



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 01 Sep 2023 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number: M16/2023
File Title: Rehmat & Mehar Pty Ltd & Anor v. Hortle
Registry: Melbourne
Document filed: Form 27C - Intervener's submissions
Filing party: Interveners
Date filed: 01 Sep 2023

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **REHMAT & MEHAR PTY LTD (ACN 640 452 991)**
First Plaintiff

and

GAURAV SETIA
Second Plaintiff

and

ROBERT HORTLE
Defendant

**SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES,
INTERVENING**

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Basis of Intervention

2. The Attorney General for New South Wales (**NSW Attorney**) intervenes pursuant to s 78A of the Judiciary Act 1903 (Cth) in support of the defendant.

Part III: Argument

3. The plaintiffs contend that a “real conflict” exists between the Fair Work Act 2009 (Cth) and the Wage Theft Act 2020 (Vic) which may be discerned in two ways:
Jemena Asset Management (3) Pty Ltd v Coinvest Ltd (2011) 244 CLR 508 (**Jemena**) at 525 [42] per the Court.
 - a. First, the plaintiffs contend that the Fair Work Act, through s 26, makes clear that it was intended to apply to the exclusion of the Wage Theft Act.

The subject matter in respect of which the Fair Work Act is said to be complete, exhaustive or exclusive is the system of inspection, compliance and enforcement of the terms and conditions of employment for national system employees under the Fair Work Act and instruments made under it: Plaintiffs' Submissions filed 7 July 2023 (PS) at [31]; see also at [16]. In the plaintiffs' submission, there is no room for the operation of the Wage Theft Act to deal with that subject matter: Work Health Authority v Outback Ballooning Pty Ltd (2019) 266 CLR 428 (**Outback Ballooning**) at 447 [33] per Kiefel CJ, Bell, Keane, Nettle and Gordon JJ, 456 [65] per Gageler J, 473 [106] per Edelman J.

- b. Second, the plaintiffs contend that the Wage Theft Act alters, impairs or detracts from the Fair Work Act in so far as the former criminally penalises what the latter intends to deal with via the imposition of civil penalties: PS [34]. The duplication of a system of inspection, compliance and enforcement is said to undermine the Fair Work Act: Outback Ballooning (2019) 266 CLR 428 at 447 [32] per Kiefel CJ, Bell, Keane, Nettle and Gordon JJ, 473 [107] per Edelman J.

4. The NSW Attorney supports and adopts the submissions of the defendant and the Attorney-General for the State of Victoria as to why these contentions should not be accepted and makes the following supplementary submissions: see Joint Submissions of the Defendant and the Attorney-General for the State of Victoria filed 18 August 2023 (DS).

Whether Fair Work Act intended to be complete or exhaustive

5. Section 26 of the Fair Work Act expresses a limited intention of exclusion: see, by analogy, John Holland Pty Ltd v Victorian Workcover Authority (2009) 239 CLR 518 at 528 [23] per the Court. It relevantly provides that the Fair Work Act is intended to apply to the exclusion of State industrial laws in the form of an Act of a State that applies to employment generally and provides, as one of its main purposes, for the establishment or enforcement of terms and conditions of employment: Fair Work Act, s 26(2)(b)(ii), (4); PS [30].
6. For the reasons given by the defendant and Victoria, the Wage Theft Act does not apply to employment generally in the terms of s 26(4) of the Fair Work Act:

DS [42]-[48]. Nor does the Wage Theft Act have, as a main purpose, the enforcement of terms and conditions of employment in the terms of s 26(2)(b)(ii) of the Fair Work Act.

7. The Fair Work Act seeks to ensure a “guaranteed safety net of fair, relevant and enforceable minimum terms and conditions”: s 3(b). The terms and conditions of employment of national system employees are provided in Chapter 2 and Chapter 4 provides for enforcement of the Act: see ss 4(1), 5(1), 7(1). The range of enforcement mechanisms includes injunctions, orders for compensation, orders for reinstatement and pecuniary penalty orders: see Fair Work Act, ss 545, 546. For example, pursuant to s 323(1) in Part 2-9 (“Other terms and conditions of employment”) of the Fair Work Act, an employer must pay an employee amounts payable to the employee in relation to the performance of work in full and in money by one of the methods referred to in s 323(2), at least monthly. Section 323(1) is a civil remedy provision referred to in the table in s 539(2). Thus, compliance with s 323(1) could be enforced by way of orders for compensation or pecuniary penalty orders.
8. The enforcement of terms and conditions of employment provided in the Fair Work Act is designed to secure compliance with those terms and conditions. That is plainly the case for injunctions and orders for compensation or reinstatement, which seek to correct or remedy non-compliance in the context of the relationship between the national system employee and national system employer. But the same is also true of pecuniary penalty orders. As Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ observed in Australian Building Commissioner v Pattinson (2020) 274 CLR 450 (**Pattinson**) at 457 [9], “the purpose of a civil penalty is primarily, if not solely, the promotion of the public interest in compliance with the provisions of the Act by the deterrence of further contraventions of the Act”: see also Commonwealth v Director, Fair Work Building Industry Inspectorate (2015) 258 CLR 482 at 506 [55] per French CJ, Kiefel, Bell, Nettle and Gordon JJ.
9. The imposition of criminal sanctions does not seek to correct or remedy non-compliance with the terms and conditions of employment in the Fair Work Act. That enforcement is not a main purpose of the Wage Theft Act. The main purpose of the Wage Theft Act is to “create offences relating to the theft of employee entitlements and the keeping of records relating to employee entitlements”: s 1(a). Thus, the

Wage Theft Act is concerned with accountability through criminalisation and criminal punishment: DS [37]. That entails notions of retribution and denunciation, which have a separate operation to measures which seek to carry into effect the terms and conditions of employment in the Fair Work Act. By contrast, the absence of retribution as a relevant factor in the setting of civil penalties was critical to the reasoning in Pattinson (2020) 274 CLR 450: see at 467 [38]-[39], 468 [42], 469-470 [45] per Kiefel CJ, Gageler, Keane, Gordon Steward and Gleeson JJ.

10. For the purposes of determining whether, as a matter of construction, s 26(2)(b)(ii) of the Fair Work Act indicates an intention to exclude State laws which impose criminal sanctions for conduct which constitutes a breach of the terms and conditions of employment in the Fair Work Act, it is relevant to recall that ss 552, 553 and 554 of the Fair Work Act contemplate that a person may be subject to criminal liability in connection with conduct that is substantially the same as conduct which constitutes a contravention of a civil remedy provision. Section 549 makes clear that such criminal liability does not arise under the Fair Work Act. The “criminal proceedings” referred to in ss 552, 553 and 554 may be brought pursuant to a State law. If it were intended that an “offence” for the purposes ss 552, 553 and 554 of the Fair Work Act should be a Commonwealth offence (only), that could have been made clear with language similar to that adopted in s 556 concerning the imposition of pecuniary penalties “under some other provision of a law of the Commonwealth”.
11. Section 536C of the Fair Work Act does not assist the plaintiffs: cf PS [17]. It too proceeds on the basis that State laws creating criminal offences may have concurrent operation with the Fair Work Act. Section 536C clarifies the potential overlap between State offences and the corrupting benefits offences contained in Part 3-7, whereas State offences and the civil remedy provisions serve different purposes and, in any case, are addressed in ss 552, 553 and 554 of the Fair Work Act, so far as they overlap.
12. The Fair Work Act indicates an intention to operate within the setting of other laws, including State criminal laws. It was intended to be supplementary to, and not exclusive of, laws imposing criminal liability for conduct that is substantially the same as conduct constituting a contravention of a civil remedy provision: see Ex parte McLean (1930) 43 CLR 472 at 483 per Dixon J (Rich J agreeing); McWaters v Day (1989) 168 CLR 289 at 299 per the Court; Outback Ballooning

(2019) 266 CLR 428 at 449 [39]-[40] per Kiefel CJ, Bell, Keane, Nettle and Gordon JJ. This weighs strongly against the existence of a negative proposition, in the Fair Work Act, that nothing other than what it provides as consequences for conduct constituting a contravention of a civil remedy provision is to be the subject of legislation: Outback Ballooning (2019) 266 CLR 428 at 447-448 [35] per Kiefel CJ, Bell, Keane, Nettle and Gordon JJ.

13. If the Fair Work Act does not reveal an intention that it be the complete or exhaustive statement of the law on liability arising or consequences resulting from conduct constituting a contravention of a civil remedy provision, then the Wage Theft Act may operate validly, even on the same subject matter, save to the extent that the Wage Theft Act otherwise alters, impairs or detracts from the Fair Work Act: see R v Credit Tribunal; Ex parte General Motors Acceptance Corporation (1977) 137 CLR 545 at 563 per Mason J (Barwick CJ, Gibbs, Stephen and Jacobs JJ agreeing).

Whether Wage Theft Act undermines Fair Work Act

14. The mere fact that a State law is capable of applying to the same factual circumstances as a Commonwealth law does not establish inconsistency for the purposes of s 109 of the Constitution: McWaters v Day (1989) 168 CLR 289 at 296 per the Court. As explained by Dixon J in Ex parte McLean (1930) 43 CLR 472 at 483, even where a Commonwealth law and a State law prescribe the same rule of conduct and impose diverse penalties, any inconsistency arises because:

... by prescribing the rule to be observed, the Federal statute shows an intention to cover the subject matter and provide what the law upon it shall be. If it appeared that the Federal law was intended to be supplementary to or cumulative upon State law, then no inconsistency would be exhibited in imposing the same duties or in inflicting different penalties.

15. In Outback Ballooning (2019) 266 CLR 428 (in the context of an argument concerning indirect inconsistency), Kiefel CJ, Bell, Keane, Nettle and Gordon JJ observed (at 449 [40]):

The fact that a Commonwealth statute makes certain conduct an offence is not conclusive of exclusivity. There is no presumption that a Commonwealth offence excludes the operation of other laws. The Crimes Act 1914 (Cth), in providing that a person cannot be punished twice, recognises this. If there were a rule or standard of conduct imposed by the [Civil Aviation Act 1988 (Cth)] directed at the safety of persons affected by

aircraft operations, gross breach of it could result in a conviction for manslaughter.

See also R v Winneke; Ex parte Gallagher (1982) 152 CLR 211 (**Gallagher**) at 224 per Mason J.

16. Analogously to s 4C of the Crimes Act 1914 (Cth), ss 552, 553 and 554 of the Fair Work Act recognise the cumulative and concurrent operation of State laws imposing criminal sanctions upon conduct constituting a contravention of a civil remedy provision. Because the Fair Work Act acknowledges that criminal liability may arise “for conduct that is substantially the same as conduct constituting a contravention of a civil remedy provision”, it should not be accepted that the Fair Work Act indicates an intention that such conduct should “be penalised through the imposition of a civil penalty” only: cf PS [34]-[35].
17. Moreover, while the conduct constituting an offence under the Wage Theft Act and the conduct constituting the contravention of the Fair Work Act may be substantially the same, the element of dishonesty in s 6(1) and s 6(7) of the Wage Theft Act is a difference of substance as between the offence and the civil remedy provision: see also s 6(5), (10); Gallagher (1982) 152 CLR 211 at 218-219 per Gibbs CJ. The Wage Theft Act specifically criminalises the dishonest withholding of employee entitlements because “theft is theft” including when committed by an employer: Second Reading Speech for the Wage Theft Bill 2020 (Vic), Parliamentary Debates, Hansard, Legislative Assembly, 18 March 2021 at 1097.
18. Different processes of “inspection and investigation, modes of trial, trial procedure, fora and punishment” are involved in criminal proceedings: PS [34]. But there is nothing inherent in a regime of criminal sanctions co-existing with a regime for civil penalties which demonstrates that the former undermines the latter: see Momcilovic v The Queen (2011) 245 CLR 1 (**Momcilovic**) at 100 [207], 108-109 [237] per Gummow J (French CJ and Bell J relevantly agreeing), 190-191 [479]-[480] per Heydon J, 239 [655] per Crennan and Kiefel JJ.
19. Finally, even if it were accepted that the civil remedy provisions in the Fair Work Act and the offence provisions in the Wage Theft Act permit of a possible operational inconsistency, no such occasion has arisen in the present case: Momcilovic (2011) 245 CLR 1 at 114-115 [252]-[257] per Gummow J (French CJ

and Bell J agreeing). The plaintiffs do not appear to rely on any suggested operational inconsistency.

Part IV: Estimate

20. The NSW Attorney estimates that 15 minutes will be required for his oral argument.

Dated: 1 September 2023



M G Sexton SC SG
Ph: (02) 8688 5502
Michael.Sexton@justice.nsw.gov.au



E S Jones
Ph: (02) 8915 2686
ejones@sixthfloor.com.au

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **REHMAT & MEHAR PTY LTD (ACN 640 452 991)**
First Plaintiff

and

GAURAV SETIA
Second Plaintiff

and

ROBERT HORTLE
Defendant

**ANNEXURE TO THE SUBMISSIONS OF THE ATTORNEY GENERAL FOR
NEW SOUTH WALES, INTERVENING**

Pursuant to Practice Direction No 1 of 2019, the NSW Attorney sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in the submissions.

	Description	Version	Provision
Constitutional provisions			
1.	Constitution	Current	s 109
Statutes			
2.	<i>Crimes Act 1914</i> (Cth)	Current (Compilation No. 146, 12 August 2023 – present)	s 4C
3.	<i>Fair Work Act 2009</i> (Cth)	Current (Compilation No. 51, 1 July 2023 – present)	ss 3, 4, 5, 7, 26, 323, 536C, 539, 545, 546, 549, 552, 553, 554, 556
4.	<i>Wage Theft Act 2020</i> (Vic)	Current (Authorised Version No. 002, 1 July 2022 – present)	ss 1, 6