Australia's highest court gives green light to casualisation

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The High Court of Australia handed down a unanimous ruling on August 4 that a worker's status as casual or permanent is determined solely by the words of their written contracts.

Without a single dissenting vote, the country's supreme court declared that employment contracts "accepted" by workers prevail, even if contradicted by "the real substance, practical reality and true nature of the employment relationship."

This is a class-war ruling. The judges resuscitated the myth of "freedom of contract," winding back decades of class struggle against this doctrine. As workers know full well, there is no "freedom" or "equality" of bargaining power in being forced by an employer to sign a contract in order to be employed.

This verdict clears the way for a deepening of the offensive against the working class, which has been accelerated by the COVID-19 pandemic. The ruling gives employers a free hand to define workers as casuals, without even the limited protections afforded by the Fair Work Act, National Employment Standards or enterprise agreements.

Last week's decision also has far-reaching implications for other insecure forms of work, including the increasingly common practice of sham contracting, rife in the gig economy. Millions of workers are already employed as casuals or supposedly independent contractors, with the highest rates among young workers.

Andrew Stewart, a professor of law at the University of Adelaide, told the Australian Broadcasting Corporation: "It's an open invitation to businesses to hire workers as independent contractors rather than employees—meaning they don't just miss out on annual leave, but minimum wages, limits on working hours, the right to complain of unfair dismissal, and maybe super and workers' compensation as well."

The decision overturned a May 2020 Federal Court finding in the case of *WorkPac Pty Ltd v Rossato*, which held that a worker, employed as a labour-hire casual but working full-time hours rostered up to a year in advance, should receive the same entitlements as a full-time employee.

Although employed by labour-hire firm WorkPac, Robert Rossato worked for three and a half years at Glencore coal mines in Queensland, under what has now become an increasingly typical arrangement in Australia's $202 billion-a-year mining industry.

The Federal Court finding was hailed as a "big win" by the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU), which had launched a class action to recover workers' unpaid entitlements. This has been quickly revealed as a dead end.

In March, the Liberal-National Coalition government introduced legislation that sought to nullify the Federal Court finding. The Fair Work Act amendment defined casuals as workers given no "firm advance commitment to continuing and indefinite work according to an agreed pattern of work."

Under the new law, regular casuals can ask for a permanent job after 12 months, but employers have the right to say no.

Casual employment was not defined under the Fair Work Act when it was introduced by the Rudd Labor government in 2009. That opened the door to rampant casualisation.

That reality has been underscored by the High Court ruling. In fact, the Morrison government's amendment was irrelevant to Rossato's case, because he had already brought legal action before it was introduced.

However, the March definition now applies retroactively to *all* workers previously hired as casuals,

further giving the green light to casualisation.

The High Court verdict prompted an ecstatic response from the financial press. The *Australian Financial Review* (AFR) published four celebratory articles on the day of the finding. Its August 4 editorial said it was "a win for black letter law against judicial activism" and a "victory for freedom and primacy of contract."

The ruling will have immediate ramifications for gig economy workers. In recent months, rideshare and food delivery workers have legally challenged the standard practice of engaging workers as "independent contractors" rather than employees.

These efforts to obtain a minimum hourly wage and some basic rights have been severely limited by the insistence of the Transport Workers Union (TWU) that they be confined to the courts. Like all the trade unions, it has opposed any industrial action.

Already, food delivery company Deliveroo has said it will use the High Court ruling to bolster its appeal against a Fair Work Commission (FWC) ruling in May that rider Diego Franco was an employee, not a contractor, and therefore protected by unfair dismissal laws. A Deliveroo spokesperson said: "The High Court's decision is a big step in a positive direction."

On Friday, the FWC itself declared that the Rossato decision called into question whether the "real substance, practical reality and true nature" of the relationship between Deliveroo and Franco could even be considered, or if the FWC could only take into account "the terms of the contract(s) between the parties."

Despite the threat posed to casual and gig workers, TWU national secretary Michael Kaine was quick to continue the union's efforts to sow parliamentary and legal illusions. He claimed there was still "legal ambiguity" and called for "regulatory intervention."

Kaine's comments are a desperate bid to save face as the Franco verdict unravels, after also being claimed as a major win for the TWU.

Similarly, Australian Council of Trade Unions secretary Sally McManus said the High Court decision showed "there is an urgent need for stronger laws to provide basic rights to casuals." McManus even appealed to Prime Minister Scott Morrison to "crack down on the rampant casualisation of the workforce."

McManus is yet again pleading to the government which, less than six months ago, passed legislation to speed up the casualisation of the workforce. This dovetails with her collaboration with the government throughout the pandemic, exemplified by Industrial Relations Minister Christian Porter calling her his "BFF [best friend forever]."

Labor leader Anthony Albanese, who has previously claimed that a Labor government would protect casual workers, has remained silent on the High Court ruling. Labor's industrial relations spokesperson Tony Burke only vaguely promised to "overturn the government's scheme."

The reality is that successive Australian governments, both Labor and Liberal-National, have eviscerated the rights of workers. The drive toward increased casualisation took off under the trade union-backed Hawke-Keating Labor governments of the 1980s and 1990s.

The High Court ruling underscores the necessity for workers to break out of the grip of the Labor and union apparatus, and form rank-and-file committees to organise independently against the escalating government-employer offensive.