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STRAYING FROM THE 'ORTHODOX PATH'? A NEW APPROACH TO CHARACTERISING EMPLOYMENT: *WORKPAC PTY LTD V ROSSATO* (2021) 392 ALR 39

> 'The power of the employer to withhold bread is a much more effective weapon than the power of the employee to refuse to labour. Freedom of contract, under such circumstances, is surely misnamed; it should rather be called despotism in contract ... [t]he worker is in the same position ... as a traveller, when he had to give up his money to a highwayman for the privilege of life.'[1]

I Introduction

The use of third-party labour hire companies, especially in the mining sector, has grown significantly in recent years.[2] Labour hire companies contract with workers to hire out their labour to various operators, often on a casual 'fly-in-fly-out' or 'drive-in-drive-out' basis. The increased use of labour hire schemes has been seen by some as an attempt by mining companies to avoid bargaining directly with their own employees. This gives mining companies more scope to limit the wages and rights of workers and invest less in improving working conditions.[3] Former mine worker Rob Foot described the use of labour hire regimes in mining in terms that labour hire companies 'don't care about their people. It's just like a revolving door … and if people questioned any of the safety rules or laws or whatever, then [they get] no more … shifts'.[4] As such, the nature of labour

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1 *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Pty Co Ltd* (1911) 5 CAR 9, 27 (Higgins J).

2 Deloitte Access Economics, *Economic Effects of Changes to Labour Hire Laws* (Report, Minerals Council of Australia, June 2019) 30–1.

3 Tobi Loftus, Melanie Groves and Meecham Philpott, 'Senate Inquiry Hears Two Sides of Claims that Mining Labour-Hire Schemes are Being Overused', *ABC News* (online, 15 July 2021) <https://www.abc.net.au/news/2021-07-15/senate-inquiry-hears-labour-hire-scheme-issues/100288404>; Construction, Forestry, Mining and Energy Union, Submission No 54 to Department of Economic Development, Jobs, Transport & Resources, *Victorian Inquiry into the Labour Hire Industry and Insecure Work* (November 2015) 11–20.

4 '(Working) Life in a Northern Town', *On the Job with Francis Leach and Sally Rugg* (Australian Unions, 19 July 2021) 00:13:20–00:14:25 <https://omny.fm/shows/on-the-job/working-life-in-a-northern-town>.

hire agreements has become an increased area of legal contest, especially for the Construction, Forestry, Maritime, Mining and Energy Union ('CFMMEU') — the industrial body representing workers in the mining sector — and WorkPac Pty Ltd ('WorkPac') — a labour hire company that contracts labour to mine operators. The status of many labour hire employees as 'casual' workers has been challenged by the union movement, with its position that they are in fact permanent employees finding considerable favour in the Federal Court.[5]

It was in this context that the High Court's decision in *WorkPac Pty Ltd v Rossato* (2021) 392 ALR 39 ('*Rossato*') was handed down. Although subsequent amendment to the *Fair Work Act 2009* (Cth) ('*Act*') has remedied the specific uncertainty to which *Rossato* was a response, this case note argues that the High Court's treatment of the issues is indicative of a developing approach to the characterisation of employment relationships more generally that focuses heavily on the written terms of employment contracts. This approach disregards the ways in which previous courts have distinguished employment contracts from other forms of contracting. This apparent interpretive turn has significant implications for the ways in which the High Court will determine where the distinction between employment and independent contracting sits. In this regard, comparison will be made with the approach taken by the Supreme Court of the United Kingdom ('UKSC') in dealing with similar issues.

II Background

A *Facts*

One of the companies that WorkPac contracts labour out to is international mining and commodities trading company Glencore Pty Ltd ('Glencore'). Mr Rossato entered into a contract of employment with WorkPac on 23 December 2013 and began work as a 'drive-in-drive-out' product operator at Glencore's Collinsville mine on 28 July 2014.[6] Mr Rossato's employment existed under six consecutive 'Notice of Offer of Casual Employment — Flat Rate' contracts.[7] Mr Rossato's work under these contracts was directed by Glencore through the provision of yearly work rosters.[8] During this period, Mr Rossato seldom questioned whether his attendance in accordance with his roster was required. Both WorkPac and Glencore similarly did not question whether Mr Rossato intended to work any of the shifts provided for in his annual roster.[9] Mr Rossato retired on 9 April 2018, and disputes subsequently

5 See, eg: *WorkPac Pty Ltd v Rossato* (2020) 278 FCR 179, 188 [10] (Bromberg J) ('*Rossato (FCAFC)*'); *WorkPac Pty Ltd v Skene* (2018) 264 FCR 536 ('*Skene*').

6 *WorkPac Pty Ltd v Rossato* (2021) 392 ALR 39, 43 [12]–[13] (Kiefel CJ, Keane, Gordon, Edelman, Steward and Gleeson JJ) ('*Rossato*').

7 Ibid 43 [13].

8 Ibid 43–4 [17]–[18].

9 Ibid 44 [22].

arose regarding the correct status of Mr Rossato's employment, namely, whether he was in fact a permanent employee, resulting in unpaid leave entitlements.[10]

B *Decision of the Full Court of the Federal Court*

In May 2020, the Full Court of the Federal Court ('Full Court') handed down the decision in *WorkPac Pty Ltd v Rossato* (2020) 278 FCR 179 ('*Rossato (FCAFC)*'). This involved the determination of an application by WorkPac for a number of declarations regarding the status of Mr Rossato's employment. WorkPac sought declarations that Mr Rossato was a casual employee for the purposes of ss 86, 95 and 106 of the *Act* and the relevant enterprise agreement, and, therefore, was not entitled to a variety of leave payments.[11] In the alternative, WorkPac sought for any unpaid leave entitlements to be set-off against the casual loading paid to Mr Rossato over the course of his employment, or, in the further alternative, that WorkPac was entitled to restitution 'by reason of a total failure of consideration, or alternatively, mistake … of that part of the remuneration paid to Mr Rossato'.[12]

The proceedings in *Rossato (FCAFC)* were themselves a response to a previous decision of the Full Court in *WorkPac Pty Ltd v Skene* ('*Skene*') involving a worker employed in an arrangement largely similar to that of Mr Rossato.[13] The Full Court held in *Skene* that a worker was not relevantly a 'casual employee' — despite contractual language to the contrary — based 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'.[14] The regular indicia considered in determining whether an employment relationship holds the 'essence of casualness' — that being the absence of a firm advance commitment — include 'irregular work patterns, uncertainty, discontinuity, intermittency of work and unpredictability'.[15] These indicia were considered to give form and meaning to the term 'casual employment' in the context of the *Act* and the relevant enterprise agreement that is informed by the legal meaning of the term and, therefore, the objective assessment undertaken by courts in considering employment relationships.[16]

In *Rossato (FCAFC)*, WorkPac submitted that the 'essence of casualness' found in the 'absence of a firm advance commitment as to … the employee's employment'[17] was not to be determined, as it was in *Skene*, with regard to the totality of

10 Ibid 40–1 [2]–[4].

11 *Rossato (FCAFC)* (n 5) 187 [5] (Bromberg J).

12 Ibid.

13 *Skene* (n 5) 542 [18]–[28] (Tracey, Bromberg and Rangiah JJ); *Rossato* (n 6) 41 [3] (Kiefel CJ, Keane, Gordon, Edelman, Steward and Gleeson JJ).

14 *Skene* (n 5) 572 [159] (Tracey, Bromberg and Rangiah JJ).

15 Ibid 575 [172]–[173].

16 Ibid 577 [181].

17 Ibid 574 [169], citing *Hamzy v Tricon International Restaurants* (2001) 115 FCR 78, 89 [38] (Wilcox, Marshall and Katz JJ).

the circumstances of employment, but instead 'in a contract wholly in writing ... only … by an express term providing such a commitment'.[18] However, WorkPac's submissions did not find favour with the Full Court, which found that the existence or not of a 'firm advance commitment' was to be determined by considering the objective conditions of employment and relevant indicia, such that 'the label which the parties themselves place on their relationship is relevant but not conclusive'.[19] In so doing, the Full Court took relevant guidance from the law regarding characterisation of independent contracting and contracts of service.[20] The foundational principle informing the Full Court's interpretation in *Rossato (FCAFC)* was that, even in contracts wholly or partly in writing, the

> parties' characterisation of their relationship in a written contract, either directly via the inclusion of a label or indirectly via the inclusion of an essential term which seeks to characterise the nature of the relationship, will not always reflect the true reality of what has been agreed when read in the context of the contract as a whole.[21]

As Bromberg J noted after canvassing the relevant authorities with respect to contract interpretation, the presence of a firm advance commitment in an employment contract is to be 'inferred from the express terms, the factual matrix and the purposes or objects the contracts were intended to secure'.[22] WorkPac's applications for set-off and restitutionary relief were also rejected.[23]

III Decision on Appeal to the High Court

On appeal to the High Court, however, the Full Court's decision was unanimously overturned, and Mr Rossato was deemed to be a casual employee. The plurality (Kiefel CJ, Keane, Gordon, Edelman, Steward and Gleeson JJ) found that the Full Court in *Skene* 'strayed from the orthodox path' in undertaking a broad exercise of characterisation with regard to the substance, conduct and practical reality surrounding the employment contract.[24] Instead, given the fact that in both *Skene* and *Rossato (FCAFC)* the employment contract had been reduced to express written terms, the contractual terms were determinative of the nature of the employment relationship.[25] The High Court, invoking the seminal *Boilermakers' Case*,[26]

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18 *Rossato (FCAFC)* (n 5) 193 [38] (Bromberg J).

19 Ibid 299 [590] (White J).

20 See generally: *Rossato (FCAFC)* (n 5); *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, 45 [58] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ) ('*Hollis*').

21 *Rossato (FCAFC)* (n 5) 206 [94] (Bromberg J).

22 Ibid 207 [98].

23 Ibid 237 [263], [265]–[266].

24 *Rossato* (n 6) 54 [66] (Kiefel CJ, Keane, Gordon, Edelman, Steward and Gleeson JJ).

25 Ibid 54 [67].

26 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

stated that such emphasis on contractual terms in determining the nature of employment 'recognise[s] that it is the function of the courts to enforce legal obligations, not to act as an industrial arbiter'.[27] Such a judgment, of which the Full Court's original decision is argued to be akin, 'does not accord with elementary notions of freedom of contract'[28] and violates the separation of powers, constituting a 'quasi-legislative judgment' beyond the express terms of the employment contract.[29] In this striking denunciation of the Full Court's approach, the High Court appears to take a strongly formalist approach to the role of the judiciary, strongly — and arguably artificially — delineating the High Court's role in statutory interpretation from other methods of lawmaking. Although a fulsome theoretical critique of legal formalism is largely beyond the scope of this case note, the High Court's approach epitomises the ways in which legal formalism falsely purports to undertake legal analysis through the application and development of 'impersonal purposes, policies, and principles'.[30] Critics of legal formalism argue that this approach is underpinned by a misguided 'commitment to, and … belief in the possibility of, a method of legal justification that can be clearly contrasted to open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary'.[31] To the extent that the High Court's approach in *Rossato* seeks to interpret the terms of employment contracts without regard to the totality of the circumstances within which the terms were drafted and agreed to, and the distinctive nature of employment contracting as opposed to traditional commercial contracting, the *Rossato* judgment exemplifies the formalist approach rightly critiqued in various schools of jurisprudence.[32]

The High Court further rejected the guidance taken by the Full Court in *Rossato (FCAFC)* and *Skene* from case authority such as *Hollis v Vabu Pty Ltd* ('*Hollis*')[33] regarding the distinction between contracts for services and employment contracts, instead taking the view that the presence of express written terms removes entirely any need for considering 'the totality of the relationship' surrounding the employment contract.[34]

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27 *Rossato* (n 6) 53 [62] (Kiefel CJ, Keane, Gordon, Edelman, Steward and Gleeson JJ).

28 Ibid 61 [99].

29 Ibid 53 [62].

30 Roberto Mangabeira Unger, 'The Critical Legal Studies Movement' (1983) 96(3) *Harvard Law Review* 561, 564.

31 Ibid.

32 See, eg: Jude Wallace and John Fiocco, 'Recent Criticisms of Formalism in Legal Theory and Legal Education' (1980) 7(3) *Adelaide Law Review* 309; Hans-Peter Haferkamp, 'Legal Formalism and its Critics' in Heikki Pihlajamaki, Markus D Dubber and Mark Godfrey (eds), *The Oxford Handbook of European Legal History* (Oxford University Press, 2018).

33 *Hollis* (n 20).

34 *Rossato* (n 6) 61 [101] (Kiefel CJ, Keane, Gordon, Edelman, Steward and Gleeson JJ).

The High Court thus interpreted Mr Rossato's series of contracts with WorkPac providing an 'assignment-by-assignment basis' for work as fulfilling the requirement of an absence of 'firm advance commitment'.[35] Further, the High Court departed from the Full Court's placement of significance in the fixing of Mr Rossato's work rosters up to a year in advance for the purposes of establishing a 'firm advance commitment' in finding that the systematic and regular nature of Mr Rossato's work is not inconsistent with 'casual employment' as considered under the *Act*.[36]

Justice Gageler issued his Honour's own judgment agreeing with the plurality on the abovementioned issues and emphasising the decreased importance of the decision in light of subsequent legislative amendment.[37] Further discussion of Gageler J's judgment in this respect is not required.

IV Comment

A *Legislative Intervention*

As the plurality noted, the issue in *Rossato* was 'ultimately, a matter of statutory interpretation' and concerned largely with the proper interpretation of the term 'casual employee' for the purposes of the *Act*.[38] As Gageler J noted, legislative change defining 'casual employment' therefore appears to render the decision 'significan[t] for few other than the parties'.[39] The *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth) ('*Amending Act*'), introduced into Parliament in December 2020 was described by the government as incorporating 'key aspects of the common law as expressed in … decisions such as *Skene* and *Rossato*, particularly the absence of a firm advance commitment to ongoing work defining casual work'.[40] However, this characterisation by the government fails to acknowledge the common law position of assessing the totality of the relationship.[41] The *Amending Act* inserted a new s 15A into the *Act* which defines a person as a 'casual employee' if

> an offer of employment … is made on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed

35 Ibid 58 [88].

36 Ibid 59 [94], 60 [96].

37 Ibid 63 [109]–[119] (Gageler J).

38 Ibid 50 [48] (Kiefel CJ, Keane, Gordon, Edelman, Steward and Gleeson JJ).

39 Ibid 63 [111] (Gageler J).

40 Commonwealth, *Parliamentary Debates*, House of Representatives, 9 December 2020, 11016 (Christian Porter, Attorney-General and Minister for Industrial Relations).

41 *Rossato (FCAFC)* (n 5) 193 [38] (Bromberg J); *Skene* (n 5) 572 [159] (Tracey, Bromberg and Rangiah JJ).

> pattern of work for the person; and the person accepts the offer on that basis; and the person is an employee as a result of that acceptance.[42]

This definition appears to cover the field of statutory uncertainty to which the decision in *Rossato* was a response and import into the *Act* the High Court's more formalist approach emphasising the primacy of contractual terms such that '[t]he nature of the employment … will be determined at the outset, as opposed to relying on periodic assessments of the relationship as it develops over time'.[43] The Attorney-General noted that the *Amending Act* sought to provide 'much-needed certainty' to business owners who, under the approach initially expressed by the Full Court in *Skene*, faced 'significant potential liability hanging over their heads'.[44] Section 545A of the *Act*, similarly inserted by the *Amending Act* provides retrospective protection for employers who have misclassified workers, by allowing the set-off approach which WorkPac was denied in *Rossato (FCAFC)*.[45] Although *Rossato* may be of significance when the newly inserted s 15A is to be interpreted, the direct impact of this decision for casual workers is incredibly limited. *Rossato* does, however, signal a shift in the High Court's approach to the interpretation of employment relationships generally, most notably in determinations of employment status.

B *Comparison with Decisions of the Supreme Court of the United Kingdom*

The plurality's observation that '[i]t is no part of the judicial function in relation to the construction of contracts to strain language and legal concepts in order to moderate a perceived unfairness resulting from a disparity in bargaining power'[46] finds a useful counterpoint in the landmark decision of the UKSC in *Autoclenz Ltd v Belcher* ('*Autoclenz*').[47] In *Autoclenz*, Lord Clarke (with whom the other members of the Court agreed) took a 'purposive approach' to interpreting the nature and character of an employment relationship, finding that:

> the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part.[48]

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42 *Fair Work Act 2009* (Cth) s 15A, as inserted by *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth) sch 1 item 2.

43 Commonwealth, *Parliamentary Debates*, House of Representatives, 9 December 2020, 11016 (Christian Porter, Attorney-General and Minister for Industrial Relations).

44 Ibid.

45 *Fair Work Act 2009* (Cth) s 545A, as inserted by *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth) sch 1 item 6.

46 *Rossato* (n 6) 53 [63] (Kiefel CJ, Keane, Gordon, Edelman, Steward and Gleeson JJ).

47 [2011] UKSC 41 ('*Autoclenz*').

48 Ibid [35] (Lord Clarke).

The *Autoclenz* approach appears to reflect more accurately the distinctiveness of the employment contract than the strict formalist approach taken in *Rossato*. Lord Clarke in *Autoclenz* cited approvingly Sedley LJ's statement made on appeal adopting the reasoning of Aikens LJ, enunciating the fundamental principle that 'while employment is a matter of contract, the factual matrix in which the contract is cast is not ordinarily the same as that of an arm's length commercial contract'.[49] Lord Clarke, noting this distinction between commercial and employment contracting, and the inequality of bargaining power that often characterises employment contracting, further affirmed Aikens LJ's view that in the interpretation of employment contracts courts and tribunals often 'have to investigate allegations that the written contract does not represent the actual terms agreed and … must be realistic and worldly wise when it does so'.[50] Contrasting these statements with the approach in *Rossato*, it appears that the High Court is developing an approach that fails to be 'realistic and worldly wise' by abandoning considerations of the surrounding context of employment relationships and limiting its gaze to the written terms of the contract. Moreover, the approach taken by his Lordship in *Autoclenz* acknowledges that the written terms of employment contracts may not accurately reflect the true intentions of the parties, such that 'armies of lawyers will simply place … clauses denying any obligation to accept or provide work in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship'.[51] This purposive approach expressed by his Lordship, and the similarly purposive approach taken by the Full Court, indicate the ways in which written employment contracts should not be taken as conclusive documents in and of themselves, but as contextually dependent documents that require consideration of the 'true intentions or expectations of the parties, not only at the inception of the contract but, if appropriate, as time goes by'.[52]

Returning to the implications of *Rossato* moving forward, subsequent application of the approach in *Autoclenz* is noteworthy, especially in light of the changing economic dynamics as a result of the COVID-19 crisis. With the expansion of the 'gig economy' being further fuelled by the global crisis of COVID-19,[53] the rights of gig workers and other 'independent contractors' need clear enunciation and, more importantly, strong protection. This has proved to be a cause of significant social and political agitation.[54] The subsequent impact of *Autoclenz* in

49 Ibid [33], citing *Autoclenz Ltd v Belcher* [2009] EWCA Civ 1046, [103] (Sedley LJ).

50 *Autoclenz* (n 47) [34] (Lord Clarke), citing *Autoclenz v Belcher* [2009] EWCA Civ 1046, [92].

51 *Autoclenz* (n 47) [25] (Lord Clarke), quoting *Consistent Group Ltd v Kalwak* [2007] IRLR 560, [57] (Elias J).

52 *Autoclenz* (n 47) [30] (Lord Clarke), quoting *Firthglow Ltd v Szilagyi* [2009] EWCA Civ 98, [50] (Smith LJ).

53 Muhammad Umar, Yan Xu and Sultan Sikandar Mirza, 'The Impact of COVID-19 on Gig Economy' (2021) 35(1) *Economic Research* 2284, 2294.

54 Transport Workers Union of Australia, 'Uber UK Case: Urgent Need to Regulate in Australia' (Press Release, 17 March 2021) <https://www.twu.com.au/press/uber-uk-case-urgent-need-to-regulate-in-australia>.

the context of the proper characterisation and protection of gig workers can be seen not to have created the 'descent into … obscurantism'[55] feared in *Rossato*, but simply to reflect in law the objective conditions of an employee's work and provide workers with the concomitant benefits and minimum working conditions. The decision of the UKSC in *Uber BV v Aslam* ('*Aslam*')[56] concerned the statutory requirements for a 'worker's contract' in the United Kingdom and the corresponding wage and holiday entitlements of a gig worker, namely an Uber driver.[57] Although there was no binding determination regarding the question of Uber drivers' status as employees, the UKSC indicated, applying the approach in *Autoclenz* to the relevant statutory provisions, that the indicia of employment were met.[58]

The approach taken in *Aslam* recognises the unique nature of the employment contract and regulation of employment generally in a way that is largely foregone in *Rossato*. Where the *Act* neglects to 'relevantly inhibit … the freedom of parties to enter into a contract for casual employment', the plurality interpreted this as leaving the creation of casual employment arrangements solely to the agreement of the parties as manifest in the relevant employment contract.[59] In *Aslam*, the UKSC took a global view of United Kingdom employment legislation as existing 'to protect vulnerable workers from being paid too little for the work they do, [and being] required to work excessive hours or subjected to other forms of unfair treatment'.[60] Such consideration of the objects and purpose of the *Act* and the unique intervention of the law was not given in *Rossato*. The reasoning in *Aslam* presents a broader, less formalistic interpretation of employment relationships as being a necessary conclusion of the acknowledgement of the fundamental purpose of legal intervention into the employment relationship. The UKSC notes in *Aslam* that, from these fundamental principles

> it can immediately be seen that it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point … It is the very fact that an employer is often in a position to dictate such contract terms and that the individual performing the work has little or no ability to influence those terms that gives rise to the need for statutory protection in the first place.[61]

Although further comparison and discussion of the objects and purpose of the *Act* and the relevant United Kingdom legislation considered in *Aslam* are beyond the

55 *Rossato* (n 6) 53 [63] (Kiefel CJ, Keane, Gordon, Edelman, Steward and Gleeson JJ).

56 [2021] UKSC 5 ('*Aslam*').

57 Ibid [41]–[42] (Lord Leggatt).

58 Ibid [90]–[102].

59 *Rossato* (n 6) 52 [58] (Kiefel CJ, Keane, Gordon, Edelman, Steward and Gleeson JJ).

60 *Aslam* (n 56) [71] (Lord Leggatt).

61 Ibid [76].

scope of this analysis,[62] the distinction between these approaches usefully signifies the ways in which the reasoning underlying *Rossato* may entrench the 'mischief' prevented from befalling gig workers in *Aslam*.[63] Moreover, critique surrounding the objects of the relevant statutes aside, the High Court's approach in *Rossato* can be seen to fundamentally misconceive the circumstances of the parties and in so doing risks misapplication of the statute. In this respect, the UKSC approach in *Autoclenz* and its fulsome consideration of the parties' circumstances in applying the relevant legislation is a useful point of comparison.

C *Broader Implications*

In appearing to do away, at least to a significant degree, with the holistic approach taken by the Federal Court, the decision in *Rossato*, in practice, creates significant opportunity for varying degrees of 'sham contracting'. Although the decision in *Rossato* differentiates between legitimate and 'sham' employment contracts, the impact of a formalistic approach — if not strictly for the High Court, for lower courts and tribunals that follow and apply the decision — gives greater scope for employers to freely define the nature of employment through the drafting of employment contracts, regardless of the actual conditions under which employees work. As previously noted, this incorrectly deals with the severe inequality in bargaining power that renders employment contracts distinct from all other forms of contracts, and puts workers at significant risk of exploitation, mistreatment and injustice. This is especially true for those who have even further disadvantage in understanding employment contracts, such as those for whom English is a second language[64] or those workers whose privation and precarity practically limit their full engagement with their rights at work.[65]

V Conclusion

The High Court's decision in *Rossato* can be seen to signal a new, more formalistic approach to determinations regarding employment relationships that diverges significantly from the general approach taken in the Federal Court. Although legislative amendment rendered the direct impacts of *Rossato* limited, the potential impacts for thousands of workers in precarious 'independent contractor' relationships are immense, especially given the continual rise of work in the gig economy.

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62 It should be generally noted that the importance of the protection of 'providing workplace relations laws that are fair to working Australians' is a primary object of the *Act*: *Fair Work Act 2009* (Cth) s 3(a).

63 *Aslam* (n 56) [76] (Lord Leggatt).

64 Migrant Workers Centre, Submission No 26 to Senate Select Committee on Job Security, Parliament of Australia, *On-Demand Platform Work in Australia* (30 March 2021) 3–4 [3.5]–[3.7].

65 Ibid 3; Victorian Council of Social Service, Submission No 13 to Senate Select Committee on Job Security, Parliament of Australia, *On-Demand Platform Work in Australia* (March 2021) 10, 18–19.

Comparison with jurisprudence surrounding similar issues in the United Kingdom shows clearly how alternative views may be taken that more accurately reflect the true nature of employment relationships and acknowledge the distinctiveness of employment contracts and the position of workers against other form of contracting. As the challenges faced by precarious and vulnerable workers in the modern workforce increase, and the law that governs it develops, reconsideration of the appropriate approach to characterising employment is vital.

VI Postscript

Following the writing of this case note the High Court released their much anticipated decisions in *ZG Operations Australia Pty Ltd v Jamsek* ('*Jamsek*')[66] and *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* ('*Personnel Contracting*').[67] The reasoning employed by the High Court in these judgments followed the formalist approach foreshadowed above and solidifies a trend in the High Court's jurisprudence towards the primacy of contractual terms over practical reality when determining the nature of employment relationships. These decisions will be summarised in turn and brief comment offered.

A *ZG Operations Australia Pty Ltd v Jamsek*

The applicant business had been owned by a variety of different companies over the period of engagement with the respondent workers, Mr Jamsek and Mr Whitby.[68] Sometime between 1985 and 1986, the applicant business advised the respondent workers — who had previously been employed as truck drivers — that the business would only continue to engage the workers' services if the workers ceased their employment, purchased their trucks from the business, and provided services as independent contractors.[69] The workers entered into such contracts with the applicant, with Mr Jamsek and Mr Whitby each forming partnerships with their wives.[70] Both partnerships purchased the trucks, entered into contracts for the transport of goods with the applicant, and invoiced the applicant for their services.[71] Under this arrangement, Mr Jamsek and Mr Whitby were required, for example, to be available to work during hours set by the applicant, display the applicant's logo on their trucks, and wear clothing adorned with the applicant's branding.[72]

66 (2022) 398 ALR 603 ('*Jamsek*').

67 (2022) 398 ALR 404 ('*Personnel Contracting*').

68 *Jamsek* (n 66) 603 [1] (Kiefel CJ, Keane and Edelman JJ).

69 Ibid 604 [2].

70 Ibid.

71 Ibid.

72 *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114, 119 [16] (Wigney J), 124 [51], 126 [58] (Anderson J) ('*Jamsek (FCAFC)*').

Dispute arose between the parties regarding the status of Mr Jamsek and Mr Whitby, namely, whether they were employees of the applicant for the purposes of the *Act* and the *Superannuation Guarantee (Administration) Act 1992* (Cth). The Full Court, undertaking a multifactorial approach to analyse the 'totality of the relationship', found that Mr Jamsek and Mr Whitby were, during the relevant time periods, employees.[73]

On appeal, the High Court found the Full Court's reasoning erroneous for two primary reasons. The first of these was 'the significant attention devoted by that Court … to the manner in which the parties actually conducted themselves'.[74] As previously discussed, the High Court's placement of emphasis upon contractual terms when characterising the totality of the relationship is at odds with the Full Court's primary consideration of practical performance of a contract. The second — and, it is the argument of this case note, most troubling — 'error' on which the High Court found the Full Court's reasoning to be based was the Full Court's determination that the character of the relationship between the parties was so affected by 'the disparity in bargaining power between the parties … that the "reality" of the relationship between the company and each respondent was one of employment'.[75]

In allowing the appeal and finding that the relationship between the parties was not one of employment but a *contract for services*, the High Court concluded that

> the character of the relationship between the parties in this case was to be determined by reference to the rights and duties created by the written agreement which comprehensively regulated that relationship. The circumstance that entry into the contract between the company and the partnerships may have been brought about by the exercise of superior bargaining power by the company did not alter the meaning and effect of the contract.[76]

The High Court's approach appears to depart from the established approach discussed above for, amongst other reasons, the rather unimpressive view that to engage in any other exercise in characterisation would be inappropriate 'as a practical matter of the due administration of justice', stating that 'the task of raking over the day-to-day workings of a relationship spanning several decades is an exercise not to be undertaken without good reason having regard to the expense to the parties and drain on judicial time involved in such an exercise'.[77] The High Court expressly rejects the analytical approach taken in the United Kingdom discussed in Part IV above in its criticism of the approach heretofore taken by the Full Court:

> It is necessary to note in these observations of the Full Court the expansive approach taken to determining the 'substance and reality' of the relationship

73 Ibid 119 [12] (Perram J), 120 [19] (Wigney J), 168 [256] (Anderson J).

74 *Jamsek* (n 66) 605 [6] (Kiefel CJ, Keane and Edelman JJ).

75 Ibid.

76 Ibid 605 [8].

77 Ibid 606 [9].

> between the parties, and especially the significance attached to the disparity in bargaining power as itself affecting the meaning or effect of what the parties had agreed. This expansive approach accords with that which has been taken in the United Kingdom. For the reasons stated in *WorkPac Pty Ltd v Rossato* and in *CFMMEU v Personnel Contracting*, this expansive approach involves an unjustified departure from orthodox contractual analysis.[78]

The High Court's decision in *Jamsek* solidifies the formalist approach to employment relationships and the concomitant emphasis on contractual terms. This approach was also applied in *Personnel Contracting*, as will be discussed below.

B *CFMMEU v Personnel Contracting*

The dispute before the High Court in *Personnel Contracting* involved a 22-year-old British backpacker who engaged in work for Personnel Contracting Pty Ltd ('Personnel'), a labour hire company in the construction industry. Mr McCourt was engaged in work through Personnel for Hanssen Pty Ltd ('Hanssen'), engaging in labouring tasks.[79] The contract between Mr McCourt and Personnel stated that Mr McCourt was to be engaged as a 'self-employed contractor'.[80] After he was advised that his work on the Hanssen project was to cease, Mr McCourt and the CFMMEU sought compensation and penalties for a failure by Personnel to pay relevant entitlements under the *Act*.

The Full Court found that an assessment of the totality of the relationship in this case required consideration of documents that are not contractual in nature, affirming the seminal statement of approach in *Hollis*:

> the relationship between the parties ... is to be found not merely from [the] contractual terms. The system which was operated thereunder and the work practices imposed by Vabu go to establishing 'the totality of the relationship' between the parties; it is this which is to be considered.[81]

In characterising the relationship between the parties, Allsop CJ said the following:

> The notion that Mr McCourt was an independent contractor when working on the building site and that Hanssen was not liable for his negligence would defy any rational legal principle and common sense. The liability of Hanssen as such cannot turn upon the intricacies of the documentation that Personnel place before people such as Mr McCourt for signing.[82]

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78 Ibid 614–15 [51] (citations omitted).

79 *Personnel Contracting* (n 67) 405 [1]–[2] (Kiefel CJ, Keane and Edelman JJ).

80 Ibid.

81 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631, 637 [11] (Allsop CJ) ('*Personnel (FCAFC)*'), citing *Hollis* (n 20) 33 [24] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

82 *Personnel FCAFC* (n 81) 641–2 [28] (Allsop CJ).

Moreover, Allsop CJ stated that 'unconstrained by authority [His Honour] would favour an approach which viewed the relationship ... as that of casual employment … being entirely in accord with the application of the principle reflected in … *Autoclenz Limited v Belcher*'.[83] Despite such characterisation, the Full Court found, on balance of the principle of comity of reasons between intermediate appellate courts, it was appropriate to consider the interpretation of similar contracts concerning Personnel by other courts and tribunals, and, as such, the particular facts in this case did not characterise an employment relationship.[84]

In contrast to the approach taken by the Full Court, the High Court underwent the same contractual analysis discussed in the above analysis of *Jamsek*, emphasising the lack of control Mr McCourt had over his work, and characterised the contract as a *contract of service*, not a *contract for services*, meaning that Mr McCourt was an employee of Personnel, not an independent contractor.

The High Court's finding that Mr McCourt was in fact an employee of Personnel may at first blush appear to be a victory for the worker and the CFMMEU, however, on analysis of the reasoning marshalled to reach this outcome, the formalist approach previously discussed is solidified.

C *Comment*

The High Court's reasoning in *Jamsek* and *Personnel Contracting* solidifies the developments foreshadowed in *Rossato* towards a formalist approach to interpretation of employment contracts and characterisation of employment relationships. For the reasons outlined in Part IV, this approach reduces the employment relationship to a simple matter of written contract and fails to properly appreciate the uniqueness of the employment relationship when compared to other forms of contracting. This understanding of employment departs significantly from the longstanding approach taken in the Federal Court and — although stating to allow for claims that a contract may be a 'sham' — significantly impacts the ability of the reality of relationships between workers and their employers to be accurately represented when legal disputation arises.

Moreover, this interpretative turn can be seen to open the door for an industrial regime in which employers are able, in practice, to 'contract out' of the statutory rights of workers provided by the *Act*. Although the High Court, in all three cases herein considered, indicated exception for claims of sham contracting, the very approach taken to characterising employment creates the opportunity for employers

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83 Ibid 642 [31].

84 Ibid 644 [38] (Allsop CJ), 644 [41] (Jagot J), 682 [185] (Lee J). Particular regard was given to the decision of a Full Bench of the Western Australian Industrial Relations Commission in *Construction, Forestry, Mining and Energy Union of Workers v Personnel Contracting Pty Ltd* [2004] WAIRComm 11445 and the decision on appeal to the Industrial Appeal Court of Western Australia in *Personnel Contracting Pty Ltd v Construction, Forestry, Mining and Energy Union of Workers* (2004) 141 IR 31.

to create arrangements that may not meet the threshold for a 'sham contract', but nonetheless exploit their bargaining position. Employers could construct contractual arrangements that unduly decrease the rights and entitlements of workers by virtue of manoeuvres in contractual drafting that are not reflective of the true totality of the relationship.

In *Construction, Forestry, Mining and Energy Union v Queensland Bulk Handling Pty Ltd*,[85] a Full Bench of Fair Work Australia (now the Fair Work Commission) discussed — although in the context of enterprise bargaining — the way in which the ability to contract out of statutory rights generally vitiates many of the purposes and policy objectives of the *Act*. First, contracting out 'undermines bargaining certainty' and creates potential issues in the context of protected industrial action.[86] Again noting the important contextual and factual differences and, therefore, limitations in comparison to the cases considered in this case note, the Full Bench cited approvingly Katzmann J's observation that '[t]he *Act* was designed to bring about the demise of statutory individual employment agreements and to encourage enterprise-level collective bargaining'.[87]

The High Court's focus on contractual terms over the practical realities of the relationship may in effect increase the prevalence of uncertain or 'gig' work which lack the certainty and clarity of responsibilities provided by traditional employment relationships.[88] Although this eventuality is uncertain, the formalist approach the High Court has taken, and its disregard for the structural inequality in bargaining power manifest in employment contracting, should raise significant concern regarding its ability to undermine the goals of a fair, democratic and transparent industrial relations regime. This will further disadvantage workers, especially those in precarious work arrangements, such as that in the gig economy.

The practical implications of the interpretative trends discussed herein can be seen in a potential appeal of the decision of the Fair Work Commission ('Commission') in *Franco v Deliveroo Australia Pty Ltd*[89] in which a gig worker for food delivery service Deliveroo Australia Pty Ltd ('Deliveroo') was found — through the Commission's engagement with a multi-factorial assessment — to have been engaged as an employee and therefore entitled to unfair dismissal protections.[90] Deliveroo has announced they intend to appeal the decision in light of the High Court's decisions

85 (2012) 224 IR 133.

86 Ibid 154 [65]–[66].

87 Ibid 154–5 [67], citing *Construction, Forestry, Mining and Energy Union v Hamberger* (2011) 195 FCR 74, 81 [27] (Katzmann J).

88 Gareth Hutchens, 'High Court Rules on Whether You Are an Employee or an Independent Contractor', *ABC News* (online, 12 February 2022) <https://www.abc.net.au/news/2022-02-12/high-court-are-you-an-employee-or-an-independent-contractor/100819396>.

89 [2021] FWC 2818.

90 Ibid [101]–[102], [138]–[139] (Commissioner Cambridge).

in *Jamsek* and *Personnel Contracting*.[91] As Deliveroo's appetite for appeal indicates, the High Court's approach to the characterisation of employment that took shape in *Rossato* which has now been solidified in *Jamsek* and *Personnel Contracting* is not only discordant with the common law approach to employment, but creates the practical risk of increased precarity, privation and disempowerment for the up to 250,000 Australian workers working in the gig economy.[92]

91 Elizabeth Byrne, 'High Court Decisions Clear Way for Appeal to Deliveroo Driver's Alleged Unfair Dismissal', *ABC News* (online, 9 February 2022) <https://www.abc.net.au/news/2022-02-09/high-court-decisions-over-employees-and-contractors-gig-economy/100812748>.

92 Donald Freudenstein and Becca Duane, *The Rise of the Gig Economy and its Impact on the Australian Workforce* (Green Paper, Actuaries Institute, December 2020) 5.