of their engagement", the primary judge determined that the nature of Mr Skene's employment had to be assessed as at the commencement of his employment (at [57]) and whether Mr Skene was a "Casual FTM" for the purposes of the Agreement was, by reason of cl 5.5.6, "left up to [WorkPac] at the time of his engagement" at ([59]). The primary judge determined that the heading to the Terms & Conditions of Employment Document (namely: "Casual or Fixed Term Employee Terms and Conditions of Employment") was sufficient to impress upon Mr Skene's employment the status of "Casual FTM" for the purposes of the Agreement.

41 At [62] the primary judge said this:

> By cl.5.5.6 it is for [WorkPac] to inform the employee of their status at the time of their engagement. Clause 5.5.6 is directed to the subjective intention of [WorkPac] and the status assigned to the employee at the time of the engagement by [WorkPac]. The offer of "casual employment" is sufficient, in my view, to engage cl.5.5.6 of the WorkPac Agreement and impress upon Mr Skene the status of "casual FTM".

42 Having regard to the way in which the case was conducted, namely that if Mr Skene was a "Casual FTM" he was not a "Permanent FTM", the primary judge determined that Mr Skene had no entitlement to annual leave under cl 19.1.1 of the Agreement. That part of Mr Skene's claim was therefore dismissed.

## ENTITLEMENT TO ANNUAL LEAVE UNDER S 86 OF THE FW ACT

### The authorities followed by the primary judge

43 In concluding that Mr Skene was not a "casual employee" for the purposes of s 86 of the FW Act, the primary judge relied upon the observations of Lucev FM in ***Williams*** *v MacMahon Mining Services Pty Ltd* [2009] FMCA 511 (and the authorities there referred to) as approved by Barker J on appeal in ***MacMahon*** *Mining Services Pty Ltd v Williams* [2010] FCA 1321.

The relevant facts of that case bear a great deal of similarity to the facts of this case. Mr Williams was employed as a miner by MacMahon Mining Services Pty Ltd ("**MacMahon Mining**") to work at the Argyle Diamond mine site in the North West of Western Australia. His contract of employment provided that he be paid a flat hourly rate of $40 per hour, described in the contract as:

> All inclusive and takes into account all responsibilities, disabilities, allowances … and includes payment for all hours necessary to undertake your rostered duties, and as a casual employee, a loading in lieu of paid leave entitlements. The rate includes compensation for any necessary shift, public holiday and weekend work.

44 The contract set out Mr Williams' hours of work which included a requirement to work either a day or a night shift. Mr Williams was required to work 12 hour shifts on a "two weeks on, one week off" roster. The evidence before Lucev FM was that Mr Williams worked seven consecutive day shifts, then seven consecutive night shifts, and then had seven days off for the entire period of his employment, save for the first three months where he worked only day shifts. Mr Williams worked in one of three crews and was provided a roster for his crew which set out his crew's night and day shifts for the entirety of 2008. Mr Williams was flown to and from Perth to attend work and accommodated at the mine by MacMahon Mining.

45 Mr Williams was not given annual leave and when his employment was terminated he did not receive any payment in lieu of untaken annual leave. Mr Williams contended that although MacMahon Mining had labelled his employment as "casual", he was not employed as a casual employee and was not a "casual employee" within the meaning of s 227 of the *Workplace Relations Act 1996* (Cth) ("**WR Act**"). He claimed an entitlement to annual leave under ss 232 and 235 of that Act. Section 232 provided for an entitlement to annual leave and s 235 provided for the payment of monies in lieu of annual leave untaken on the termination of an employee's employment. Section 227 of the WR Act identified the employees to whom the division containing ss 232 and 235 were applied. In terms identical to those now found in s 86 of the FW Act, s 227 provided that the relevant division "applies to all employees other than casual employees". Like the FW Act, the WR Act contained no definition of "casual employee".

46 At first instance, Lucev FM reasoned that Mr Williams was not employed as a "casual employee" as that phrase had been "traditionally" construed by the authorities (at [42]). By reference to various provisions of the WR Act, Lucev FM assessed whether the use of the term "casual employees" in s 227 of the WR Act was intended to have other than its "traditional" meaning. At [68] his Honour determined that it was not so intended. In considering what

constituted casual employment as traditionally construed, Lucev FM relied upon a number of judicial observations which it is convenient to set out now.

47 First, the following observations of Moore J in ***Reed*** *v Blue Line Cruisers Limited* (1996) 73 IR 420 at 425:

> What then, is likely to have been the feature of the employment at the time of the engagement that would characterise it as an engagement on a casual basis? Plainly it involves a notion of informality or flexibility in the employment following the engagement...
>
> A characteristic of engagement on a casual basis is, in my opinion, that the employer can elect to offer employment on a particular day or days and when offered, the employee can elect to work. Another characteristic is that there is no certainty about the period over which employment of this type will be offered. It is the informality, uncertainty and irregularity of the engagement that gives it the characteristic of being casual.

48 Next, Lucev FM relied upon the following observations made in ***Melrose Farm*** *Pty Ltd (t/as Milesaway Tours) v Milward* (2008) 175 IR 455 by Le Miere J at [103]-[106] (with whom Steytler P agreed at [1] and with which Pullin J at [31] would have agreed if he considered it necessary to determine the issue), which in turn cited *Reed* and the Full Court of this Court in ***Hamzy*** *v Tricon International Restaurants trading as KFC* (2001) 115 FCR 78 (Wilcox, Marshall and Katz JJ):

> In Australian law, the expression "casual employee" or "casual employment" are expressions with no fixed meanings:... *Reed v Blue Line Cruisers Lt*d (1996) 73 IR 420, 425 (Moore J)... the issue before Moore J was whether Reed was a casual employee as that expression appears in reg 30B of the *Industrial Relations Regulations* (Cth). Having observed that 'casual employee' has no fixed meaning in Australian domestic law ... went on to consider the characteristics of casual employment ...:
>
> > A characteristic of engagement on a casual basis is, in my opinion, that the employer can elect to offer employment on a particular day or days and when offered, the employee can elect to work. Another characteristic is that there is no certainty about the period over which employment of this type will be offered. It is the informality, uncertainty and irregularity of the engagement that gives it the characteristic of being casual (425).
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> In *Hamzy v Tricon International Restaurants* [2001] FCA 1589: 115 FCR 78 the Full Court of the Federal Court said ... that the essence of casual employment is the absence of a firm advance commitment as to the duration of the employee's employment or the days (or hours) the employee will work, but that is not inconsistent with the possibility of the employee's work pattern turning out to be regular and systematic.
>
> There is no one definitive test to distinguish between casual and permanent employees. There are several features characteristic of casual employment.

49 At [35], Lucev FM observed that the description by the contracting parties of the employment relationship as "casual" was not of itself determinative. Relying upon what Steytler P observed

in *Personnel Contracting Pty Ltd (t/as **Tricord** Personnel) v Construction, Forestry, Mining and Energy Union of Workers* (2004) 141 IR 31 at [41], his Honour determined that the characterisation of the relationship needed to proceed "by reference to the totality of that relationship, including the system operated and work practices imposed by the appellant, and an analysis of the terms of the contract entered into by the employee with the employer".

50 Applying what his Honour called the "traditional" definition of casual employee to the facts, Lucev FM found that Mr Williams was a casual employee on the basis of the following findings (as conveniently set out by Barker J on appeal in *MacMahon* at [17]):

- At [36], that there was an expectation that Mr Williams would be available, on an ongoing basis, to perform the duties required of him, in accordance with the roster, until such time as the Contract came to an end. This was not a contract where the availability of work was the subject of significant fluctuation from one day, or one week, or one month, to the next so as to make the work, and hours of work, irregular and uncertain. Rather, there was a stable, organised and certain roster that governed work until the Contract was ended, either for some cause or because the head contract had come to an end.
- At [37], that there was mutual expectation of continuity of employment subject only to termination of employment for cause, or termination as a consequence of the head contract ending.
- At [38], that this was not a case of an employee working for short periods of time on an irregular basis.
- At [39], the fact that Mr Williams was paid a flat hourly rate, that purported to include a loading for various leave entitlements, including annual leave, was more indicative of a casual employment relationship than not.
- At [40], that Mr Williams was not regularly contacted and asked to work, rather the work was organised and he knew when and where he was required, and how he was to get there.

51 On the appeal in *MacMahon*, Barker J referred to and adopted the authorities relied upon by Lucev FM and in particular the observations made in *Reed, Hamzy* and *Melrose Farm* (at [33], [35] and [36]). At [33] Barker J said that "the concept of a casual worker being involved in work which is discontinuous – intermittent or irregular – remains relevant and helpful…". Barker J characterised the observations of Moore J in *Reed* as "general observations concerning the concept of casual employment … under the general law today" at [34]. His Honour said that the observations of Moore J were confirmed by what the Full Federal Court said in *Hamzy* and what the Industrial Appeals Court of Western Australia said in *Melrose Farm* (at [35]-[36]).

52 As is apparent from [37] of *MacMahon*, the appeal before Barker J was largely concerned with whether, on the application of the "traditional" meaning of casual employment, the facts of that case supported the conclusion reached by Lucev FM that Mr Williams was employed as a casual employee.

53 On that issue, Barker J commenced by observing that the description by contracting parties of their relationship as employer and "casual employee" is not determinative and that, as his Honour put it, "it is well understood that the description supplied by such an instrument will not override the true legal relationship that arises from a full consideration of the circumstances" (at [38]). In that respect, Barker J relied on the observations made in *Tricord* to which we have earlier referred.

54 At [42], Barker J concluded:

> While it is plainly relevant to have regard to the fact the Contract could be terminated on one hour's notice, when one has regard to the Contract overall, it was open to the Federal Magistrate to find that Mr Williams was not a "casual employee" under the general law and therefore for the purposes of the WR Act. His engagement was not for the performance of work on an intermittent or irregular basis. The future was provided for. The nature of the work required of the employee was stipulated. A roster was in place which made clear the regularity of the employment. Travel arrangements were organised to facilitate it. All this suggests that this was an employment arrangement far beyond that of casual employment. That the Contract may be terminated on an hour's notice may be said, as I consider it is, a countervailing relevant factor. In the event, that Federal Magistrate did not, on a proper reading of his judgment, consider this to be a determinative factor. It was open to him so to find. No error is revealed.

**The contentions of Mr Skene and further authorities**

55 It is convenient to first set out Mr Skene's contentions about the proper construction s 86 of the FW Act. Mr Skene contended that the primary judge's approach to construing s 86 was correct. He submitted that the primary judge was correct to focus upon Mr Skene's contract of employment to determine whether or not he was "other than a casual employee" for the purposes of s 86 of the FW Act. Mr Skene contended that whether or not an employee is a casual employee for the purposes of s 86 is a matter of contract. He contended that the nature of the employment agreed to under a contract is to be determined by an assessment of all of the facts of the case and the reality of the employment relationship, that is, its substance rather than merely its characterisation by the parties. The essence of Mr Skene's contention was that the expression "casual employee" in s 86 of the FW Act has its legal meaning, the relevant characteristics or indicia of casual employment being those identified in the authorities and in particular the authorities relied upon by the primary judge. Relying on the observations of the

Full Court in *Hamzy* about the "essence" of casual employment, Mr Skene contended that of all of the relevant indicia in the application of a "totality test", the predominant and essential indicator of casual employment is the "absence of a firm advance commitment as to the duration of the employee's employment or the days (or hours) the employee will work" (*Hamzy* at [38]).

56 Beyond the authorities relied upon by the primary judge, Mr Skene referred to and relied upon two further authorities which it is convenient to address next.

57 In *Fair Work Ombudsman v* ***South Jin*** *Pty Ltd* [2015] FCA 1456, White J considered whether an employer of trolley collectors had failed to pay its employees various entitlements, including an entitlement to a casual loading. The claims in question related to a period in which, initially, the WR Act applied and the employees were award free and, later, a period in which the FW Act applied as well as a modern award. For the period in which the WR Act applied, the Fair Work Ombudsman claimed that a casual loading was payable to the relevant employees pursuant to s 185(2) of the WR Act. Section 185 was found in Pt 7 of the WR Act which contained provisions that set out the "Australian Fair Pay and Conditions Standard" ("**AFPCS**"). The AFPCS was, at least conceptually, the legislative predecessor of the National Employment Standards. Section 185 headed "Guarantee of Casual Loadings" was in the following terms:

> **185 The guarantee**
>
> (1) This section applies to a casual employee for whom, under section 182, there is a guaranteed basic periodic rate of pay, other than a casual employee in relation to whom the following paragraphs are satisfied:
>
> (a) subsection 182(1) applies to the employee;
>
> (b) the APCS that covers the employment of the employee does not contain casual loading provisions under which a casual loading is payable to the employee;
>
> (c) the employee's employment is not covered by a workplace agreement.
>
> (2) The casual employee must be paid, in addition to his or her actual basic periodic rate of pay, a casual loading that is at least equal to the guaranteed casual loading percentage of that actual basic periodic rate of pay.

58 As White J stated at [65], s 185 of the WR Act required that "a casual employee" be paid a "casual loading' in defined circumstances. His Honour noted that the WR Act did not contain any definition of the term "casual employee" or its cognates. In that context and of importance to the issues here raised, White J said this:

> It is reasonable to infer that, subject to some qualifications to be mentioned shortly, the term was used with its meaning in the general law.

59 The "qualifications" was a reference to White J's discussion at [72]-[74] as to whether any implications were to be drawn from other provisions of the WR Act, and a reference to [75]-[84] which addressed implications arising from the applicable award.

60 As to the meaning of "casual employee" in the general law, White J referred to Moore J in *Reed* and the observations of the Full Court in *Hamzy* (extracted above) and then said this (at [71]):

> In addition to these features of casual employment, the authorities indicate that the characterisation of a worker's employment as casual, or otherwise, is essentially a question of fact in which no single criterion is likely to be decisive. Instead, regard must be had to a number of matters, including the way in which the parties themselves regarded their relationship, any commitment by the employer or the worker to ongoing employment, the regularity or otherwise of the worker's hours or days of work, how the worker was notified of each period of work, the payment of an hourly rate for the hours actually worked, any indication that the hourly rate was intended to encompass leave entitlements, the absence of payment of the benefits associated with employment of an indefinite nature such as paid annual leave, sick leave and public holidays, and whether the employer and worker were able to refuse to offer or accept, as the case may be, further work: *Bernardino v Abbott* [2004] NSWSC 430 at [21]-[23]; *Melrose Farm Pty Ltd t/as Milesaway Tours v Milward* [2008] WASCA 175; (2008) 175 IR 455 at [106].

61 Applying those principles to the facts, White J determined that the pattern of work of some of the employees in question (employees who worked 39 or more hours each week) suggested "some regulatory and certainty about their work" (at [144]). In relation to those employees, White J was not satisfied that it had been established that they were casuals (at [145]). His Honour considered that the position of employees who worked 19.5 hours over four days in each week was different. In relation to those employees, and despite some regularity to the nature of their work (at [147]), "there was an unpredictability about the place and hours of their work" that White J considered was consistent with them being casuals (at [146]).

62 The other authority relied on by Mr Skene was the judgment of Buchanan J in ***Ledger*** *v Stay Upright Pty Ltd* [2016] FCA 659. In that case, Buchanan J was required to directly consider s 86 of the FW Act and whether or not the claimant employees were "other than casual employees". The case concerned a number of employees, employed as instructors by a company which provided motorcycle training services, who claimed various underpayments. One of the claims was that during their employments, they were not provided annual leave and on termination no payment in lieu of annual leave was made. In the period of the claimants' employments, the WR Act initially applied and from 1 January 2010 the FW Act applied.

63 It was agreed, as Buchanan J recorded at [42], that before 1 January 2010 no federal or state award applied to the employment of the employees but the AFPCS applied and provided entitlements to annual leave. At [42], Buchanan J considered that the resolution of whether any entitlements arose depended on whether the claimant employees were casual employees before 1 January 2010. For the position after 1 January 2010, the primary contention of the employees was that after 1 January 2010 their entitlements were sourced in the National Employment Standards. In the alternative, the employees contended that an award applied and provided for entitlements to annual leave.

64 At [57]-[58], Buchanan J set out the terms of s 86 of the FW Act and noted that there was no definition of "casual employee" in the FW Act, although there was a definition of "long-term casual employee" in s 12. His Honour observed that "[u]nderstanding even that definition requires understanding of the terms 'casual employee'" (at [58]).

65 As Buchanan J stated at [59]-[60], whether the award applied or not, the ultimate question remained the same for the purpose of considering the entitlements claimed under either the AFPCS, the National Employment Standards or the award. The question posed by Buchanan J was this (at [59]):

> Were the applicants engaged and employed as casual employees in the usual connotation of that term?

66 In answer of that question Buchanan J turned (at [61]) to the observations of Moore J in *Reed* (which he had previously referred in his judgment in ***Thompson*** *v Big Burt Pty Ltd (t/as Charles Hotel)* (2007) 168 IR 309 at [57]). His Honour noted that Moore J in *Reed* "was influenced against a conclusion of casual employment by the apparent regularity and eventual overall period of Mr Reed's engagement".

67 In applying the "usual connotation" of the term "casual employee" to the facts of that case, Buchanan J determined that neither of the employees was ever engaged otherwise than as a casual employee and rejected the claims made for annual leave under the AFPCS, under the National Employment Standards and under the relevant award. At [65], Buchanan J said this:

> The things most in favour of their contentions of permanent employment are the length, general regularity and frequent weekly hours of their engagements. However, it is clear that the engagements were otherwise not fixed, not certain and were variable. Hours of work depended on agreed rosters and payment was based upon the submission of specific timesheets. Payments were earned, calculated and paid on an hourly basis. Both parties to the contracts conducted themselves on the footing that absences (for any reason) were not paid. The significance of that circumstance is that the absence was not treated as an absence from work. Leave was not required and could not be

withheld.

68 Although Mr Skene did not rely upon it in his submissions, the decision to which White J referred to in *South Jin* at [71] (extracted above at [60]), ***Bernardino*** *v Abbott* [2004] NSWSC 430 (Gzell J), is also instructive. This was a case in which an employee made a claim for monies in lieu of annual leave under the *Annual Holidays Act 1944* (NSW). The issue was whether the employee was a full-time employee entitled to holiday pay under that Act or a casual employee whose rate of pay had incorporated compensation for annual leave. Gzell J referred to *Reed*, *Hamzy* and ***Cetin*** *v Ripon Pty Ltd (t/as Parkview Hotel)* (2003) 127 IR 205 (to which we refer later) and concluded that the employee was not a casual employee in view of the regular nature and stability of his employment, and the expectation that his employment would continue for a considerable length of time.

69 Further, in *Fair Work Ombudsman v Hu (No 2)* [2018] FCA 1034, in considering whether particular employees were casual employees for the purposes of an award, Rangiah J referred at [224] to *Hamzy* and observed that a strong indication that the employees were engaged as casual employees was that their "days and hours of work were not fixed and were dependent upon [the employer's] labour requirements".

**WorkPac's contentions and the principal authorities it relied upon**

70 The sole ground of WorkPac's appeal is that the primary judge erred in failing to find that Mr Skene was a casual employee for the purposes of s 86 of the FW Act. WorkPac's principal contention was that the Agreement designated Mr Skene to be a casual employee and it followed, as a matter of statutory construction, that Mr Skene was also a casual employee under s 86 of the FW Act. That contention was predicated on the proposition that "casual employee" for s 86 is an employee designated as such by the industrial instrument which covers that employee. That was because, so WorkPac contended, "within the industrial relations system in Australia, it is well-recognised that an employee is regarded as a casual employee, for the purposes of identifying and calculating their paid minimum entitlements, if he or she is described or defined as a casual employee under an applicable federal industrial instrument".

71 WorkPac explained that the meaning of "casual employee" for which it contended was the "common industrial meaning" of the phrase, or put another way, the "entrenched notion" of what has been understood to be a casual employee by federal industrial Tribunals for the past 70 years. That industrial understanding, so WorkPac contended, was adopted by Parliament as the intended meaning of "casual employee" in s 86 of the FW Act.

72 In short, WorkPac rejected the assumption applied by the primary judge that the expression "casual employment" in s 86 was intended to have its legal meaning (that is, the usual meaning or connotation given to the phrase by the authorities) and contended, in essence, that the expression had a non-legal technical meaning uniformly used in a specialised sense in federal awards and industrial agreements and adopted by Parliament in s 86 of the FW Act.

73 The primary judge rejected WorkPac's contention. At [80], the primary judge stated that there was "no warrant to interpret the phrase *casual employee* in s 86 of the [FW Act] in a way that draws upon the definitional provisions of various industrial instruments according to the 'industrial history' of those instruments" (emphasis in original).

74 WorkPac principally relied on two decisions of the Fair Work Commission ("**FWC**"). A Full Bench of the FWC (Lawler VP, Richards SDP, and Lewin C) in ***Telum*** *Civil (Qld) Pty Limited v Construction, Forestry, Mining and Energy Union* [2013] FWCFB 2434, gave consideration to the meaning of the expression "casual employee" in the FW Act. *Telum* was considered and endorsed by a Full Bench of the FWC (Hatcher VP, Hamberger SDP, Kovacic DP, Bull DP and Roe C) in *Re 4 Yearly Review of Modern Awards – Casual Employment and Part-time Employment* (2017) 269 IR 125 ("***Casual Conversion Case****"*) at [84]-[85].

75 In *Telum* a dispute was raised pursuant to a dispute settlement procedure in an enterprise agreement made under the WR Act. The dispute concerned whether a group of employees whose employment had been terminated upon the completion of a construction project were entitled to redundancy pay provided for by the National Employment Standards and specified by s 119 of the FW Act. Section 123(1)(c) of the FW Act provided that the division in which s 119 is included did not apply to "a casual employee". Section 739 of the FW Act empowered the FWC to resolve the dispute and a Commissioner of the FWC conducted an arbitration and determined whether the relevant employees were entitled to a redundancy payment under s 119 or whether such entitlements were excluded by s 123(1)(c). The employees in question were recorded in Telum Civil (Qld) Pty Ltd's ("**Telum**") records as casual employees and paid a casual loading. The case proceeded on the basis that the employees had been engaged as casuals at the time of their employment, paid and otherwise treated as casuals by Telum. It was uncontested that the relevant employees were engaged for full-time equivalent hours, and that the hours worked by the employees were regular and not subject to variations of any kind, in circumstances where the employees worked regular, consistent start and finish times and the

employees attended work at the same time each working day without specific direction because there was an expectation that they would so attend. As is recorded in *Telum* at [17]-[18], the Commissioner determined the issue on the basis that the expression "casual employee" in s 123(1)(c) of the FW Act has a meaning consistent with the meaning given to the expression by judicial authorities or, as the Full Bench put it, a meaning consistent with the general law. Based on the factors mentioned in the various judicial authorities considered by the Commissioner, it was determined that the proper characterisation of the relevant employees was that the nature of their employment was not casual.

76 *Telum* dealt with an appeal from the decision of the Commissioner. The Full Bench at [20] determined that the Commissioner's assumption that the expression "casual employee" referred "to the notion of casual employment under the general (common) law" was erroneous. The Full Bench's reasoning may be conveniently addressed by identifying the foundational propositions upon which it is based. Those propositions, each of which was relied upon (with some adaption) by WorkPac, may be summarised as follows:

- *First*, as to statutory construction, s 123(1)(c) of the FW Act is to be construed in context and with the purposive approach mandated by s 15AA of the *Acts Interpretation Act 2001* (Cth). No rule of construction dictates that the expression "casual employee" must have its general law meaning: *Telum* at [22].
- *Second*, the "notion of casual employment remains 'ill-defined' under the general law and calls for the application of criteria that do not deliver a clear and unambiguous answer in many cases but, rather, lead to results on which reasonable minds may differ": *Telum* at [21].
- *Third*, under the WR Act, an award modernisation process was undertaken in anticipation of the central place now given to modern awards in the FW Act. Historically, "the specification of casual employment in Federal awards had diverged from the (ill-defined) general law position to a position where, by the time of [the] award modernisation process, for many, if not most, federal awards, an employee was a casual employee if [he or she was] engaged as a casual (that is, identified as casual at the time of engagement, perhaps with a requirement of a [sic] writing) and paid a casual loading". That approach led to a position where employees working regular and systematic hours on an ongoing basis could still be casual employees under a federal award: *Telum* at [23]-[25].

- *Fourth*, the FW Act contemplates that casual employment, as a type of employment, might be defined in modern awards and all modern awards contain a "definition" of casual employment. Notwithstanding some variations in the wording of those "definitions", they all have "the same core criteria", namely, that on engagement the employee is labelled a casual employee and paid a casual loading. None of the modern awards adopt the general law approach to the identification of casual employees. The general approach to casual employment in modern awards is a continuation of the historical approach referred to in the third proposition above: *Telum* at [33] to [45].
- *Fifth*, a range of National Employment Standards entitlements do not apply to a "casual employee" (parental leave and related entitlements, annual leave, personal/carer's leave and compassionate leave, notice of termination and redundancy pay, public holidays). Those entitlements are entitlements of permanent employees that are compensated for in the casual loading required by awards to be paid to casual employees. There would be "double dipping" by employees engaged as casuals and paid the casual loading, but who work regular and systematic hours, if "casual employee" in s 123(1)(c) of the FW Act had its general law meaning. It is unlikely that the legislature intended that outcome. Such an outcome would be inconsistent with the purpose and objects of the FW Act as it would tend to impede productivity and flexibility (see s 3(a) and (f) of the FW Act): *Telum* at [46]–[48].
- *Sixth*, other uses of the expression "casual employee" or the word "casual" in the FW Act and in particular the definition of "long-term casual employee" in s 12, the use of "casual employee" in s 23(2)(b) and in s 384(2)(a), support the conclusion that references to those expressions in the FW Act are references to the characterisation of the employee as a casual employee made by the applicable modern award or enterprise agreement: *Telum* at [49]–[57].
- *Seventh*, "the FW Act provides for the regulation of terms and conditions of employment of employees through an *interrelated* system of National Employment Standards, modern awards, enterprise agreements (and, in some cases, workplace determinations or minimum wage orders). Having regard to the objects and purpose of the legislation, the legislature intended that those components should interact consistently and harmoniously" (emphasis in original): *Telum* at [58].

77 On the basis of that reasoning, the Full Bench in *Telum* concluded at [58], that:

> [T]he legislature intended that a 'casual employee' for the purposes of [The National Employment Standards] would be consistent with the characterisation of an employee as a "casual employee" under an enterprise agreement made under Part 2-4 of the FW Act … that applies to the employee or, if no such agreement applies, then consistent with the characterisation of an employee as a "casual employee" within the modern award that applies to the employee.

78 At [59] the Full Bench in *Telum* noted the decision of Barker J in *MacMahon* and considered that it did not assist the proper construction of the expression "casual employee" in s 123(1)(c) of the FW Act because it was a case "concerned with a different statutory context".

79 That conclusion was the subject of criticism by the Full Bench in the *Casual Conversion Case* at [77]. The Full Bench there said, and we agree, that "it is not clear [that] the statutory context made any difference, with the real position being that *Telum* and [*MacMahon*] took quite different and inconsistent approaches to the same issue".

80 Ultimately, the Full Bench in the *Casual Conversion Case* preferred the approach taken in *Telum* to that in *MacMahon*, stating (at [70]) that the reasoning in *McMahon* was "problematic in the award context" for reasons earlier given by that Full Bench at [58] in its criticism of the decision of the Full Bench in *Cetin*.

81 In *Cetin*, a Full Bench (Ross VP, Duncan SDP and Roberts C) of the the Australian Industrial Relations Commission) ("**AIRC**") (the predecessor of the FWC) considered the expression "casual employee engaged by a particular employer for a short period" within the meaning of Reg 30B(1)(d) of the *Workplace Relations Regulations 1989* (Cth) ("**WR Regulations**"). That Full Bench applied the reasoning in *Hamzy* to the facts of that case to conclude that the employment of the employee in question could not reasonably be said to be "informal, uncertain or irregular" and that the employee was not a casual employee of the kind referred to in the WR Regulations. At [58], the Full Bench in the *Casual Conversion Case* said that the approach taken in *Cetin* "causes difficulty" for the following two reasons:

> The first is that, as the High Court has emphasised in the decisions referred to above, casual employment cannot be assigned any fixed meaning, and there is a lack of any clear objective criteria by which it may be characterised beyond the right to terminate at short or on no notice and the lack of certainty as to future employment. The second difficulty in the industrial context is that because awards typically describe a casual employee as one who is engaged and paid as such, the subjective label placed on the employment at its commencement becomes determinative of the employee's award entitlements. If a different approach to the determination of casual employment is taken outside the award context, then a real potential for radical disconformity between award and other employment entitlements may arise, as we discuss further below.

82 That reasoning and the later discussion in the *Casual Conversation Case* followed and endorsed *Telum*.

83 At [81], the Full Bench remarked on the present case and said that the primary judge's approach following the decision of Barker J in *MacMahon* involved an implicit rejection of *Telum*. It observed at [82] that a consequence of the approach taken by the primary judge would be the kind of "double dipping" that *Telum* referred to. The Full Bench took the view at [84] that as no "authoritative" court decision had determined that *Telum* was incorrectly decided, it would proceed on the basis that *Telum* represented the correct approach "at least for modern award-covered employees".

84 It is convenient to note at this point that the *Casual Conversion Case* was concerned with whether a model clause dealing with casual employees which provided a right for such employees to have their employment converted to full-time or part-time employment should be included in modern awards. The Full Bench was not directly concerned with the meaning of the expression "casual employee" in s 86 or elsewhere in Pt 2–2. Although the decision of the Full Bench contains a fairly comprehensive discussion of the authorities, the Full Bench did not consider *Ledger* or *South Jin*. With respect, the suggestion (at [78]) that an "approach apparently consistent with *Telum*" was taken by White J in *Fair Work Ombudsman v* ***Devine Marine*** *Group Pty Ltd* [2014] FCA 1365 (a case which we later address), is erroneous. None of the propositions falling from *Telum* and listed above were considered by White J in *Devine Marine*. His Honour only considered *Telum* in relation to the award construction exercise discussed at [136] below.

85 Although WorkPac placed little reliance upon it, some support for its argument based on *Telum* is found in *Putland v Royans Wagga Pty Ltd* [2017] FCA 910 at [312]-[317] (Bromwich J). In that case it was held that a clause in an award that "[a] casual employee is an employee engaged as such", meant that in order to be a casual employee under the award, the employee had to be designated to be a casual employee. However, in that case there was no need for any consideration to be given to the meaning of "casual employee" in the FW Act and it was not considered.

**The immediate and surrounding legislative context**

86 Before setting out the detail of our reasoning, it is necessary to say a little more of the provisions of Pt 2–2 which provide the National Employment Standards. As s 61(1) specifies, the National Employment Standards are "minimum standards that apply to the employment of employees

which cannot be displaced …". Furthermore, s 55(1) provides that a modern award or enterprise agreement "must not exclude the National Employment Standards or any provision of the National Employment Standards". Section 56 provides that "a term of a modern award or enterprise agreement has no effect to the extent that it contravenes s 55".

87 In the hierarchy of terms and conditions of employment, the National Employment Standards are at the pinnacle. The Standards have primacy over terms and conditions of employment provided by all other instruments including an enterprise agreement, modern award or a contract of employment.

88 The subjects dealt with by the National Employment Standards are identified at [3] above. We have recorded already that Div 6 of Pt 2–2 addresses annual leave and related entitlements. As set out at [5] above, s 86 provides that Div 6 applies to "employees, other than casual employees".

89 It is important to note that Div 6 applies to employees who are "award/agreement free employees". That expression is defined in s 12 of the FW Act to mean "a national system employee to whom neither a modern award nor an enterprise agreement applies". It is an expression used in various provisions in Div 6 including ss 87(1) and (3), 92(6), and 94(1), (5) and (6).

90 Section 87 specifies the entitlement to annual leave. The general entitlement is to four weeks of paid annual leave for each year of service, although an employee will be entitled to five weeks of paid annual leave in the circumstances contemplated by s 87(1)(b). Section 87(1)(b) extends the entitlement to five weeks of paid leave to an employee to whom a modern award or enterprise agreement applies, and who is "defined or described as a shiftworker for the purposes of the National Employment Standards" by the modern award or enterprise agreement. An employee who is "award/agreement free" may also qualify for the extended annual leave entitlement available to a shiftworker if he or she meets the criteria set out in s 87(3).

91 Section 87(2) deals with the accrual of leave and is in the following terms:

> (2) An employee's entitlement to paid annual leave accrues progressively during a year of service according to the employee's ordinary hours of work, and accumulates from year to year.

92 Section 88 deals with the taking of paid annual leave and provides that leave may be taken for a period agreed between an employee and his or her employer, and requires the employer not

to unreasonably refuse to agree to a request by the employee to take paid annual leave. Section 90 provides for the payment of annual leave. Where paid annual leave is taken, the employer is required to pay the employee "at the employee's base rate of pay for the employee's ordinary hours of work in the period" (s 90(1)). Alternatively, where at the cessation of the employment, the employee has a period of untaken paid leave, "the amount that would have been payable to the employee had the employee taken that period of leave" is payable (s 90(2)).

93 Sections 92–94 are of some importance to the issue we need to determine. They say a great deal about the purpose of the provision of a minimum entitlement to annual leave. In essence, the provisions specify the circumstances in which the entitlement of an employee to take annual paid leave may be exchanged for monetary compensation; in other words, the "cashing out" of an employee's entitlement to annual leave. Section 92 prohibits the "cashing out" of paid annual leave other than in accordance with either a modern award or enterprise agreement under s 93 or, in relation to an award/agreement free employee, in accordance with an agreement of the kind dealt with by s 94. It is important that in the case of either "cashing out" terms included in a modern award or enterprise agreement under s 93 or included in a s 94 agreement for award/agreement free employees, a limitation is imposed upon paid annual leave being "cashed out" "if the cashing out would result in the employee's remaining accrued entitlement to paid annual leave being less than 4 weeks" (s 93(2) and s 94(2)). Parliament's concern that employees actually take at least four weeks of annual leave is evident from the restrictions to which we have just referred.

94 It is also necessary to record, in summary terms, where particular provision is made in relation to casual employees by the National Employment Standards that deal with entitlements other than annual leave.

95 Division 3 of Pt 2–2 deals with maximum weekly hours of work. Casual employees are not specifically mentioned.

96 Division 4 provides employees with a capacity to make requests for flexible working arrangements in particular circumstances. Section 65(2) provides when an employee is not entitled to make such a request. For an employee other than a casual employee, the employee must complete at least 12 months of continuous service with the employer immediately before making the request (s 65(2)(a)). For a casual employee, the employee must be a "long-term casual employee" of the employer immediately before making the request and have a

reasonable expectation of continuing employment by the employer on a regular and systematic basis (s 65(2)).

97 Division 5 deals with parental leave and related entitlements. The application of Div 5 to employees "other than casual employees" is dealt with by s 67(1). It is unnecessary to go to the detail of the entitlement of casual employees save to say that casual employees are entitled to various forms of unpaid parental leave and related entitlements. As for an entitlement to paid leave, only "a long-term casual employee" (s 67(2)(a)) who has a reasonable expectation of continuing employment (of the kind identified at s 67(2)(b)) has an entitlement to paid leave.

98 Subdivision A of Div 7 deals with paid personal/carer's leave. Section 95 provides that the subdivision only applies to employees "other than casual employees". Subdivision B of Div 7 deals with entitlements to unpaid carers leave. There is no distinct treatment of casual employees in that subdivision. Subdivision C deals with an employee's entitlement to compassionate leave. It provides an entitlement to all employees to take compassionate leave in the circumstances specified by s 104. Section 106 provides for paid compassionate leave for employees "other than a casual employee".

99 Division 8 deals with community service leave. The capacity to take such leave is provided to all employees. Where community service leave is taken for the purpose of jury service, s 111 provides for payment to the employee taking such leave other than where the employee is a casual employee.

100 Division 9 deals with long-service leave. No distinct arrangements are made in relation to casual employees.

101 Division 10 deals with public holidays and again no exclusion or other relevant mention is made of casual employees.

102 Division 11 deals with notice of termination and redundancy pay. Section 123(1)(c) provides that the Div 11 does not apply to "a casual employee".

103 As the discussion of *Ledger* above noted at [#], the legislative predecessor of the National Employment Standards is the AFPCS provided for under the WR Act. Section 227 of the WR Act was contained in the division dealing with annual leave and was in the same terms as s 86 of the FW Act. There were other entitlements provided for by the AFPCS which excluded casual employees but it is not necessary to go to the detail of those exclusions.

**Principles of statutory construction**

104 It is necessary then to record some principles of statutory construction of relevance to the interpretative task with which we are concerned.

105 The phrase "casual employee" as it appears in s 86 of the Act is not a defined term. Ordinarily, the meaning of an undefined expression is discerned by reference to the language of the Act viewed as a whole. As French CJ, Hayne, Kiefel, Gageler and Keane JJ said in ***Thiess*** *v Collector of Customs* (2014) 250 CLR 664 at [22], the task of statutory construction involves the attribution of meaning to statutory text. It is a task which must begin with the consideration of the text itself, but the meaning of the text must be construed by reference to context and legislative purpose of the provision. Similar guidance emphasising the need to discern the statutory purpose of a provision was given by Kiefel CJ, Nettle and Gordon JJ in ***SZTAL*** *v Minister for Immigration and Border Protection* [2017] HCA 34 at [39] where their Honours said that "integral" to the making of constructional choices "is discernment of statutory purpose". Similar guidance also is derived from ***Alcan*** *(NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47] (Hayne, Heydon, Crennan and Kiefel JJ).

106 It is ordinarily considered a sound rule of construction that the same word appearing in different parts of a statute should be given the same meaning. Such an assumption is a logical starting point or a sensible working hypothesis, particularly where an expression is used in the same division or in closely proximate provisions of a statute. However, it is not an assumption that is to be rigidly adopted and it may be rebutted where the context, purpose or surrounding text provide reason to do so. Whether the context, purpose or surrounding text so require must be considered on a case by case basis: *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The Laverton North and Cheltenham Premises Case)* [2018] FCAFC 88 at [3] (Allsop CJ); *Craig Williamson Pty Ltd v Barrowcliff* [1915] VLR 450 at 452; *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at [11] (Mason J); *Secretary, Department of Social Security v Copping* [1987] 73 ALR 343 at 347-348 (Jenkinson J); *Minister for Immigration and Multicultural and Indigenous Affairs v SZAYW* (2005)145 FCR 523 at [14] (Moore J); and *The State of Queensland (Queensland Health) v Chi Forest* (2008) 168 FCR 532 at [41] (Black CJ).

107 There is an abundance of authority for the proposition that where the Parliament repeats without alteration words which have been judicially construed, it is presumed to have intended the words to bear the meaning already judicially attributed to them: *Re Alcan Australia Limited;*

*Ex Parte Federation of Industrial Manufacturing and Engineering Employees* (1994) 181 CLR 96 at 106-107 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); ***Electrolux*** *Home Products Pty Limited v Australian Workers' Union* (2004) 221 CLR 309 at [7]–[8] (Gleeson CJ), [81] (McHugh J) and [161]-[162] (Gummow, Hayne and Heydon JJ)*; Hewlett Packard Australia Pty Ltd v GE Capital Finance Pty Ltd* (2003) 135 FCR 206 at [171] (Allsop J) and [24] (Branson J); *Vidler v Federal Commissioner of Taxation* (2010) 183 FLR 440 at [29] (Sundberg, Bennett and Nicholas JJ); *Baini v The Queen* (2012) 246 CLR 469 at [43] (Gageler J); *Informax International Pty Ltd v Clarius Group Limited* (2012) 207 FCR 298 at [174] (Besanko, Jagot and Bromberg JJ). The effect of the presumption is that Parliament is taken to know the current law when amending a statute and to have adopted an interpretation unaltered by the amending statute absent any contrary indication. That is, the amended statute is taken to have been enacted against the background provided by existing authority and to endorse that authority.

108 Each case will turn on its own circumstances having regard to the legislative history of the specific statute under consideration and supervening jurisprudence. As Gleeson CJ cautioned in *Electrolux* at [8], no doubt there are circumstances in which it is artificial, and unpersuasive, to attribute to Parliament a consciousness of a judicial interpretation which might have been placed upon an expression, perhaps years before, and in some different context. However, conversely, the inference is strong in a case, such as this where, in the specialised field of industrial relations legislation, Parliament may readily be taken to have an awareness of the interpretations placed by courts on pivotal definitions: *Electrolux* [162] (Gummow, Hayne and Heydon JJ) and [81] (McHugh J).

109 As words are not always used in a statute in their ordinary or popular sense, there are further principles of statutory construction of relevance to this case. As McHugh JA observed in ***Gamer's Motor Centre*** *(Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd* (1985) 3 NSWLR 475, at 494:

> Parliament does not always use words in their popular sense. It may, for example, use words in their legal sense: *Commissioner for Special Purposes of Income Tax v Pemsel* (at 573, 577, 580). In that case Lord Macnaghten said (at 580) that in "construing Acts of Parliament, it is a general rule … that words must be taken in their legal sense unless a contrary intention appears". This passage was approved by the Judicial Committee in *Ashfield Municipal Council v Joyce* [1976] 1 NSWLR 455 at 459; [1978] AC 122 at 134. Parliament may, for example, also use words "according to common commercial or trade usage" and not in their "natural and ordinary sense": see per Mason J in *D & R Henderson (Mfg) Pty Ltd v Collector of Customs (NSW)* (1974) 48 ALJR 132 at 135; see also *Herbert Adams Pty Ltd v Federal Commissioner of Taxation*

> (1932) 47 CLR 222 at 228 and *General Accident Fire and Life Assurance Corporation Ltd v Commissioner of Pay-Roll Tax* [1982] 2 NSWLR 52 at 55. And Parliament may sometimes use words according to the special meanings that they have in particular localities or districts: *Canonba Pastures Protection Board v Leigh* (Court of Appeal, 26 July 1985, unreported).

110 Mc Hugh JA is further cited by Professors Pearce and Geddes in *Statutory Interpretation in Australia,* 8th Ed at [4.13]-[4.19]. The discussion in that text divides technical words in two categories – legal technical words and non-legal technical words. Legal technical words are words that have acquired a legal meaning including words which describe an established legal concept or construct. Non-legal technical words are words that have acquired a specialised common or uniform understanding in a particular trade or other particular area of activity or place.

111 Further to the authorities referred to by McHugh JA in support of the general rule that words that have a legal meaning are to be so construed unless a contrary intention appears, O'Connor J in *Attorney-General (NSW) v Brewery Employee's Union of New South Wales* (1908) 6 CLR 469 at 531 said this:

> Where words have been used which have acquired a legal meaning it will be taken, *prima facie*, that the legislature has intended to use them with that meaning unless a contrary intention clearly appears from the context. To use the words of Denman J. in *R v Slator*: "But it always requires the strong compulsion of other words in an Act to induce the Court to alter the ordinary meaning of a well known legal term."

112 In that case, it was held that the term "trade mark" when used in the Constitution was used in its legal sense. O'Connor J observed at 531 the words "trade" and "mark" when taken together had acquired "a meaning as a legal term".

113 The principles relating to the interpretation of non-legal technical words have been collected and discussed on a number of occasions and are conveniently set out in *Collector of Customs v Bell Basic Industries Ltd* (1988) 20 FCR 146 at 157 (French J). Of relevance to the matters that we need to consider are two of the principles there recorded. The first is that ordinarily, the existence of a common usage in relation to a particular term is to be proven by evidence. Secondly, if the expression is not uniformly understood in a specialised sense in the trade or area of activity, it cannot be assumed that Parliament has adopted or recognised that specialised meaning. In that event, the ordinary meaning (or the legal meaning) of the expression will be applied, having regard to the legislative context.

**Discussion**

114 The main issue on this part of the case is really this: did Parliament intend that the words "casual employees" in s 86 be used in their ordinary sense, their legal sense (as the primary judge did) or the specialised non-legal sense which WorkPac contended was common to federal industrial instruments?

115 Although by identifying that question we have suggested three potential answers, it is necessary to recognise that there may well be overlap and care needs to be taken to avoid an overly compartmentalised approach. As Priestly JA said in *Gamer's Motor Centre* at 483-484:

> In considering the appropriate meaning of the words in their setting it is my view that if there is one ordinary and natural meaning of the words then that meaning must be given to them, but if as is the case here the words have a range of meanings, then the construction to be given to the words used must take into account the legal as well as the "ordinary" uses to which they have been put. No matter how hard a draftsman tries to keep the language of a statute clear and simple, the statute is a legal document. The *Sale of Goods Act* 1923 (the Act) is a legal instrument using words with legal significance in an overall context where all concerned with its passage through Parliament knew the past history of the words used in it and knew also that the meaning to be put upon the words in cases of such doubt as would lead to litigation would be decided by lawyers. Thus when this Court comes to consider the meaning of the words in s 28 of the Act it seems to me necessary to make the kind of survey made by McHugh JA in his reasons [ie a close analysis of the cases interpreting the words in question]. The object of the approach is not to find the legal as opposed to the "ordinary" meaning, but to find from the range of legal and ordinary meanings, which in any event will seldom be in watertight compartments, the meanings best suited to the statutory document as a whole.

116 No party contended that the expression "casual employee" is used in s 86 in its ordinary or popular sense. The expression does, however, have a popular or ordinary meaning which is reflected in the legal sense of the expression but not in the specialised sense for which WorkPac contended. The Macquarie Dictionary (5th Ed) defines the word "casual" in connection to a worker as meaning "employed only irregularly". The Shorter Oxford English Dictionary (6th Ed) refers to special collocations of the word "casual" and lists "casual labourer" as meaning "without permanent employment, working when the chance comes".

117 For reasons which we later give, we are not persuaded on the material to which WorkPac took the Court, that there is a uniformly understood specialised meaning of the expression "casual employee" referrable to the use of that term in federal industrial awards. Further, even if we had been so satisfied, or even if we had been satisfied that a common as opposed to a uniform understanding existed, we would have rejected the meaning contended for by WorkPac on the facts of this case.

118 There are a host of difficulties with WorkPac's contention, based as it is, on the approach taken in *Telum*. The first, and in our view a fatal difficulty, is that the specialised meaning for which WorkPac contended can, at best, only provide part of the meaning for the expression "casual employee" as used in s 86. This is because the meaning contended for by WorkPac only addresses employees covered by an award or enterprise agreement, and is silent as to "award/agreement free employees". Employees not covered by awards/agreements who are also casual employees are also excluded by s 86, but the meaning contended for by WorkPac says nothing of what the expression "casual employee" means for those employees. WorkPac obliquely suggested that the expression in its legal sense would be applicable for such employees. The contention, only faintly put by WorkPac and not established on the evidence, that there may not be many such employees, seems intuitively wrong and is beside the point. Given the extensive reference made in Div 6 (and elsewhere in the National Employment Standards) to award/agreement free employees, it must be presumed that Div 6 was drafted on the basis that such employees exist and that their entitlements to annual leave, including the specification of those who are excluded because they are casual employees, has been addressed.

119 The acceptance of WorkPac's contention requires the conclusion that a single expression used once in a legislative provision was intended to have a dual or compound meaning. Namely, in relation to award/enterprise agreement covered employees, the expression "casual employee" is used in s 86 in the specialised sense for which WorkPac contended, and, that for award/enterprise agreement free employees the expression is used in its legal sense (although as we later discuss, WorkPac sought to deny that the expression had a legal meaning). WorkPac's submissions did not identify, and our own research has not discovered, any authority supportive of a single statutory expression being attributed a dual or compound meaning in analogous circumstances. There is no extant interpretative maxim or principle which supports the adoption of such an interpretation absent a statutory definition or an express or clearly discoverable intent in the text of the statute.

120 Such a result could have been achieved by the inclusion of a definition for the single expression in question. But it seems untenable that where no such definition was provided or no other textual explanation included, the framers of s 86 proceeded in the expectation that it would be understood that the expression "casual employee" was intended to have one meaning when applied to award/agreement covered employees and a completely different meaning for award/agreement free employees. Such an approach to drafting ought not be presumed.

121 The unconventional approach to drafting which WorkPac's contention assumes was applied to s 86 is to be contrasted with the manner in which an entitlement to an extra week of annual leave for a "shiftworker" has been addressed in the same division. Like the expression "casual employee", the term "shiftworker" is undefined. For employees for whom a modern award or enterprise agreement applies, the FW Act has expressly left it to the award or enterprise agreement to "define[s] or describe[s] the employee as a shiftworker for the purposes of the National Employment Standards" (s 87(1)(b)(i) and (ii)). However, in this case, the draftsperson has been conscious that the capacity given to the applicable award or enterprise agreement to define a "shiftworker" entails the need to expressly provide a definition of "shiftworker" for an award/agreement free employee. Such a definition is provided by s 87(3).

122 The manner in which s 87 has given content to the definition of "shiftworker" also draws attention to the observation that, where in Div 6 a criteria of eligibility to an entitlement has been given over to an applicable award or enterprise agreement to define or describe, that has been done expressly and in clear and unambiguous language.

123 So much may be expected. It ought to be presumed that where Parliament is prepared to cede control over a significant definition used in the National Employment Standards to the FWC or to industrial parties making enterprise agreements, it would do so expressly. That is particularly so given the consequences which that course is likely to entail. Delegating to the FWC and to the makers of enterprise agreements the power to define who is a casual employee for the purposes of the National Employment Standards would likely result in a substantial differentiation in the accessibility of those Standards to some employees as opposed to others, despite the fact that the true nature of the employments of all is the same. Alternatively, it may result in the access of the same employees varying over time, as new enterprise agreements are made, despite the fact that the true nature of those employments has not altered.

124 Given the primacy of the terms and conditions provided for by the National Employment Standards, and in particular the inability of awards or enterprise agreements to displace those Standards, it would be counter-intuitive to think that Parliament has, by ceding control of an important expression like "casual employee", intended to reverse the order of priority ordinarily applicable as between the National Employment Standards on the one hand and awards and enterprise agreements on the other. Parliament may well do that, and in the case of "shiftworkers" and their access to an additional week of annual leave, it has done that; but, importantly, Parliament has done so expressly. Absent clear language, it would be wrong to

impute to Parliament an intent to provide industrial parties making enterprise agreements with the capacity to control which employees will and which will not have access to the National Employment Standards.

125 The specific context of accessibility to paid annual leave is particularly instructive. As earlier discussed, the principal entitlement provided for by Div 6 which, by s 86, applies "to other than casual employees", is the taking of annual leave. The purpose of that entitlement is to provide an employee access to rest and recreation. That purpose is apparent in s 93, amongst other provisions. Section 93 permits a modern award or enterprise agreement to include a term providing for the "cashing out" of paid annual leave by an employee. However, such a term must require that paid annual leave not be "cashed out" so as to result in the employee's remaining accrued entitlement to paid annual leave being less than four weeks. The purpose of the restriction imposed on "cashing out" annual leave is confirmed by [378] of the Explanatory Memorandum to the *Fair Work Bill 2008* (Cth). Relevantly, the restrictions imposed are said to be "[i]n recognition of the importance of employees taking leave for the purposes of rest and recreation". Similar restrictions on cashing out paid annual leave are provided for in relation to award/agreement free employees in s 94. What Parliament intended was that the entitlement provided by the National Employment Standards to paid annual leave be utilised as leave in order to provide employees with obligations to provide ongoing work access to rest and recreation.

126 If WorkPac's contention is correct, that statutory purpose could be readily defeated simply because an employee is designated to be a casual employee by an award or enterprise agreement irrespective of the true nature of the employment (remembering, that as few as two employees and their employer may make an enterprise agreement (s 172(6) of the FW Act). On WorkPac's construction, an employee designated to be a casual but working a full-time pattern of work (eg 9.00am to 5.00pm, Monday-Friday) in on-going employment never gains an entitlement to take paid leave, irrespective of how many months or years that pattern of work continues. It cannot be said that, because such an employee would receive a casual loading to compensate for the inability to take paid leave the statutory purpose is addressed. As the cashing out restrictions imposed by ss 93 and 94 show, monies paid in lieu of leave may not defeat Parliament's intent that access to leave be given so as to provide rest and recreation.

127 There are other reasons why, in the absence of clear language, it would be erroneous to impute to Parliament an intent consistent with WorkPac's construction. Parliament must be taken to

be aware that courts will interpret a statute in accordance with conventional principles of statutory interpretation. One such principle is that where words have acquired a legal meaning it will be taken that the legislature intended to use the words with that meaning unless a contrary intention clearly appears. A second relevant principle with particular applicability in a specialist field like industrial relations legislation, is that where Parliament repeats without alteration words which have been judicially construed, it is presumed that the words bear the meaning already attributed to them. Thirdly, the same words appearing in different parts of the statute would ordinarily be construed as words intended to have the same meaning. Each of those cannons of construction have been earlier discussed, and they are each relevant here.

128 As further discussed below, the expression "casual employee" is an expression that has acquired a legal meaning. It is an expression which appears in s 384 of the FW Act in a provision which regulates which employees may access unfair dismissal protections provided by the FW Act. The expression has a long history of use for the same purpose in federal industrial legislation as *Reed* demonstrates in relation to the *Industrial Relations Act 1988* (Cth) and the regulations made thereunder and as *Hamzy* demonstrates in relation to the WR Act. In that context, the expression has been the subject of extensive judicial consideration. As the discussion above of *Williams*, *MacMahon* and *Ledger* records, the expression "casual employee" was extensively used in relation to the legislative predecessors of the National Employment Standards including in the predecessor provision to s 86 itself where it was there used for an identical purpose. *Williams*, which considered the expression in s 86 as it appears in the WR Act and applied its legal meaning, was handed down shortly prior to the enactment of the FW Act.

129 It is difficult to accept that in that historical context, and in the knowledge that the application of well-known principles of statutory construction would (absent clear contrary indication), lead to the expression "casual employee" being construed in its legal sense and consistently with prior authority, Parliament would not have provided a clear indication of a contrary intent if such an intent was held. That has not been done; not directly and not by way of extrinsic material such as the Explanatory Memorandum. We consider that absence to be significant, and in combination with the fact that WorkPac's construction requires the expression "casual employee" to have two distinct meanings (one a specialised industrial meaning and the other a legal technical meaning), we have found the construction contended for by WorkPac unattractive.

130 There are, however, additional hurdles to the acceptance of WorkPac's construction. To this point the discussion has assumed that a uniformly understood specialised meaning of the expression "casual employee" referable to the use of that term in federal industrial awards existed when the FW Act was enacted. The existence of that understanding as a common understanding is the foundation of WorkPac's construction as well as the reasoning in *Telum*.

131 The existence of such an understanding would, as we have said, ordinarily need to be established by evidence. No attempt to do that has been made here. Instead, WorkPac relied on views expressed in decisions of the FWC suggestive of the "common industrial meaning" contended for. Given the FWC's position as a specialist industrial Tribunal, we will assume for the purpose of this discussion, that it is permissible to regard the view of the FWC expressed by its decisions as capable of establishing a uniformly understood specialised meaning of a term used extensively in the field of industrial relations.

132 Even so, WorkPac's contention faces at least two difficulties. *First*, the FWC does not speak with one voice on the matter. There are views expressed in other decisions of the FWC which serve to deny the proposition that the history of engagement by the FWC and its predecessors with the expression "casual employee" has created a "common industrial meaning" which was known to Parliament and adopted by it. The decision in *Cetin*, earlier discussed, is a case in point. There, a Full Bench of the AIRC (presided over by Ross P the current President of the FWC) gave the expression "casual employee" its legal meaning. As earlier stated, that course was the subject of criticism by a differently constituted Full Bench in the *Casual Conversion Case*. In a recent decision of another Full Bench (again presided over by Ross P), *Re 4 Yearly Review of Modern Awards – Penalty Rates* (2017) 265 IR 1, this was said of an expression found in s 134(1)(da)(ii) of the FW Act (at [201]):

> "Irregular or unpredictable hours" is apt to describe casual employment.

133 *Second*, the factual basis for the view expressed in *Telum* and endorsed in the *Casual Conversion Case* is itself questionable. In *Telum*, the Full Bench said that by the time of the award modernisation process "many, if not most" (at [25]) awards and all modern awards (at [38]) contained or contain a "definition" of casual employee the core of which is that a casual is a person labelled or designated as such (at [38]).

134 There are two reasons to question that assertion. The content of modern awards is not to the point; modern awards post-date the enactment of the FW Act and their content is not informative of any understanding Parliament may have had when the FW Act was enacted.

135 Further, the analysis assumes that clauses historically found in federal awards and now in many modern awards which provide that "a casual employee is one engaged and paid as such" (or words similar), is a "definition" clause which, irrespective of the objectively discernible nature of the employment, designates the employee to be in casual employment. As White J said in *Devine Marine* at [141], the word "engaged" in a clause of this type:

> [I]s capable of more than one meaning. On one view, it can refer to the way in which the parties themselves identified their arrangement at its commencement. On another view, it can be a reference to the objective characterisation of the engagement, as a matter of fact and law, having regard to all the circumstances.

136 White J noted (at [141]–[144]) that support for the former construction can be seen from the decision in *Telum* at [38] but that support for the latter construction can be seen from other decisions. Submissions on the competing constructions were not received in *Devine Marine* and White J did not express a concluded view of general application; however, by reference to the particular provisions of the award in question White J preferred the former construction.

137 The Full Bench in *Telum* did express a view of general application but the correctness of that view is contestable. As White J's judgment in *Devine Marine* demonstrates, much may depend on context including the terms of related provisions in the particular award in question.

138 Further, the discussion in *Telum* at [38]–[42] suggests that the clauses in awards which the Full Bench had in mind and which it regarded as designating a casual employee to be a person labelled as such, included clauses of the kind set out at [41] of *Telum*. The clause there exemplified, is in similar terms to cl 5.5.6 of the WorkPac Agreement considered by the primary judge. For reasons later given at [193]-[227], cl 5.5.6 is not a clause which designates an employee to be a casual employee.

139 In our view, the conclusion in *Telum* that most federal awards defined casuals in the manner there stated is the product of a broad generalisation based on an interpretive exercise which is contestable. On the basis of the reasoning in *Telum*, we would not accept, as a fact, WorkPac's proposition that most federal awards defined a casual employee to be a person designated as such by the award and therefore the expression "casual employee" acquired a commonly understood industrial meaning that a casual employee is an employee designated as such by the applicable industrial instrument.

140 We note also that, despite WorkPac's submission that such a meaning has been commonly understood for some 70 years, the only relevant specialist dictionary we are am aware of, *The CCH Macquarie Dictionary of Employment and Industrial Relations* (1992, CCH Australia

Limited), makes no mention of the meaning contended for. There, "casual employee" is given this definition (emphasis in original):

> **casual employee** an employee who is employed for work of intermittent nature which does not carry with it the guarantee of a full week's work each week, nor, often, an on-going employment relationship. Casual employees are often not entitled to specific award provisions applying to other employees (e.g. **leave** provisions and the standard **redundancy** provisions applying to employees under federal awards as a result of the **termination of employment test case**). A casual loading is usually added to the employee's wage to compensate for such disadvantages. Also **casual worker.** See also **casual work**.

141 Further, a Full Bench of the Industrial Relations Commission of New South Wales (WrightP, Walton VP, Harrison DP, Haylen J and Tabbaa C) said in *Re Secure Employment Test Case* (2006) 150 IR 1 at [231]:

> The concept of a "casual" which has emerged through historical employment practice and industrial jurisprudence and which has now long been defined and regulated in awards in this State is essentially one in which: the employee has a short term engagement; shifts are irregular and unpredictable; the employee is not obliged to accept an offer to work a particular shift; the employee's employment technically commences at the beginning of a particular shift and ceases at the end of that shift; the employee is paid a loading as compensation for, amongst other things, annual leave and other benefits "accrued" during each shift worked; and the employee has no expectation of being rostered for another shift.

142 We do not accept that WorkPac has established a uniformly understood specialised meaning of the expression "casual employee" which existed in the field of industrial relations at the time that the FW Act was enacted. We should add that a consistency of understanding for the "common industrial meaning" contended for was not even maintained in the course of the hearing. While WorkPac's written submissions stated that a "casual employee" was an employee defined or described as a casual employee under the applicable federal industrial instrument, WorkPac's oral submissions, at various times, identified two additional features. First, that the employee is paid a casual loading pursuant to the applicable industrial instrument, and second, that the employee is employed on an hourly or daily basis.

143 To this point, we have directly addressed and rejected the third and fourth propositions from *Telum* and implicitly disagreed with the first proposition dealing with the principles of statutory construction. For reasons that will already be apparent, the failure in *Telum* to take into account all of the applicable principles of statutory construction helps to explain why the reasoning in *Telum* is flawed.

144 The second proposition from *Telum* is that the "ill-defined" general law notion of casual employment on which reasonable minds may differ, would not have been adopted by

Parliament. It may well be true that reasonable minds may differ as to the meaning of "casual employee". However, the same may be said about the meaning of the term "employee", a key term in the FW Act which is also not defined, the content of which is left to the general law. We see nothing surprising in the suggestion that the same approach was taken to the expression "casual employee".

145 The seventh proposition that Parliament intended that awards, enterprise agreements and the National Employment Standards interact consistently and harmoniously cannot be denied. That intent is expressly effectuated by s 55 of the FW Act which addresses the interaction between the National Employment Standards and a modern award or an enterprise agreement. Sections 56 and 61 are also part of the hierarchy established by the FW Act in which priority is given to the National Employment Standards over enterprise agreements and awards. Section 57 deals with the interaction between awards and enterprise agreements. It is via those provisions, in which priority is accorded as between the National Employment Standards, awards and agreements that consistency and harmony is achieved. The construction of the expression "casual employee" in s 86, which we prefer, respects those priorities and the intended harmony for the reasons already given. The construction preferred in *Telum* and contended for by WorkPac does not.

146 The fifth proposition that, there would be "double dipping", is related to the proposition just addressed. If the priority order or the hierarchy just mentioned is respected, as Parliament must have intended, there would be no "double dipping". There is nothing in the FW Act that requires employees who are not casual employees and thus entitled to annual leave under s 87 to be paid a casual loading. If so much is recognised and respected by awards and enterprise agreements, as the hierarchy established by the FW Act must envisage, no "double dipping" is possible.

147 In this case, Mr Skene was paid an all in flat rate (initially $50.00 and later $55.00 per hour) under his contract of employment. It is not clear that he was paid a casual loading at all. Like the contract under consideration in *MacMahon* (see at [67]), Mr Skene's contract did not allocate any part of the rate of pay to a casual loading or as monies in lieu of paid annual leave. For that and other reasons a claim of set-off failed in *MacMahon*. The primary judge did not find that a loading was paid to Mr Skene**.** Assuming, however, that Mr Skene was paid a casual loading which was at least in part in lieu of paid annual leave, it may be said he will be paid twice for the same entitlement if he is now compensated for not being paid annual leave as the

primary judge found he should be. However, that Mr Skene was paid a casual loading when he need not have been is not a legitimate basis for construing s 86 of the FW Act in the manner for which WorkPac contends.

148 Returning to the propositions in *Telum*, the sixth proposition from *Telum*, (and WorkPac's submissions) pointed to the definition in s 12 of the FW Act of "long term casual employee" and in particular to the content of paragraph (b) thereof. That definition states:

> ***long term casual employee***: a national system employee of a national system employer is a ***long term casual employee*** at a particular time if, at that time:
>
> (a) the employee is a casual employee; and
>
> (b) the employee has been employed by the employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months.

149 The Full Bench in *Telum* at [51] said this:

> This very definition suggests that [the] legislature did not intend the expression "casual employee" to call up the general law approach. If the criterion in (b) is satisfied then the employee would likely not be a "casual employee" under the general law approach but the definition presupposes that an employee who satisfies the criterion in (b) can still be a "casual employee" within the meaning of (a).

150 That reasoning is at odds with the reasoning in *Williams* at [57]-[68] where the legislative predecessor to the s 12 definition of "long term employee" was considered. Further, the reasoning impliedly assumes that the word "regular" in para (b) of the definition of "long term casual" is referring to the pattern of work of the employee and the frequency and consistency of work performed, rather than the pattern of engagement of the employee to perform work. The word "employed" in para (b) like the word "engaged", is capable of referring to the act of hiring an employee to perform work or the actual performance of work. In ***Yaraka Holdings Pty Limited v Ante Giljevic*** (2006) 149 IR 339, the ACT Court of Appeal was called upon to construe s 11 of the *Workers Compensation Act 1951* (ACT). That provision deemed a person engaged under a contract for services (ie an independent contractor) to be an employee for the purposes of that Act. An individual "engaged … on a casual basis under a contract of service" is taken to be a worker but, relevantly, only where the engagement "has been on a regular and systematic basis". As Crispin P and Gray J noted at [64] the concept of "employment on a regular and systematic basis" was drawn from provisions found in regulations under the WR Act, in particular reg 30B. The same can be said of the s 12 definition in the FW Act of "long-term casual employee". At [65], Crispin P and Gray J observed that what needed to be "regular and systematic" was the "engagement" of the person rather than the hours worked pursuant to

such engagement. Whilst the frequency of work was to be considered, their Honours considered that the provision "contains nothing to suggest that the work performed pursuant to the engagement must be regular and systematic as well as frequent". At [68], their Honours said this:

> The term "regular" should be construed liberally. It may be accepted, as the Magistrate did, that it is intended to imply some form of repetitive pattern rather than being used as a synonym for "frequent" or "often". However, equally, it is not used in the section as a synonym for words such as "uniform" or "constant".

151 In his judgment, Madgwick J came to the same view. At [89], his Honour said:

> a 'regular… basis' may be constituted by frequent though unpredictable engagements and that a 'systematic basis' need not involve either predictability of engagements or any assurance of work at all".

152 The correctness of the assumption made in *Telum* that para (b) of the definition of "long-term casual employee" requires constancy of work rather than regularity of hiring is contestable. We see some force in the proposition that the construction adopted in *Yaraka Holdings* has application to the definition of "long-term casual employee", but there are textual differences between the two provisions and the Court has not had the benefit of submissions from the parties on the issue. It is not necessary to express a final view because we would reject the reasoning in *Telum* even if the assumption was correct. The lack of any significant tension between the use of the expression "casual employee" in its legal sense and the s 12 definition of "long-term casual", even if the assumption made in *Telum* is correct, is illustrated by example at [174]-[175] below. Consistently with the reasoning in *Williams* at [61] to the effect that para (b) is retrospectively focussed on how the employee "has been engaged", the fact that the pattern of work performed by the employee turned out to be constant, does not deny the characterisation of the employment as casual employment.

153 The reasoning in *Telum* also wrongly assumes that the general law meaning of "casual employee" is inconsistent with or does not countenance the possibility that a casual employee may have worked on a regular and systematic basis for a sequence of periods of employment. As we will further discuss below, the statement in *Hamzy* at [38] that "[t]he essence of casualness is the absence of a firm advance commitment as to the duration of the employee's employment or the days (or hours) the employee will work", provides the rationale of casual employment. Immediately following the sentence just quoted, the Full Court said this:

> But that is not inconsistent with the possibility of the employee's work pattern turning out to be regular and systematic.

154 In any event, if there is inconsistency between the general law understanding of the expression and the use of the expression in the FW Act, the proper conclusion, in our view, is that Parliament intended to use "casual employee" in its legal sense as adjusted by any indications to be drawn from the FW Act.

155 For all those reasons we reject the construction of the expression "casual employee" for which WorkPac contends. In our view, the expression in s 86 is used in its legal sense of which we will say more shortly. That being so, WorkPac's primary challenge to the finding that Mr Skene was "other than a casual employee" under s 86 of the FW Act should be rejected.

156 Even if we are wrong and the expression "casual employee" is used in the specialist sense contended for by WorkPac, because we later conclude that the WorkPac Agreement did not designate Mr Skene to be a casual employee, the application of WorkPac's construction would lead to the dismissal of its appeal.

157 WorkPac did contend that the expression "casual employee" did not have a fixed legal meaning. In so far as by that submission, WorkPac was contending that the expression had not acquired a legal meaning, we disagree.

158 In ***Doyle*** *v Sydney Steel Company Limited* (1936) 56 CLR 545, Starke J at 551 said that the expression "casual worker" was "not one of precision". McTierrnan J made a similar remark at 565 stating that each case is to be determined on its facts. Dixon J at 555 said that casual employment is "ill-defined" but that it was open "to treat most forms of intermittent or irregular work as casual". In ***Shugg*** *v Commissioner for Road Transport & Tramways (NSW)* (1937) 57 CLR 485 at 496, Dixon J said that the expression "casual" is a word of "indefinite meaning" but apt to be associated with "elements of chance or of discontinuity". His Honour further observed that casual employment was considered to be "occasional or intermittent" employment.

159 It may be accepted that the term "casual employee" has no precise meaning and that whether any particular employee is a casual employee depends upon an objective characterisation of the nature of the particular employment as a matter of fact and law having regard to all of the circumstances. That the expression lacks precise definition and that the shade of its colour is dependent upon context does not deny that the term has acquired a legal meaning, especially where the general law has laid down indicia by which the factual circumstances are to be assessed in the process of characterisation. In that regard the expression "casual employee" is

no different to the term "employee". Both have acquired a legal meaning referrable to the particular indicia found by the authorities to be relevant to the characterisation process. For the term "employee" the relevant indicia are applied through what is commonly described as a "totality test"*: Hollis v* ***Vabu*** *Pty Ltd* (2001) 207 CLR 21 at [24] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ). White J in *South Jin* recognised that the expression "casual employee" had a "meaning in the general law" at [65]. As did Barker J in *MacMahon* at [34].

160 In the alternative to its primary contention that "casual employee" has a specialised meaning, WorkPac contended that the facts support the conclusion that Mr Skene nevertheless fell within the expression as used in s 86. On this submission, WorkPac's contention was based on the general law approach to characterisation but with adjustment said to be justified by the statutory context.

161 First, Workpac's contention sought to distance the characterisation process from the indicia identified in *Doyle*, *Reed*, *Hamzy* and *Melrose Farm* on the basis that statements there made about the relevant indicia were confined by the legislative context in which the expression "casual worker" or "casual employee" was there being considered. In the case of *Doyle*, the legislative subject considered was workers compensation. In *Reed* and *Hamzy*, the subject was unfair or unlawful dismissal. In *Melrose Farm*, the issue was whether an employee had been underpaid under a particular industrial award. Why the indicia identified in those cases were particular to the statutory or regulatory context in which those cases were determined was not really explained.

162 The contention is unpersuasive. We take into account that Moore J in *Reed* was interpreting a specific phrase ("engaged on a casual basis for a short period") and doing so in light of a meaning given to that expression in a treaty (the International Labour Organisation's Convention Concerning Termination of Employment at the Initiative of the Employer). Nevertheless, the indicia of informality, uncertainty and irregularity of employment identified in *Reed* were not suggested by Moore J to be inapplicable to the Australian understanding of the concept of casual employment and are reflected in other authorities which have considered casualness of employment in a purely Australian context, including the early observation of Dixon J in *Doyle* set out above and those of Barker J in *MacMahon* at [33]-[34]. The observations of Moore J in *Reed* were also applied by Crispin P and Gray J (with whom Madgwick J agreed) in *Yaraka Holdings* (at [66]).

163 Furthermore, WorkPac made no attempt to distinguish *MacMahon* on the basis of the legislative subject of the provision considered. As already recorded, the subject was a statutory entitlement to annual leave. Nor was any attempt made to distinguish *Ledger* on the basis of statutory context, which is understandable given that *Ledger* dealt with the very legislative context that is here being considered. Nor did WorkPac make any attempt to distinguish, by reference to statutory subject (casual loading), the general law approach taken in *South Jin* to construing the expression "casual employee".

164 In our view, the indicia identified in those cases are relevant and not excluded by reason of the statutory context in which the expression "casual employee" is found in s 86. We accept, of course, that a statute may indicate that the legal (or indeed the ordinary meaning) of a term is to be adjusted. However, if the subject matter addressed by s 86 (and Div 6) favours any adjustment, the indications given by that subject matter support the contention that employees in continuous employment are not within the scope of the expression "casual employee". That is because, as we have already explained, the purpose of Div 6 includes providing to employees a guaranteed break from work, an entitlement which it is likely was directed at employees in continuous employment rather than those in irregular, intermittent, occasional or discontinuous employment.

165 *Shugg* is a case in point. The issue there was access to an entitlement to annual leave conferred upon employees of the Commissioner of Road Transport and Tramways by s 123 of the *Transport Act 1930* (NSW). Section 123 provided annual leave "to officers". The plaintiff had been employed as a "casual" but had been continuously employed for over three and a half years. The issue was whether the plaintiff was an "officer" for the purposes of s 123 despite having been engaged as a "casual". By majority the High Court held that he was. That the provision of annual leave was directed at employees in continuous employment and that therefore the word "officer" should be construed to include such employees (whether engaged as "casuals" or "permanent" employees) is apparent from the reasoning of Latham CJ at 491, Dixon J at 496-497 (where his Honour drew a distinction between "general, indefinite or continuous employment" to which s 123 applied and "an employment for a particular occasion or occasions, or to fulfil some special or defined purpose of brief duration" to which s 123 was inapplicable), and Evatt J at 498.

166 We do not accept that the statutory context in this case indicates the adjustment contended for by WorkPac. Despite the absence of a finding that Mr Skene was paid a casual loading, the

primary way in which that adjustment was put by WorkPac was that the only relevant indicator of casual employment for the purposes of s 86 is that the employee is paid a casual loading.

167 The statutory context and the way in which WorkPac relied upon it has already been discussed in relation to WorkPac's primary contention. It is similarly answered by the reasoning already given. WorkPac's appeal to context is fundamentally based on the idea that Parliament intended that an employee should be entitled to either a minimum period of leave or monies in lieu thereof. Therefore, so the argument goes, a person who receives monies in lieu has been excluded from the entitlement to take leave. However, the exchange upon which that proposition is founded is antithetical to Parliament's purpose in relation to the taking of the leave conferred by s 87. Sections 93–94 provide that a minimum period (four weeks) of access to annual leave may not be exchanged for monies.

168 A rationale for the exclusion of casual employees consistent with Parliament's purpose is to be found in what the Full Court in *Hamzy* said was "the essence of casualness" being (from the perspective of the employee) the absence of a firm advance obligation to provide on-going work and therefore a capacity for the employee to have access to rest and recreation. In other words, employees who have no ongoing obligation to provide their services have the capacity to take a break from work and need not be guaranteed annual leave. Accordingly, no such guarantee is given to casual employees by Div 6.

169 In rejecting WorkPac's contention, we do not intend to suggest that the payment of a casual loading may not be a relevant indicator in the characterisation process. Our conclusion however reinforces the importance of the "essence of casualness" referred to in *Hamzy*. We respectfully agree with Wilcox, Marshall and Katz JJ in *Hamzy* at [38] that the "absence of a firm advance commitment as to the duration of the employee's employment or the days (or hours) the employee will work" is the essence of casualness. That insightful description needs to be further explored so as to expose its rationale.

170 What needs to be recognised is that the expression "casual employee" describes a type of employment that, at least in part, takes its meaning from other recognised types of employment. Beyond the reference made to casual employees, there is extensive reference made in the FW Act to two other types of employees – full-time and part-time employees (including, in Pt 2–2 at ss 62(1), 63(1), 64(1) and 114(4) in respect of full-time employees, and ss 65(1B) and 114(4) in respect of part-time employees). This reflects the reality that the vast majority of employees in Australia conveniently fall into one of three categories – full-time, part-time or casual.

Another type of employee also extensively referred to in the FW Act is a "shiftworker", but a shiftworker will usually also be a full-time, part-time or casual employee.

171 A "type" of anything is usually distinguished by a characteristic or perhaps several characteristics not present in other categories of a like nature. The characteristic that distinguishes full-time and part-time employment is that those employments are on-going (sometimes called "permanent") employments. On-going employment does not mean life-long employment (***McClelland*** *v Northern Ireland General Health Services Board* [1957] 1 WLR 594 at 601 (Lord Goddard); *Haley v Public Transport Corporation of Victoria* (1998) 119 IR 242 at [82] (Ashley J) but on-going employment is employment for an indefinite term subject to rights of termination (*McClelland* at 601 (Lord Goddard)). 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 (as distinct from overtime) work. A corresponding commitment to provide service is given by the employee. What distinguishes a full-time employee from a part-time employee is the pattern of work agreed to. A full-time employee's pattern of work will be the ordinary full-time hours applicable at the particular workplace (eg eight hours each week-day). A part-time employee's pattern of work will be a fixed number of ordinary hours, the number of hours being less that the full-time ordinary hours applicable at the workplace, worked at a regular time on regular days (eg 9.00 am to 1.00 pm every Monday, Tuesday and Thursday).

172 In contrast, a casual employee has no 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. That characteristic, drawn from *Hamzy,* is what White J referred to in more general terms in *South Jin* at [71] as "any commitment by the employer or the worker to ongoing employment". In our view, what is referred to in *Hamzy* as the "essence of casualness", captures well what typifies casual employment and distinguishes it from either full-time or part-time employment.

173 The indicia of casual employment referred to in the authorities – irregular work patterns, uncertainty, discontinuity, intermittency of work and unpredictability – are the usual manifestations of an absence of a firm advance commitment of the kind just discussed. An irregular pattern of work may not always be apparent but will not necessarily mean that the underlying cause of the usual features of casual employment, what *Hamzy* identified as the "essence of casualness", will be absent.

174 This is best illustrated by example. A relief teacher is employed by a secondary school to relieve a teacher ill with the flu. She is employed for 10 consecutive school days. On the ninth day she is asked to relieve a teacher taking two months long-service leave. That takes her employment through to the end of the school term. A few days into the new term, the relief teacher relieves for another teacher who has unexpectedly been dismissed and works for a month until a replacement for the dismissed teacher is found. And so the pattern continues for 12 months. Whilst irregularity was not a feature of the employment, at no time during the 12 month period was the teacher other than in casual employment because at no time was there a firm advance mutual commitment to on-going employment on an agreed pattern of ordinary hours of work. It just happened that the teacher's work turned out to be regular.

175 A second example may be illustrated by reference to a researcher employed by a university as and when funding grants for particular scientific research become available to fund the employment of an additional researcher. Funding grants are short-term and whether or not the university will succeed in obtaining funds is unpredictable. In a particular year the university is successful in winning several grants across a number of research projects. That results in the researcher moving from one project to the next but being regularly employed for over 12 months. Unpredictability as to the availability of further work for the researcher meant that at no point in the 12 month period was an advance mutual commitment to on-going employment on an agreed pattern of work a characteristic of the employment. Despite the regularity of the employment, the researcher remained a casual employee over that period.

176 Each of those employees would likely meet the definition of "long-term casual employee" in s 12 on the completion of a 12 month pattern of employment of the kind which the examples illustrate. At the end of such a period, each will be a casual employee having been employed by their employer "on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months". If the employee had a reasonable expectation of that pattern of employment continuing, the FW Act provides the employee with access to flexible working arrangements (s 65(2)(b)) and parental leave (s 67(2)).

177 The discussion has sought to emphasise that, in their ordinary conceptions, casual employment and full-time and part-time employments are mutually exclusive categories of employment. An employee cannot be both a casual employee and full-time or part-time employee at the same time in the same employment. The features that distinguish one from the other are important to bear in mind in the characterisation process.

178 It is also necessary to bear in mind that employment arrangements may change during the course of an employment. What is agreed to at the commencement of an employment is relevant to the characterisation process, but an employment which commences as casual employment may become full-time or part-time because its characteristics have come to reflect those of an on-going part-time or full-time employment.

179 As Buchanan J said in *Ledger* at [62]:

> It must be accepted that, over time, repetition 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 discrete and separate periods of employment has become, upon the tacit understanding of the parties, a regular ongoing engagement (for an example of historical interest, see *Cameron v Durning* [1959] AR (NSW) 142).

180 The conduct of the parties to the employment relationship and the real substance, practical reality and true nature of that relationship will need to be assessed. This is now the settled approach to the question of whether a person is an employee: see *Fair Work Ombudsman v* ***Quest*** *South Perth Holdings Pty Ltd* [2015] FCAFC 37 at [142] (North and Bromberg JJ) citing *R v Foster; Ex parte The Commonwealth Life (Amalgamated) Assurances Limited* (1952) 85 CLR 138, at 151 and 155 (Dixon, Fullagar and Kitto JJ); *Vabu* at [24], [47], [57], [58] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *ACT Visiting Medical Officers Association v Australian Industrial Relations Commission* (2006) 232 ALR 69 at [25] and [31] (Wilcox, Conti and Stone JJ); *Damevski v Giudice* (2003) 133 FCR 438 at [77]–[78] (Marshall J, with whom Wilcox J agreed) and [144], [172] (Merkel J); *Dalgety Farmers Ltd t/as Grazcos v Bruce* (1995) 12 NSWCCR 36 at 46–48 (Kirby ACJ, with whom Clarke and Cole JJA agreed); *Autoclenz Ltd v Belcher* [2011] 4 All ER 745 at [22], [25]–[26], [29]–[32] (Lord Clarke SCJ, with whom Lord Hope DP, Lord Walker, Lord Collins and Lord Wilson SCJJ agreed). See also *ACE Insurance Ltd v Trifunovski* (2011) 200 FCR 532 at [29] (Perram J); and on appeal ***ACE Insurance*** *Ltd v Trifunovski* (2013) 209 FCR 146 at [93] and [102] (Buchanan J, with whom Lander and Robertson JJ agreed). In such an assessment "the nature of the relationship may be legitimately examined by reference to the actual way in which the work was carried out": *Ace Insurance* at [91]. The same approach is appropriate to adopt in determining the nature of the employment relationship. It is the approach adopted in *MacMahon* (at [38]) and apparent from the reasoning in *Reed* (at 424), *Hamzy* (at [38]), *Melrose Farm* (at [101]-[105]), *Bernardino* ([18]-[23]), *Ledger* (at [62] and [65]) and *South Jin* (at [138]-[152]) discussed above and also *CPSU, Community & Public Sector Union v State of Victoria* (2000) 95 IR 54 at [10] (Marshall J). In *Reed*, Moore J at 424 said this:

> The characterisation of Reed's employment by either Reed and/or representatives of the Company generally or in a document, and the provisions of the Award, are simply matters to be taken into account in determining the true character of the employment.

181 Whether the requisite firm advance commitment to continuing and indefinite work (subject to rights of termination) 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 (including the FW Act, awards and enterprise agreements) applicable to the employment.

182 The payment by the employer and the acceptance by the employee of a casual loading, like the description of the type of employment given by the parties in their contractual documentation, speaks to the intent of the parties to create and continue a casual employment. But the objective assessment will need to consider whether that intent has been put into practice and if achieved, has been maintained. The objectively demonstrated existence of a firm advance commitment to continuing and indefinite work (subject to rights of termination) according to an agreed pattern of work will ordinarily demonstrate a contrary intent and the existence of on-going full-time or part-time employment rather than casual employment. 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.

183 In this case, the primary judge found (at [85]) that the essence of casual employment as described in *Hamzy* (and applied in *MacMahon*) was missing in relation to Mr Skene's employment. His Honour did so having found (at [81]) that Mr Skene's pattern of work was "regular and predictable", "continuous" and "not subject to significant fluctuation" in circumstances where "there was plainly an expectation that Mr Skene would be available, on an ongoing basis, to perform the duties required of him in accordance with his roster" (set 12 months in advance).

184 WorkPac's contention that the primary judge erred because what he regarded to be the essence of casual employment cannot be the essence of casual employment under the FW Act must be rejected. Nor, was there any error in the primary judge's reliance upon the regularity, predictability, certainty and continuity of the pattern of Mr Skene's work.

185 Whilst the contention does not seem to have been raised before the primary judge, that the primary judge did not treat the payment of a casual loading to Mr Skene as a determinative factor of casual employment, is not demonstrative of error.

186 WorkPac also contended that a relevant factor was that both it and Mr Skene had considered that Mr Skene was in casual employment. We agree that that was a relevant factor. At [82], the primary judge took that factor into account.

187 Furthermore, WorkPac contended that the fact that the WorkPac Agreement defined or described Mr Skene as a casual employee was "highly relevant if not determinative". We agree that if the Agreement had defined or described Mr Skene as a casual employee, for the purposes of s 86 of the FW Act, that fact would have been a relevant factor to be taken into account just as a designation in a contract would be a relevant factor. However, as we later determine, the Agreement did not define or describe Mr Skene to be a casual employee. There is no error in the primary judge having had no regard to that factor.

188 Further, WorkPac contended that Mr Skene was engaged by the hour and that that was a relevant factor. While that may be a relevant factor in some circumstances, it is "not a necessary characteristic of casual employment that the employee work under a series of separate and distinct contracts of employment each entered into for a fixed period" (*Melrose Farm* at [106]). Further, as McTiernan J said in *Doyle* at 565, "[e]ngagement at an hourly rate is not a criterion of casual employment as distinct from regular employment".

189 In any event, WorkPac's contention faces two hurdles neither of which are overcome. First, the contention that Mr Skene was engaged by the hour was made on the basis that Mr Skene was a "casual FTM" under the Agreement. We have determined that he was not and also determined (at [224]) that cl 5.6.1 does not, on its proper construction, envisage hourly employment; that is, cl 5.6.1 does not envisage that an employee is separately contracted for each hour of work. Second, the primary judge made a factual finding, not challenged by the ground of appeal, that Mr Skene was not engaged "by the hour" (at [54]).

190 The second contention relies on the erroneous proposition that Mr Skene was designated to be a casual employee under the Agreement. However, the primary judge (at [82]) took into account that Mr Skene was paid by the hour and that (at [54]) even if Mr Skene had been engaged by the hour, that would not necessarily mean that he was a casual employee even for the purposes of the Agreement.

191 Lastly, WorkPac contended that a relevant factor was that Mr Skene's employment could be terminated on an hours' notice. The submission being that termination on an hour's notice is indicative of casual employment. Again, while we accept that termination on very short notice may be a relevant factor (*MacMahon* at [42]), it is not a factor necessary indicative of casual employment. Subject to any regulatory restriction, contracting parties are free to provide for termination on short notice for any kind of employment. In any event, the primary judge (at [82]) took into account that Mr Skene's employment was terminable on an hours' notice. There was no error in the primary judge not regarding that factor as determinative or giving it any more significance than he did.

192 For all those reasons, WorkPac's alternative challenge to the judgment of the primary judge that Mr Skene was entitled to annual leave under the FW Act must be rejected. As WorkPac has failed on both its primary and alternative challenges, its appeal must be dismissed.

**ENTITLEMENT TO ANNUAL LEAVE UNDER THE WORKPAC AGREEMENT**

193 The approach taken by the primary judge and the conclusions reached by him on the issue of whether or not under the Agreement Mr Skene was entitled to annual leave and, on termination, monies in lieu of untaken annual leave, are addressed earlier in our reasons at [39]-[42]. Recapping, the primary judge held that only a "permanent FTM" was entitled to annual leave under cl 19.1.1 of the Agreement and that Mr Skene was a "casual FTM" and, it followed having regard to the way the case was conducted, not a "permanent FTM". The primary judge's finding that Mr Skene was a "casual FTM" for the purposes of the Agreement was based on the primary judge's interpretation of cl 5.5.6 of the Agreement. The primary judge held that by reason of that provision, whether Mr Skene was a "casual FTM" for the purposes of the Agreement was "left up to [WorkPac] at the time of his engagement" (at [59]) and that WorkPac had impressed upon Mr Skene the status of "casual FTM" by having made him an offer of casual employment in the "Notice of Offer of Casual Employment" (at [62]).

194 It is necessary to set out the terms of cl 5.5 of the Agreement:

> **5.5 Status of Employment**
>
> 5.5.1 FTMs under this Agreement will be employed in one or more of the following categories:
>
> (a) full-time FTMs; or
>
> (b) part-time FTMs; or
>
> (c) casual FTMs; or

(d) limited term or assignment FTMs; or

(e) FTMs employed for a specific project/site or workplace related task.

5.5.2 FTMs engaged in each of the above categories will be engaged as either a base rate FTM or a flat rate FTM. The method of remuneration for base rate and flat rate FTMs is set out in clause 8.

5.5.3 FTMs engaged and paid the base rate of pay shall be referred to in this agreement as Base Rate FTMs.

5.5.4 FTMs engaged and paid the flat rate of pay shall be referred to in this agreement as Flat Rate FTMs.

5.5.5 Casual FTMs will be engaged by the hour on one of the following basis:

(a) A person engaged as a base rate casual, as defined in clause 8.1.1, will be paid a casual loading of 20% on the rates prescribed herein. The casual loading is in lieu of all paid leave entitlements (with the exception of long service leave).

(b) A person engaged as a flat rate casual, as defined in clause 8.1.1, will not be paid an additional amount as the casual loading has been incorporated into the flat rate of pay.

5.5.6 At the time of their engagement, the Company will inform each FTM of the status and terms of their engagement.

195 The first ground of Mr Skene's appeal is that the primary judge erred in holding that he was a casual employee for the purposes of the Agreement. Mr Skene contended that the primary judge erred in holding that pursuant to cl 5.5.6, WorkPac could subjectively determine that Mr Skene was a "casual FTM". Mr Skene contended that cl 5.5.6 merely cast a duty on WorkPac to inform Mr Skene of his correct employment status as objectively determined. Based on the same matters relied upon to contend that Mr Skene was not a casual employee for the purposes of s 86 of the FW Act, Mr Skene contended that objectively determined, he was not a casual employee. He contended that the primary judge should have concluded that he was not a casual employee for any purposes, including for the purposes of the Agreement. In short, Mr Skene contended that the Agreement operated on the true character of Mr Skene's employment and that as he was not a casual employee, he was not a "casual FTM" and therefore was a "permanent FTM" for the purposes of cl 19.1. In the alternative, Mr Skene contended that if the Agreement operated on the basis of a status accorded to him under the Agreement, he was not a "casual FTM" because pursuant to cl 5.5.5 a "casual FTM" is an employee "engaged by the hour" and the primary judge found (at [54]) that Mr Skene was not engaged by the hour.

196 WorkPac's submissions essentially supported the approach taken by the primary judge. WorkPac contended that the meaning of "casual FTM" turned upon the effect given to that

expression by the provisions of the Agreement. It contended that the Agreement has "express machinery" for the determination of the status and category of employment of employees to whom the Agreement applies. It submitted that cl 5.5.1 provided for the characterisation of employees into one of the six categories there specified and that cl 5.5.6 provided the machinery for the determination of the status and category of the employee. WorkPac denied that the purpose of cl 5.5.6 was to require it to accurately inform the employee of his or her employment status. WorkPac contended that properly construed the "words of cl 5.5.6 necessitate the conclusion that the status of each FTM is the status accorded to that employee (as the clause provides) by the 'Company … inform[ing] each FTM of [their] status'".

197 The starting point for interpretation of an enterprise agreement is the ordinary meaning of the words, read as a whole and in context: *City of Wanneroo v* ***Holmes*** (1989) 30 IR 362 at 378 (French J). The interpretation "… turns on the language of the particular agreement, understood in the light of its industrial context and purpose …": ***Amcor*** *Limited v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241 at [2] (Gleeson CJ and McHugh J). The words are not to be interpreted in a vacuum divorced from industrial realities (*Holmes* at 378); rather, industrial agreements are made for various industries in the light of the customs and working conditions of each, and they are frequently couched in terms intelligible to the parties but without the careful attention to form and draftsmanship that one expects to find in an Act of Parliament (*Holmes* at 378–9, citing *Geo A Bond & Co Ltd (in liq) v McKenzie* [1929] AR(NSW) 498 at 503 (Street J)). To similar effect, it has been said that the framers of such documents were likely of a "practical bent of mind" and may well have been more concerned with expressing an intention in a way likely to be understood in the relevant industry rather than with legal niceties and jargon, so that a purposive approach to interpretation is appropriate and a narrow or pedantic approach is misplaced: see *Kucks v CSR Limited* (1996) 66 IR 182 at 184 (Madgwick J); *Shop Distributive and Allied Employees' Association v Woolworths SA Pty Ltd* [2011] FCAFC 67 at [16] (Marshall, Tracey and Flick JJ); *Amcor* at [96] (Kirby J).

198 Industrial agreements (such as enterprise agreements) will commonly differentiate between groups of employees covered by the agreement because some terms and conditions provided for by the agreement will be applicable to some groups but not others or, if applicable to all, may provide that different rates or conditions apply to different groups. In those circumstances, an enterprise agreement must assign the employees covered by it into different categories and

provide a definition, or identify some other mechanism, for allocating employees into those categories.

199 That, for instance, is commonly done in relation to rates of pay. For this purpose an agreement will commonly provide for the categorisation of employees into different competency based classifications. Indeed, that is done by the Agreement. Schedule 1 sets out and defines the classifications, and cl 7.1 provides a mechanism by which an employee is assigned to a particular classification.

200 Beyond the competency-based classification groupings provided for by the Agreement, it is clear from cl 5.5.1 that, for the purposes of the Agreement, the Agreement envisages that employees be grouped according to the full-time, part-time, casual etc nature of their employments. That is necessary because the Agreement provides different terms for those different categories. For instance, cl 5.6 provides for termination of employment, including notice of termination, differentially according to the categories of employment set out in cl 5.5.1.

201 Unlike the classification definitions provided in Schedule 1, there are no definitions given for the categories listed in cl 5.5.1. Clause 1.6 of the Agreement is headed "Definitions". It defines some categories of employees such as "5 day weekend roster employee", but not the categories listed in cl 5.5.1.

202 Where a term is undefined, unless there is contrary indication, it ought to be presumed that the draftsperson intended that the term have its ordinary meaning. Despite the broad purposive approach to be taken to the interpretation of industrial agreements, that cannon of construction remains applicable as a starting point.

203 Each of the categories listed in cl 5.5.1 are well-known categories of employment. In fact the list includes all of the generally understood kinds of employment available. That suggests that a "casual FTM" (FTM meaning an employee) was intended to mean a casual employee in the usual connotation of that term (in its legal sense).

204 If that is so, the primary judge's ultimate conclusion was erroneous. For reasons already given in relation to WorkPac's appeal, Mr Skene was not a casual employee according to the usual connotation of that term.

205 However, it may be that what was intended was that "casual FTM" have its usual meaning as adjusted by any indications elsewhere found in the Agreement. Or, alternatively, it may be, as

WorkPac contended and as the primary judge found, that instead of providing a definition for the categories listed in cl 5.5.1, the Agreement by cl 5.5.6 provides "machinery" for the categorisation process which provides that WorkPac determines, at its election, which of the categories listed in cl 5.5.1 is applicable to a particular employee.

206 There are a number of difficulties with this proposition. *First*, that the employer should be given the capacity to unilaterally determine which category an employee should be classified into could lead to arbitrary and capricious results. In the absence of clear language, it ought not be presumed that that was intended.

207 *Second*, where the Agreement has given the employer a power to unilaterally elect the category into which an employee should be assigned, that power has been given expressly.

208 Thus, cl 5.5.2, also dealing with an employee's "status", requires that FTMs in each of the categories listed in cl 5.5.1 be categorised as either a "base rate FTM" or a "flat rate FTM". Reference is there made to cl 8. Clause 8.1.1 provides for an FTM to be paid as either a "base rate FTM" or a "flat rate FTM" "at the election of the Company".

209 Further and as earlier stated, cl 7.1 together with the definitions provided in Schedule 1 deal with the assignment of employees into competency-based classification levels. Clause 7.1 provides that "a FTM will be assigned to a classification level based on skills, qualifications and experience and in consideration of the substance of the duties to be carried out on the site or workplace". In that regard, a standard or criteria to be applied in accordance with the definitions in Schedule 1 is provided for. Clause 7.1 then states that the "FTM's classification level, applicable to the assignment, will be *specified* in the notice of offer made by the Company to the FTM" (emphasis added).

210 In contrast, cl 5.5.6 does not say that the "status" of the employee is to be determined or specified by WorkPac or that the status is at WorkPac's election.

211 The plain and ordinary meaning of the word "inform", in the apparent context in which it is used in cl 5.5.6, is to state, tell or make known.

212 We accept that in limited circumstances the context in which a term is used may suggest that a non-grammatical meaning was intended for a word or expression: *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531 at [65] (Gageler and Keane JJ). However, the context here seems to confirm that "inform" was intended to have its ordinary or grammatical meaning. The obligation imposed by cl 5.5.6 upon WorkPac is to "inform" the employee about

two matters, the "status" (an obvious reference to the matters addressed by cls 5.5.1-5.5.4) *and* the terms of the employee's engagement. It cannot be suggested that cl 5.5.6 empowers WorkPac to specify or determine the terms upon which an employee is engaged and WorkPac made no such submission. If the word "inform" has its plain grammatical meaning in relation to the terms of an employee's engagement, it is impossible to conclude that it has a non-grammatical meaning in relation to "status".

213 *Third*, it makes no practical sense that the Agreement should intend that the nature of the employment be forever fixed by a designation given at its commencement. The nature of an employment may and often does change over time. An employee working part-time may be offered and take up full-time hours. Would such an employee remain a "part-time FTM" merely because that was the designation given at commencement? What if the employer fails to "inform"? Is an employee working full-time not a "full-time FTM" under the Agreement and not entitled to the benefits provided for a "full-time FTM" because there has been a failure to "inform"? Practical considerations suggest that cl 5.5.6 has a facilitative rather than a controlling or dispositive purpose.

214 *Fourth*, the Agreement was made when the WR Act was in force and cls 19.2.4 and 19.4.5 of the Agreement specify that a "casual FTM" is entitled to unpaid carers' leave and unpaid compassionate leave "in accordance with the [WR Act]". Particularly given the specific reference to the entitlements of casuals under the WR Act, it is appropriate to presume that the Agreement was intended to operate harmoniously with the WR Act and apply the same meaning to "casual employee" as that applicable under the WR Act. The notion that the WR Act's conception of a "casual employee" was that of an employee designated as such under the applicable industrial instrument encounters all of the difficulties already addressed in relation to the FW Act. The better view and the view reached in *Williams* (at [57]–[68]) is that the WR Act used the expression "casual employee" in its legal sense (or what in *Williams* was referred to as the "traditional" definition of that phrase).

215 The reasoning of the primary judge at [60]-[62] suggests that his Honour was influenced by the reasoning of White J in *Devine Marine*. The clause there under consideration was a clause that provided that a "casual employee is one engaged and paid as such". The primary judge appears to have equated the clause considered in *Devine Marine* with cl 5.5.6 of the Agreement. However, that clause is markedly different to cl 5.5.6 which is not confined to casual

employment and does not use the phrase "engaged as such" which (together with other contextual considerations) was critical to the reasoning of White J in *Devine Marine*.

216 A more appropriate reference to the reasoning of White J would have been to the approach his Honour took in *South Jin* in dealing with a clause which did bear far greater similarity with cls 5.5.1 and 5.5.6 of the Agreement. The clause in question in *South Jin* (cl 12 of the Cleaning Services Award) relevantly provided:

> **12. Employment categories**
>
> **12.1** Employees under this award will be employed in one of the following categories:
>
> (a) full-time employment;
>
> (b) part-time employment; or
>
> (c) casual employment.
>
> **12.2** At the time of engagement, an employer will inform each employee of the terms of their engagement and in particular whether or not they are to be full-time, part-time or casual, their usual location of work and the employee's classification. This will then be recorded in the time and wages record of the employee.

217 Of that clause, White J at [76] said this:

> As can be seen, cl 12 contemplates three categories of employment: full-time employment, part-time employment and casual employment and, implicitly, that each employee will be in one or other of these categories. Clause 12.2 requires an employer, at the time of engagement, to inform each employee of the terms of their engagement and, in particular, whether they are to be full-time, part-time or casual employees.

218 His Honour made no reference to his own reasoning in *Devine Marine* and did not suggest that the word "inform" had anything other than its plain grammatical meaning.

219 The approach that White J took in *South Jin* was driven by the specific text and context of that clause. That, of course, was also the position in relation to the clause in question in *Devine Marine*. Here, cl 5.5 must also be construed by reference to its own text and context and, in our respectful view, the reliance placed by the primary judge on reasoning referrable to different text and different context led his Honour into error.

220 As cl 12.2 of the clause considered in *South Jin* demonstrates, a clause requiring an employer to inform an employee at the time of engagement of the nature of the employment is not uncommon. Generally speaking, the purpose of a clause of that kind is likely to be to confirm and provide some record of the nature of the employment that has been agreed to between the employee and the employer and the terms of engagement that are applicable. The purpose is

simply to give clarity to the engagement. Contrary to Mr Skene's contention, we do not accept that cl 5.5.6 is a clause that requires WorkPac to accurately inform the employee of his or her employment status in accordance with the reality of the employment relationship on an ongoing basis. All that is required to be communicated by cl 5.5.6 is what is understood as at the time of engagement.

221 However, we do not accept the primary judge's conclusion that by cl 5.5.6 the Agreement intends that the employer's subjective understanding or intent be dispositive of the "status" of the employee under the Agreement. As indicated already, one aspect of "status", that dealt with in cl 5.5.2 and whether an employee is a "base rate FTM" or a "flat rate FTM" is at the election of WorkPac. In contrast, there is nothing in the terms of the Agreement or their context to support the proposition that other aspects of "status" and in particular whether an employee is full-time, part-time or a casual is left to the election of WorkPac.

222 Having not defined any of the categories listed in cl 5.5.1 and not otherwise provided a designational mechanism, the Agreement should be presumed to intend that the categories listed have their ordinary meaning or usual connotation with any adjustment as might be indicated by the Agreement itself.

223 We have given consideration to whether the reference in cl 5.5.5 that "Casual FTM's will be engaged by the hour" justifies an adjusted meaning, namely that only persons engaged by the hour are "Casual FTM's". As earlier stated, engagement by the hour on separate and distinct contracts is not a necessary characteristic of casual employment, but it may be that the Agreement seeks to make it so.

224 The ordinary conception of an employee being engaged by the hour is that the employee is separately contracted for each hour of work. Such a contract terminates on the expiration of the hour and not by notice. However in contra-distinction to the concept of an hourly contract which cl 5.5.5 suggests, cl 5.6.1 requires that a "Casual FTM" be given an hour's notice of termination. The two provisions are contradictory. Reading both provisions harmoniously suggests that what was contemplated is that a casual employee should be employed on the basis that the employment can be terminated on an hour's notice rather than engagement by separate and distinct hourly contracts.

225 That seems to be the approach to construction adopted by the primary judge at [54] where the judge concluded first, that Mr Skene was not engaged by the hour and, second, that if he was

engaged on a contract terminable upon an hours' notice, termination on an hours' notice was not to be regarded as definitional of casual employment. That was so because other categories of employees under the Agreement who are not casual employees could also have their employments terminated upon one hours' notice.

226 The better view is that the Agreement intends to apply the usual connotation of what constitutes casual employment without adjustment. In any event, if a casual employee is confined to an employee engaged on separate hourly contracts, the primary judge held (at [54]) that Mr Skene "was not engaged 'by the hour' consistently with the suggestion in cl 5.5.5".

227 Nonetheless, as the primary judge misconstrued cl 5.5.6, he erred in holding that Mr Skene was a casual employee for the purposes of the Agreement. The first ground of Mr Skene's appeal should be allowed. That being so and consistently with the way in which the case was run before the primary judge, his Honour should have found that Mr Skene was a "permanent FTM" and entitled to the benefit of cl 19.1 of the Agreement.

**PENALTY**

228 Mr Skene's appeal also challenges the decision of the primary judge not to impose a pecuniary penalty on WorkPac for its contravention of s 44(1) of the FW Act in failing to pay to Mr Skene his untaken paid annual leave. Section 44(1) of the FW Act provides that an employer must not contravene a provision of the National Employment Standards. The primary judge's reasons on penalty are recorded in *Skene v WorkPac Pty Ltd (No 2)* [2017] FCCA 525.

229 Mr Skene contended that in declining to impose a pecuniary penalty, the primary judge erred in the exercise of his discretion.

230 The primary judge concluded that the contravention by WorkPac was "unknowing" in the sense that WorkPac was mistaken about the legal effect of the employment arrangements it had with Mr Skene having regard to the FW Act. In other words, his Honour was not satisfied that the contravention was knowingly deliberate. No challenge is made to that finding by Mr Skene.

231 Mr Skene contended before the primary judge, by reference to observations made by Barker J in *MacMahon*, that the imposition of a penalty was justified where the contravener had failed to closely consider the legality of the employment arrangements it proposed to put in place before doing so, particularly where the contravener was a large organisation with sufficient financial resources to properly explore in advance, the legal implications of its proposed actions. The primary judge accepted that in those circumstances a penalty is warranted (at

[54]). However, at [55] the primary judge determined that, factually, this case was different to *MacMahon* in that WorkPac had taken the advice of its National Employee Relations Manager, Mr Powell. The implication being that WorkPac had closely considered the legal consequences of the employment arrangement made with Mr Skene prior to that arrangement being entered into.

232 Mr Skene contended that the primary judge erred in finding that WorkPac had taken the advice of Mr Powell, and as a consequence, wrongly held that there was a point of differentiation between his case and *MacMahon*,

233 In his reasons on penalty the primary judge said (at [45]) that for the purposes of the contravention of s 44(1) of the FW Act, the relevant point in time was April 2012 when Mr Skene's employment was terminated. It is uncontested that Mr Powell did not commence employment with WorkPac as its National Employer Relations Manager until 11 November 2013. Given that Mr Powell's employment post-dated the termination of Mr Skene's employment, if follows that, contrary to the finding made by the primary judge, WorkPac had not taken the advice of Mr Powell and that (absent any other evidence) there was no basis for the primary judge to find that WorkPac had closely considered the legal implications of the arrangements it made with Mr Skene prior to (or at any time during) Mr Skene's employment. That Mr Powell was in the employment of WorkPac throughout the life of Mr Skene's legal proceedings, as WorkPac contended, is beside the point and provides no answer to the error which Mr Skene's appeal establishes.

234 A mistake as to a material fact is an error which may warrant the appellate correction of a sentence: *Comcare v Post Logistics Australasia Pty Limited* (2012) 207 FCR 178 at [38]-[39] (Rares, Cowdroy and Griffiths JJ).

235 Here the error is not only material, but significant. On the approach taken by the primary judge, the factual error concerned a key fact. The main or, at least, a significant reason that the primary judge took the view that WorkPac's conduct was sufficiently excusable as to not warrant a penalty, was because his Honour mistakenly held that WorkPac had taken appropriate advice and had closely considered the legal implications of its conduct.

236 For those reasons, Mr Skene's third ground of appeal is established.

237 We would add that although an unknowing contravention will diminish the objective seriousness of a contravention, ignorance of the law is not ordinarily excusatory. The primary

judge's conclusion that there was no need for either specific or general deterrence is suggestive of a manifestly inadequate penalty. Even if the primary judge's approach had been free of factual error, it seems to me that insufficient attention was paid to the objective seriousness of the contravention and the particular circumstances of the contravener: see *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68 at [103]–[104] (Dowsett, Greenwood and Wigney JJ).

**RELIEF**

238 WorkPac's appeal should be dismissed. Mr Skene's appeal should be allowed.

239 It is appropriate for the matter to be remitted to the Federal Circuit Court of Australia for the re-determination, in accordance with these reasons, of the compensation payable to Mr Skene for WorkPac's failure to meet his entitlements to annual leave and any pecuniary penalties that should be imposed on WorkPac in respect of its failure to meet those entitlements. Our view that Mr Skene was entitled to receive annual leave or be paid monies in lieu thereof in accordance with Div 6 of Pt 2-2 of the FW Act and cl 19.1.1 of the Agreement is sufficiently apparent from these reasons. There is no need for the declarations sought by Mr Skene to be now made. If declarations are to be made they can be made by the primary judge on the remittal of the proceeding.

240 In those circumstances, as is proposed by Mr Skene, order 1 of the orders made by the primary judge on 21 March 2017 dealing with the payment of compensation referrable to the contravention of the FW Act should be set aside as well as order 2 which otherwise dismissed Mr Skene's application including his claim that pecuniary penalties be imposed.

241 No party sought an order as to costs and no such order should be made.

I certify that the preceding two hundred and forty-one (241) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Tracey, Bromberg and Rangiah

Associate:

Dated: 16 August 2018