

# Common Cause.

JUNE 2020

## Nail in the coffin for the 'permanent casual' rort

The Federal Court judgment in *WorkPac v Rossato* has reinforced our earlier win in the Skene case, finding that the 'permanent casual' labour hire model in coal mining is unlawful. Here's what you need to know.

The full bench of the Federal Court handed down a decision on 20 May that:

- Upholds the previous *WorkPac v Skene* decision run by the CFMEU
- Reaffirms that casual labour hire coal miners working full-time regular hours on advance rosters are not genuine casuals and entitled to paid leave
- Paves the way for claims for backpaid entitlements for long-term casuals in some circumstances

The Court's decision in the matter of *WorkPac v Rossato* was a big win for our Union and a big loss for *WorkPac* and the 'permanent casual' work model.

It upholds key principles of the landmark August 2018 *WorkPac v Skene* decision, namely that work which is regular, on-going and permanent in nature is not genuinely 'casual' and therefore attracts entitlements such as paid annual leave. The full bench also ruled that *WorkPac* could not 'set off' money supposedly paid as casual loading against leave entitlements owed.



Pictured: Paul Skene

Leave and loading: landmark ruling set to rock coal industry

# CASUALS TRIUMPH

BY IAN KIRKWOOD

THE widespread use of 'permanent casuals' in the coal industry as a cost saving measure has been dealt a major blow with a full bench Federal Court decision going against the labour hire firm that brought the case.

A long-awaited verdict in *WorkPac v Rossato* was handed down at 4pm yesterday. It was praised by unions but employers want Canberra to intervene, saying it could cost \$8 billion in extra annual leave costs alone.

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To watch National Legal Director Alex Bukarica explain the decision, go here: [www.youtube.com/watch?v=saOHRfjAGws](http://www.youtube.com/watch?v=saOHRfjAGws)

## WORKPAC V SKENE

Paul Skene was a casual labour hire coal miner employed by WorkPac and member of our Queensland District, working a typical 7/7 roster set 12 months in advance. In his case, fought over four years by our Union, he argued that his work arrangement did not fit the legal definition of a 'casual' and was therefore owed annual leave entitlements under the National Employment Standards.

In August 2018, a full bench of the Federal Court agreed that Paul was owed leave entitlements, paving the way for other casual labour hire coal miners to also claim unpaid entitlements and effectively declaring the 'permanent casual' work model so commonplace in mining an illegal rort.

**Listen to the decision explained on our podcast:**  
[commoncause.cfmeu.org.au/podcast](http://commoncause.cfmeu.org.au/podcast)

## WORKPAC V ROSSATO

The Skene judgment was a blow to WorkPac. Instead of appealing it to the High Court they initiated a new case in the Federal Court with hand-picked employee Robert Rossato, in the hope of undermining the Skene decision's definition of casual as intermittent and irregular and obtain a favourable judgment on the issue of 'set-off' to reduce their potential financial liability for backpay claims. The full bench rejected their arguments and found that like Paul Skene, Robert Rossato was also not a genuine casual and was also eligible for paid leave entitlements.

## WHAT DOES THE DECISION MEAN FOR MEMBERS?

In reinforcing the Skene judgement, the Rossato judgment paves the way for long-term casuals to claim unpaid leave entitlements. This decision is relevant to members who are or have been working in the following circumstances:

- Employed as a 'casual' and assigned to a host employer in the coal mining industry
- Paid a flat hourly rate for all rostered hours
- Provided with a fixed roster that sets out working days well into the future
- Worked regular, full time hours under that roster for an extended period of time.

The Union is pursuing claims for unpaid leave entitlements on behalf of members, beginning with current and former WorkPac employees via our class action (see more at [classaction.cfmeu.org.au](http://classaction.cfmeu.org.au)).

**Here's how A Current Affair covered the decision:**

[www.youtube.com/watch?v=gwprd94bZ5yk](http://www.youtube.com/watch?v=gwprd94bZ5yk)

## WHAT ABOUT NON-MEMBERS?

The benefits of this decision will flow to all workers in mining and other affected industries by mine operators and labour hire companies reviewing their employment arrangements and relevant entitlements.

The Union will only pursue legal claims for compensation for Union members. If you have affected co-workers who are not Union members, please encourage them to join and remind them that class action law firms jumping on this decision to drum up business will take a substantial cut from any settlement they reach. Only the Union can guarantee that the recovery of entitlements will be free of charge and that all of the money recovered will go to the employee.

## WILL THE GOVERNMENT REVERSE THIS WIN FOR CASUAL WORKERS?

Employer groups are in a frenzy about this decision, which is the second time the Federal Court has called out the 'permanent casual' labour hire model as unlawful. They claim it will generate billions of dollars in backpay claims and cripple small business. This is a nonsense.

The decision is highly relevant in coal mining and some other parts of the economy where the outsourced labour hire business model is prevalent. These employers are large multinational mining and labour hire companies, not mum and dad corner stores. In other industries like hospitality, casual work arrangements are more likely to be irregular and intermittent in line with the legal definition and community expectations.

Industrial Relations Minister Christian Porter has said he will review the decision and consult with employers and unions about its implications.

Employer groups are urging the Government to introduce a new definition of casual to the Fair Work Act as an employee who is 'engaged and paid as such'. We are urging the Government to adopt a definition of casual as 'intermittent and irregular' in line with the Skene and Rossato Federal Court judgements, and plain common sense.

We know there is deep community concern about exploitation of casuals in coal mining and other parts of the economy. With this case we have had an important win and we will keep up the fight to restore good, permanent jobs to our industries.

# Full steam ahead for class action

## The court win in *WorkPac v Rossato* has cleared the way for the Union's class action against WorkPac to proceed.

The class action was adjourned pending the outcome of the Rossato matter, but now that the Federal Court judgement has clarified the rights of existing and former WorkPac employees to claim backpaid leave entitlements due to being misclassified as casuals, the Union will push forward as soon as possible.

There are currently over 700 confirmed claimants in NSW and Queensland, with many more expressing interest since hearing about the Rossato casuals decision.

The 'class' covered by this action are coal mineworkers who are, or were:

- CFMEU members
- Employed by WorkPac in the coal mining industry for at least three months, between August 2013 and 2019
- Placed by WorkPac on 'assignment' with the work crew of a mine operator
- Worked in accordance with a long-term roster determined by the mine operator
- Designated as a 'casual' employee by WorkPac and paid a flat hourly rate of pay.

Register your interest: [classaction.cfmeu.org.au](http://classaction.cfmeu.org.au).

The CFMEU class action is fully funded by the Union and all compensation won will be paid directly to affected members, with none taken in legal fees.

The lead claimant is Hunter Valley coal miner Ben Reynard, who worked for WorkPac at Mt Thorley Warkworth as a casual on a flat rate.

Like many 'casual' coal miners, Ben was given his roster a year in advance, was expected to work every rostered day and found it very difficult to take time off.

*"To get a day off, us labour hire employees were required to put in an application form to our Rio Tinto supervisors with two weeks' notice and then if approved by Rio Tinto, WorkPac would*

*approve the leave. The leave taken was unpaid leave. Also, it was almost always expected that we would try and find other employees to cover our shifts that we requested off.*

*"I recall it being very difficult to get permission to take leave during popular holiday times and the permanent employees were given preference for this leave. In any case, I found it difficult to take leave because of the financial pressure it caused due to it being unpaid.*

*"It was always my aim to get a permanent job with the mine operator at MTW mine. However, the only way I could get employment initially at the MTW mine was via a labour hire company as a casual. In comparison to a permanent employee, a labour hire employee is a second-class citizen. The labour hire employee does the same work, under the same supervisors, but gets significantly less money and no sick leave or annual leave. You also have less job security as the mine operator can get rid of you whenever they want."*

Queensland coal miner Chad Stokes is also part of the class action. He has worked in the coal industry for 10 years and the last six years as a casual with WorkPac at BMA's Blackwater mine. After starting at Blackwater in 2014, he took no leave for four years until he had accrued some industry long service leave in 2018. As a labour hire worker, Chad works alongside BMA employees and does the same work, but on far less pay and entitlements.

*"I am hopeful about the class action recovering entitlements, but most importantly I hope it helps end the labour hire model for future generations,"* said Chad.

*"The bank doesn't want to lend money when you're a casual, even if you have a decent deposit. After all, you could be let go any day. If there is an important family event I can't take a day off without losing money.*

*"Multinational mining companies should employ and pay people properly. Workers should be able to have holidays with their families and take sick days when they need them."*





# Win puts Operations Services workers closer to a better deal

**BHP has suffered a setback in its efforts to ram through substandard Enterprise Agreements covering thousands of Operations Services (OS) coal miners without bargaining with them.**

The full bench of the Fair Work Commission agreed with the CFMEU that BHP hadn't demonstrated genuine agreement by workers or proved its two EAs left OS workers better off overall than the Award, quashing their approval.

While BHP has another opportunity to have the agreements approved, the recent decision was an important win for the Union and puts OS workers a step closer to improving their pay and conditions by bargaining with CFMEU representation.

National Legal Officer Eliza Sarlos said BHP had made a mockery of the enterprise bargaining process by 'negotiating' the OS agreements with just a handful of iron ore workers in the Pilbara.

*"Those agreements now cover over 2000 coal workers, with OS now scaling up significantly and providing labour across its east coast coal operations," she said.*

*"An enterprise agreement is an opportunity to set the conditions with workers at that enterprise. But BHP engaged iron ore workers that wouldn't ever be working at coal mining sites to set the conditions that would come to cover all workers.*

*"What is sinister about that is the terms and conditions of the OS agreements are far below the terms and conditions that exist on BHP coal mining sites that have been negotiated*

*over decades of agreement-making with those workforces.*

*"They are paid as much as \$50,000 a year less, with a significant loss of conditions such as accident pay."*

The Fair Work Commission decision overturns a previous decision in December to approve the agreements. Applications by BHP to have the Agreements approved will now be reheard. If the Agreements are rejected again, it gives an Operations Services workers an opportunity to engage in genuine bargaining for new Enterprise Agreements, with Union representation.

CFMEU National President Tony Maher said Operations Services was a variation on the labour hire business model designed to cut costs by driving down wages.

*"It's not enough just to be given a nice BHP shirt and told you're part of the team if you're not given BHP pay and conditions or even the chance to bargain for them.*

*"Operations Services is a strategy dreamt up by BHP executives to drive down wages and conditions in mining by employing people on non-union agreements through an in-house labour hire provider.*

*"Our message to Operations Services workers is that you deserve better. You deserve to be paid and treated the same as the people you work alongside and that includes the right to bargain for a better deal."*





# Win! Coal industry conditions in sight for Orica shotfirers

**The CFMEU is ready to bargain for a better deal for Orica shotfirers at Boggabri Coal in NSW's Gunnedah Basin, after an important legal victory on coverage rights.**

In a common sense decision, the Fair Work Commission agreed with the Union that the contract explosives workers are part of the coal industry, making them eligible for CFMEU coverage.

Orica has long argued that their shotfirer employees are not coal industry workers, even though they work exclusively in coal mines, because the company is part of the explosives rather than the coal industry.

But after a majority of Orica shotfirers at Boggabri joined the CFMEU and sought representation in bargaining, the Union successfully challenged a prior ruling that the contract shotfirers were not eligible for CFMEU.

*"These shot firers are obviously coal industry workers,"* said CFMEU Northern Mining and NSW Energy Vice President Jeff Drayton.

*"They go to work each day in a coal mine and perform the same work as shotfirers who are directly employed by mine operators.*

*"But they have far worse conditions because they don't get coal industry standards in areas like annual leave, accident pay, long service leave and allowances.*

*"There's an important principle at stake, which is that workers in coal mines should get coal industry conditions that have been fought for over many years and reflect the tough nature of the industry.*

*"These shotfirers saw the successful industrial campaign of the production workforce at Boggabri last year in bargaining for better pay and conditions. Now it's their turn and we are with them 100% of the way."*

The decision paves the way for the CFMEU to represent Orica shotfirers at other coal mines in bargaining.

It follows an important win for Hitachi tradesmen last year, who waged a determined 12-month industrial campaign to be recognised as coal industry workers and receive industry standard conditions in their Enterprise Agreement.





## What does Australia's recession mean for the mining industry?

On 3 June Australia it was reported that the Australian economy shrank 0.3% in the three months to the end of March. Given that most of the impact of the COVID-19 shutdowns happened after that, it is certain that the economy will shrink far more in the three months to the end of June. The Reserve Bank has predicted the economy will shrink by a huge 8% in the 2019-20 year. That's a strong recession.

Official unemployment for April was still relatively low at 6.2% and 820,000 people, but this hides the reality that 500,000 people gave up looking for work, and a further 750,000 were employed but did not work an hour (many of those on JobKeeper government support payments). So the real unemployment rate is more like 2 million and 15%. Truly awful.

But the broader story of the Australian economy is not the same as mining. While various sectors of the economy were almost entirely shut down for most of April and May,

the mining industry continued in full production. While most parts of the economy are strongly linked to domestic demand (so, for example, the construction industry was never shut down, but is now declining due to higher unemployment and increased economic insecurity) the mining industry basically operates in response to the international economy.

The iron ore industry has continued particularly strongly because Brazil, Australia's major competitor, still has a lot of production shut down due to tailing dam safety issues. Other minerals are taking a hit on prices due to falling overseas demand, but it varies.

Coal prices had been drifting down since about April last year, but suddenly dropped 15-20% this April. For thermal coal, spot prices in the US\$60s per tonne suddenly dropped to low US\$50s /tonne. Coking coal dropped from US\$130s/tonne to not much over US\$100 per tonne.



**Steel industries in some countries did shut down during the first stage of the pandemic. Power stations didn't shut, but power demand from industry fell. As of late May/ early June, the steel and power industries of major Australian coal markets like Japan, Korea, Taiwan and China are recovering. And other coal producing countries like Colombia and South Africa closed their coal mines wholly or partly, leaving more market share for Australia.**

The result for Australian coal to date is that the vast majority of production and employment has continued. But current low prices mean some producers will be cash-negative, and no company will be making much profit.

There have been some job cuts – with Peabody mines Coppabella, Wambo and Metropolitan being prominent. These mines have not closed but are reducing operations. Peabody is a US company that, like all US coal companies, is having a very difficult time in its home country and that may influence their willingness to cut jobs here.

Predicting when there will be strong recovery from the current situation is extremely difficult. On top of the highly unusual situation of dealing with a global government-induced recession due to the pandemic shutdowns, we now have major civil unrest in the world's largest economy, the USA. The US\$ is now falling against many currencies, including the Australian dollar, due to fears of economic collapse. Among many impacts, this means coal sales in US\$ to Asian markets convert into less Australian dollars, shrinking the revenues of coal companies.

The governments of Australia are now gradually re-opening the various sectors they shut down in April and May. But no one thinks there will be a rapid bounce-back to the pre-pandemic period (which was rather weak already).

Some argue that Australia may be perceived as a “safe haven” due to its relative success in suppressing COVID-19, and that this may produce an economic benefit. Any possible benefit will be reduced by the continuing ban on almost all international travel well into 2021. As well as stopping dead the major international tourism industry, this will dampen international trade and investment.

The US economy was already crashing due to President Trump's bungling of the pandemic response there that has caused well over 100,000 deaths (and still rising). And that was before the civil unrest over the police killing of black American George Floyd. Compounded by the likelihood of a second wave of infections and deaths there, the US recession will be incredibly bad. And that will affect the whole world as the US is a very large part of world trade.

So far the Australian mining industry including coal has suffered only mildly from the pandemic (especially in comparison to many other major industries). But the international trade scenarios are more uncertain than ever – in scale as well as direction. The US situation increases the downside risks substantially.

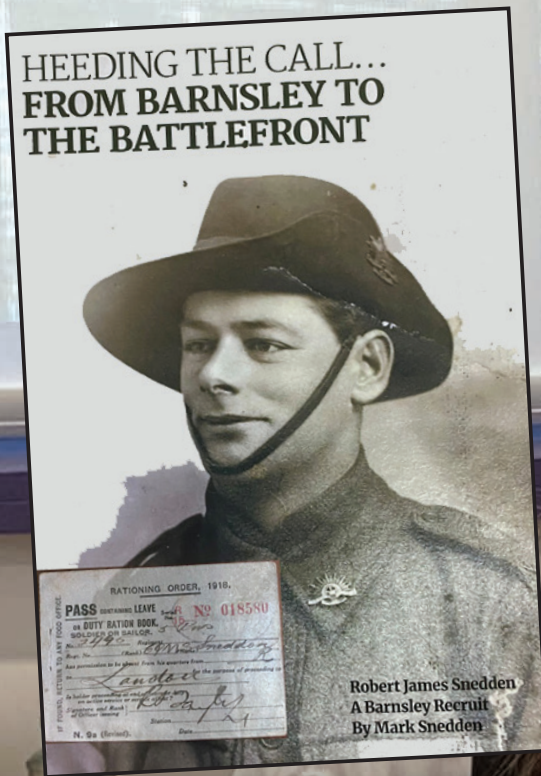
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#### **ON A BRIGHTER NOTE:**

The financial year 2018-19 may seem like a century ago, but the Australian Bureau of Statistics released industry performance data on 29 May. It showed the mining industry had a very healthy profit rate of 33%, while coal mining did even better at 39%. Industry value-added (income minus operating costs) was a whopping \$1,164,100 per person employed, just beating metal ore mining on \$1,128,600 per person. It seems strange that, with all the automation that has occurred in iron ore mining (which dominates metal ore mining) that value added per worker was higher in coal!

**Peter Colley**  
**National Research Director**





# ‘Heeding the call’ – a coal miner’s journey to the Western Front

**Kotara High School principal Mark Sneddon grew up in the Lake Macquarie area. His father, grandfather and great uncles were miners. He has recently written a book about his great uncle Robert Snedden, ‘Heeding the Call... from Barnsley to the Battlefield,’ which has been published with the support of our Northern District’s Mandalong and Myuna Lodges.**

Mark recently shared with Common Cause some of his memories of growing up in a mining family and his book about his Uncle Bob’s journey from the coal mines to the Western Front:

*“I am indebted to the CFMEU for their sponsorship of a book that I have written about my Great Uncle Robert James Snedden, who ‘Heeded the Call’ and fought on the Western front during the First World War. He left his family behind in Barnsley, in Lake Macquarie, and returned after some four years, and like so many other young volunteers at the time, as a different man. Uncle Bob (b.1894), was a miner, who worked in collieries close to him before, and after, his time overseas.*”

*My father David Snedden (b.1947) was a miner in the Lake Macquarie area for most of his working life, up until his retirement from Awaba Colliery in 1999. His father John Snedden was a miner, as was his Uncle Bob, who I have written about, and their father Andrew Snedden. Andrew came to Australia in 1883 from Scotland as a young man, who had already begun his working life as miner in his native Scotland before disembarking.*

*Growing up in a mining family in Lake Macquarie, in the 1970s and 1980s, I remember quite vividly and fondly the ‘Pit Picnics’ that took place each year. My Dad, being a Fed at Awaba Colliery, paid money into the colliery’s Social Club each week that contributed money toward a Christmas Hamper and the picnics. The colliery would also match, dollar for dollar, into the fund each calendar year. Every even year picnic day was spent at Rathmines Park, on the western side of Lake Macquarie, where families would gather, have some treats and all the kids had the opportunity to join in on various activities, including running races, sack races, three legged races and the old favourite, the “egg and spoon” race. Every odd year was a trip away.*





*The Colliery was an integral part of community, and essentially were tight knit and supportive communities within themselves. Families knew each other, connected, and formed the basis of non-judgmental and sincere support networks.*

*Miners from the Lake Macquarie and the Hunter would even holiday together at various locations around the lake each Christmas break. Miners would camp, in the early days at Speers Point Park and Croudace Bay. And later on it would extend to Wangi Wangi (on the site of the current Workers Club) and Coon Island in Swansea. Literally whole communities and streets would pick up the family and plant themselves at these venues, sometimes neighbours camping next to neighbours. Everyone would spend time together and relax whilst pits were only open with skeleton crews until the end of January. Essentially, families, if not by blood and marriage, were formed by spending this time together, an extension of the bond that the men would forge, working together in the mines.*

*Coal has meant so much more than an energy source for thousands of Australian families over the last two hundred years. Coal meant a livelihood, coal was a means to put food on the table, a roof over a family's head, and the resources to put children through education. The coal industry was also integral to community donations, especially through the CFMEU and individual Colliery fund raising projects. Both the Wallsend and Kurri Kurri Hospitals, in the Newcastle/Hunter area were actually opened on the funds that miners raised themselves.*

*Life in Australia was built around the colliery and coal, more so in my opinion, than 'the sheep's*

*back'. Coal provided our country with the progress that we all enjoy today, so I think it is sad when people are quick to denounce it.*

*The book that I have written, entitled "Heeding the Call...from Barnsley to the Battlefront", is an authentic account of a young boy raised in regional NSW (Barnsley, Lake Macquarie) who was raised by a Scottish father, and a mother who was a convict descendant, in a family with six siblings. The story traces Robert James Snedden from being a boy, to recruitment, to the battlefront and home.*

*The story takes the reader on the journey to Egypt, following Robert in his training, and the extreme conditions faced here. From here the reader is taken to the Western Front and immersed within the physical and emotional turmoil that the young soldier faces, illustrated from the above sources. Finally, the reader returns home to Australia with Robert, and is painted the picture of the man, post his war experience, and how it shaped him, along with the dark shadows that hung around his persona. Finally, key members of the family*

*deliver candid accounts of their relationship with Robert as a man returned from war as father, father-in-law, uncle and grandfather.*

*I am indebted to the support of the CFMEU, and in particular, the Mandalong and Myuna Lodges."*

**If anyone is interested in a copy of the book (\$25 plus postage), please contact Mark at [mark.snedden@det.nsw.edu.au](mailto:mark.snedden@det.nsw.edu.au), with all proceeds being donated to Barnsley Public School which has been attended by generations of the Snedden family, including 'Uncle Bob'.**





# A great win delivered by Union members

**Every member of our Union should be enormously proud of our big court win for casuals in the matter of WorkPac v Rossato. This is a decision that has deeply rattled employers because it is a fatal blow to the ‘permanent casual’ business model they have been using for years to rip off workers, especially in coal mining.**

Our legal wins first in WorkPac v Skene then WorkPac v Rossato were a big investment by our Union and took many years of work to achieve. But the principle they have established in law is a common sense one that will substantially improve job security across the workforce.

If you were to ask the average person in the street “*what is a casual employee*” the answer would be pretty consistent. Most people would regard casual employment as a mode of engagement where there is no ongoing expectation of work. Casual work is intermittent, unpredictable, irregular – *the opposite of permanent*.

This is not rocket science, or high-brow legal theory. In fact, the layperson’s definition of casual employment pretty much lines up with how the Courts have now defined it.

Both Paul Skene and Robert Rossato were employed as mineworkers by the labour hire company WorkPac as “permanent casuals”. For all practical purposes, they were indistinguishable from the permanently employed mineworkers they worked side by side with. The only difference being they were labelled as “casuals”.

Following the decisions of the Federal Court in *Skene* and *Rossato* there has been a hysterical over-reaction by big business and the labour hire industry. The reason is that the court rulings have exposed an exploitative business model that involves labour hire companies supplying “casual” employees for years on end at a substantially lower rate of pay than the direct employees of the client company that these workers work side by side with. Along with the lower rates of pay – 30 to 40% less than most established enterprise agreements in the coal industry – these “permanent casuals” do not get sick leave, or annual leave and can be sent home without pay whenever there is a disruption to production, such as wet weather. It is a great way for multinational mining giants to improve their bottom line.

One of the furphies that has been peddled by the big business lobbyists since the Skene decision is that there has been “double-dipping” because casual workers are already paid a “casual loading” to compensate them for foregone conditions such as annual leave. This is plain wrong.

In the *Skene* and *Rossato* cases the court found that there was nothing in his flat rate of pay to indicate that it contained compensation for casual employment. In other words, there was no identifiable casual loading. But equally, from a real-world perspective, these workers were paid far less than the permanent employees they worked side by side with, even taking into account their flat rate of pay and had no right to annual leave or sick leave. In which universe is that double-dipping?

Until these Federal Court judgments, fought for by our Union, there was no legal barrier to companies employing workers on permanent casual arrangements.

With employers now screaming blue murder, Industrial Relations Minister Christian Porter has announced he will consider amendments to the Fair Work Act to allow the practice to continue. The big business lobby wants the Government to effectively endorse a sham and allow employers to legally label someone as a casual, regardless of the objective reality of their employment relationship.

To embark on this course would be to betray the many thousands of casual coal miners who have been exploited and treated as second class citizens. We will be using every avenue at our disposal to oppose legislative changes that would undermine the impact of the important *Skene* and *Rossato* judgments.

Mining companies are tough opponents and we know that to achieve lasting change we need to fight and fight again. But let’s take a moment to reflect on our important achievement in changing the law. I’d like to thank Paul Skene, our labour hire member who took the fight up to WorkPac, our great legal team and every CFMEU Mining and Energy member - it’s your commitment to collective action through the Union that has delivered this win.

**Tony Maher**  
General President