HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY No. M16 of 2023

BETWEEN: **REHMAT & MEHAR PTY LTD**
First Plaintiff

and

GAURAV SETIA
Second Plaintiff

and

ROBERT HORTLE
Defendant

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE NORTHERN TERRITORY OF AUSTRALIA, INTERVENING

Part I: Certification

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

Part II: Intervention

2. The Attorney-General for the Northern Territory of Australia (**Territory**) intervenes pursuant to s 78A(1) of the *Judiciary Act 1903* (Cth) in support of the Defendant.

Part III: Argument

A. SUMMARY OF ARGUMENT

3. The *Wage Theft Act 2020* (Vic) (**WTA**) is not inconsistent with the *Fair Work Act 2009* (Cth) (**FWA**) because:

   (a) ***Indirect inconsistency:*** s 26 of the FWA marks out the subject-matters which Parliament intends to exhaustively regulate (**Part C**). The WTA is not a law on those subject-matters. The only provisions relied on by the Plaintiffs are ss 26(2)(b)(ii) and (iii). The WTA is not a law for the 'enforcement' of terms and conditions of employment within the meaning of (ii) and is not a law for the 'making' of certain instrument for the purposes of (iii) (**Part D**).

   (b) ***Direct inconsistency:*** There being no intention to exhaustively regulate the subject-matter of the WTA, that Act does not 'alter' or 'detract from' the scheme of compliance and enforcement established by the FWA (**Part E**).

B. PRINCIPLES AND CONCEPTS

4. ***Section 109:*** The FWA is an industrial law of general application throughout Australia passed in reliance on disparate powers under ss 51 and 122 of the *Constitution*.[1] The WTA is a criminal law of the Victorian Parliament passed in reliance on its 'plenary power'[2] to make laws 'in and for Victoria in all cases whatsoever.'[3] In the event of irreconcilable conflict[4] between the two laws, s 109 of the *Constitution* resolves the inconsistency in favour of the Commonwealth law.

5. ***Inconsistency:*** Inconsistency between laws may operate in different modes.[5] First, where conflicting duties are imposed.[6] Secondly, where the paramount law permits conduct which the subordinate law prohibits[7] (or vice versa[8]). Thirdly, where the paramount law is intended to be a complete statement of the law governing a subject-matter and the subordinate law also purports to regulate that subject-matter.[9]

6. Those different 'approaches'[10] are mere analytic tools directed to answering a single question, namely, whether a 'real conflict' exists between Commonwealth and State laws.[11] Care must be taken that their use does not mask the central importance of deciding whether there is a conflict, by diverting attention to the attempt to classify what species of conflict is encountered.[12] The species are often related and overlapping.[13]

7. The inquiry to determine whether the laws are inconsistent is the same in each case. The starting point is the proper construction of the two laws.[14] The question is then

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1 See Explanatory Memorandum to the *Fair Work Bill 2008* (Cth), Notes on clauses [63]-[66], referring to ss 51(i), 51(xx) and 122. See also Pt 1-3, Divs 2A and 2B of the FWA, relating to matters referred to the Commonwealth Parliament under s 51(xxxvii).
2 *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, [46] (Gleeson CJ).
3 *Constitution Act 1975* (Vic), s 16.
4 *Momcilovic v The Queen* (2011) 245 CLR 1 (***Momcilovic***), [317] (Hayne J), quoting *University of Wollongong v Metwally* (1984) 158 CLR 447, 463 (Mason J).
5 *Momcilovic* (2011) 245 CLR 1, [240]-[244] (Gummow J, Bell J agreeing at [660]).
6 *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61, [27] (the Court).
7 *Dickson v The Queen* (2010) 241 CLR 491 (***Dickson***), [22] (the Court).
8 *Momcilovic* (2011) 245 CLR 1, [240] (Gummow J, Bell J agreeing at [660]).
9 *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 (***Marriage Equality Case***), [59] (the Court).
10 *Work Health Authority v Outback Ballooning* (2019) 266 CLR 428 (***Outback Ballooning***), [31]-[33] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
11 *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 (***Jemena***), [41]-[42] (the Court); *Momcilovic* (2011) 245 CLR 1, [630] (Crennan and Kiefel JJ).
12 *Momcilovic* (2011) 245 CLR 1, [318] (Hayne J).
13 *Jemena* (2011) 244 CLR 508, [42] (the Court); *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237 (***Ansett***), 260 (Mason J).
14 *Momcilovic* (2011) 245 CLR 1, [243]-[244] (Gummow J, Bell J agreeing [660]).

whether the subordinate law, if operative, would 'undermine' the paramount law by altering, impairing or detracting from it.[15] In the third category of case ('indirect inconsistency'), the 'undermining' occurs when the subordinate law conflicts with a negative proposition in the paramount law that nothing other than what the latter provides upon a particular subject matter may by the subject of legislation or the common law.[16] In this sense, indirect inconsistency involves a 'more subtle… contrariety'[17] than direct inconsistency, but there must be contrariety nonetheless.

8. In this connection, the Plaintiffs' invocation of the concept of 'covering the field' is inapt (PS [12], [16], [18], [19]), particularly the juxtaposition of 'field' and 'subject matter' as distinct concepts: PS [16].[18] The relevant test was properly explained in the *Native Title Act Case* (emphasis added):[19]

> If the application of State law *to a particular subject matter* be expressly excluded by a valid law of the Commonwealth, a State law which is expressed to apply *to the subject matter* is inconsistent with the Commonwealth law and s 109 of the Constitution is thereby enlivened.

9. The 'two-dimensional'[20] metaphor of a field is apt to mislead because it ignores the fact that legislation may intersect with persons, objects transactions or relationships in nuanced ways.[21] This nuance is important here because, as explained below, 'two laws may deal with different subject matters, so that each may validly apply in relation to the same facts'[22] without inconsistency.

10. ***Express intention:*** The Commonwealth law may state expressly the existence and scope of the negative proposition.[23] Where that occurs, it may not be determinative

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15 *Ansett* (1980) 142 CLR 237, 259-280 (Aickin J); *Momcilovic* (2011) 245 CLR 1, [242]-[245] (Gummow J, Bell J agreeing [660]) and [317] (Hayne J).

16 *Momcilovic* (2011) 245 CLR 1, [244] (Gummow J, Bell J agreeing [660]); *Marriage Equality Case* (2013) 250 CLR 441, [59] (the Court). See also *Ex parte McLean* (1930) 43 CLR 472, 483 (Dixon J) and *Victoria v Commonwealth* (1937) 58 CLR 618 (***The Kakariki***), 630 (Dixon J).

17 *Jemena* (2011) 244 CLR 508, [40] (the Court).

18 *Outback Ballooning* (2019) 266 CLR 428, [33] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

19 *Western Australia v Commonwealth* (***Native Title Act Case***) (1995) 183 CLR 373, 466 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

20 *Momcilovic* (2011) 245 CLR 1, [264] (Gummow J), quoting *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128, 147 (Evatt J). See also *The Kakariki* (1937) 58 CLR 618, 634 (Evatt J).

21 Goldsworthy, 'Legal Rights, Subject Matters and Inconsistency' (1981) 7 *Adelaide Law Review* 487 at 500

22 *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211 (***Gallagher***), 218 (Gibbs CJ).

23 *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation, Australia* (1977) 137 CLR 545, (***Ex parte General Motors***) 563-564 (Mason J, Barwick CJ, Gibbs and Stephen JJ concurring 552 and Jacobs J concurring 565); *Native Title Act Case* (1995) 183 CLR 373, 466 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Council of the Municipality of Botany v Federal Airports Corporation* (1992) 175 CLR 453, 465 (the Court); *Bayside City Council v Telstra Corporation* (2004) 216 CLR 595, [35]-[36] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

of all questions of inconsistency because the Parliament cannot avoid the operation of s 109 by eschewing a conflict which arises through 'direct inconsistency or collision'.[24] However, extreme cases aside, such statements will be an effective and sufficient marker of the subject-matters which the Commonwealth intends to exhaustively regulate.[25]

11. As explained below, the Commonwealth has done that through ss 26-30 of the FWA.[26] The Commonwealth has, by those provisions, charted the metes and bounds of the subject-matters which it intends to regulate exhaustively. A law falling outside those bounds will not be invalid by reason of s 109, unless there is some textual or direct[27] collision between the laws.

12. ***Concurrent norms:*** Much of the Plaintiffs' argument turns on the incompatibility of norms capable of simultaneous obedience: PS [2], 34]-[36]. However, the Acts in question both concern prohibitions and it is 'commonplace'[28] that the doing of a single act may involve the actor in the contravention of more than one norm (i.e. both federal and State). For example, there is 'no prima facie presumption that a Commonwealth statute, by making it an offence to do a particular act, evinces an intention to deal with that act to the exclusion of any other law.'[29] As Crennan and Kiefel JJ explained in *Momcilovic* (citations omitted):[30]

> 'Inconsistency in the relevant sense does not arise merely because of the co-existence of two laws capable of simultaneous obedience or because of the existence of differences between them. Further, the fact that a Commonwealth law and a State law "impose different penalties for the same conduct does not necessarily mean that the laws are inconsistent." What is required in every case is that the two laws being compared be construed so as to determine their operation as a matter of construction, and, in particular, so as to determine whether the Commonwealth's coverage of the subject matter is complete, exhaustive or exclusive.'

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24 *Ex parte General Motors* (1977) 137 CLR 545, 563 (Mason J, Barwick CJ, Gibbs and Stephen JJ concurring 552 and Jacobs J concurring 565).

25 Ibid, 563-564 (Mason J, Barwick CJ, Gibbs and Stephen JJ concurring 552 and Jacobs J concurring 565).

26 As to the predecessor in s 16 of the *Workplace Relations Act 1996* (Cth), see *New South Wales v Commonwealth* (2006) 229 CLR 1 (*Work Choices*), [346]-[377] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

27 *Blackley v Devondale Cream (Vic) Pty Ltd* (1968) 117 CLR 253, 258 (Barwick CJ, McTiernan J concurring 259).

28 *Gallagher* (1982) 152 CLR 211, 224 (Mason J).

29 *Gallagher* (1982) 152 CLR 211, 224 (Mason J); *Outback Ballooning* (2019) 266 CLR 428, [40] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ). See also *McWaters v Day* (1989) 168 CLR 289, 296 (the Court).

30 *Momcilovic* (2011) 245 CLR 1, [637] (Crennan and Kiefel JJ).

13. Thus, in *Gallagher*, this Court held there was no inconsistency between State and Commonwealth laws making it an offence for witnesses not to answer questions in an inquiry. As Gibbs CJ said:[31]

> '[t]he different penalties provided by the two Acts are in respect of what are in truth independent offences which are created by law to serve different purposes. It is not right to say that the Acts provide different penalties for the one offence. There is no inconsistency between Acts which prescribe different penalties for offences which, albeit constituted by the same conduct, are in substance different from one another.'

10 14. The result was different in *Dickson* (2010) 241 CLR 491 where the federal law deliberately did not proscribe significant elements which the State law did proscribe. The collision rested in the State law making unlawful conduct that the Commonwealth law left deliberately at liberty.[32]

15. By contrast, in *McWaters v Day* (1989) 168 CLR 289, a State law prohibiting driving while intoxicated was not invalid where a Commonwealth military discipline offence attached to the same person and conduct. That was despite the penalties being different and the Commonwealth law requiring an additional element (that the person charged be incapable of having proper control of the vehicle concerned).

20 16. Those matters were 'insufficient' to give rise to an inconsistency; the real question being whether the Commonwealth statute, in prescribing a rule to be observed, evinced an intention to exclude State and Territory criminal laws operating on the same facts.[33] The statute did not evince that intention because it 'contemplated a parallel system of military law and ordinary criminal law and [did] not evince an intention that defence force members enjoy absolute immunity from liability under the ordinary criminal law'.[34] The two sets of laws could operate concurrently because the Commonwealth Act did not 'serve the same purpose as laws forming part of the ordinary criminal law.'[35]

17. The FWA, on its proper construction, demonstrates a similar intention.

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31 *Gallagher* (1982) 152 CLR 211, 219.
32 *Dickson* (2010) 241 CLR 491, [22] (the Court).
33 *McWaters v Day* (1989) 168 CLR 289, 296-8 (the Court).
34 Ibid, 299 (the Court).
35 Ibid, 299 (the Court).

C. CONSTRUCTION OF THE *FAIR WORK ACT*

18. ***Objects:*** The object of the FWA is to 'provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians': s 3. The Act achieves that object by, amongst other things 'providing workplace relations laws' and 'ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through… modern awards…': s 3(a) and (b).

19. ***Express statement of intention:*** In pursuit of those objects, Ch 1, Pt 1-3, Div 2 expressly identifies the subject-matters which the Parliament intends to exhaustively regulate. The Division contains no express statement to the effect that that the subject-matters extend to State or Territory laws that impose criminal responsibility for failing to adhere to employment entitlements. As will be seen, the identified subject-matters are more nuanced than merely the creation of 'one, exclusive field of federal industrial law "in relation to a national system employee or a national system employer"': PS [16]. Part 1-3 establishes a national workplace relations system that recognises '*the appropriate balance* between Commonwealth, State and Territory regulation.'[36]

20. That 'balance' is reflected in a number of interlocking provisions. First, by s 26, the FWA operates to the exclusion of certain 'State or Territory industrial laws'. As elaborated upon below, those laws are defined severally and with some specificity, so that s 26 does not operate by reference to a monolithic concept of 'industrial law'. This starting point is then subject to further limitation as provided in s 27. By s 29, modern awards and enterprise agreements prevail over State or Territory laws, but only 'to the extent of any inconsistency'. Section 28 recognises that room is left for State and Territory laws, by providing that further laws may excluded through prescription by regulation: s 28. Section 30 provides that Div 2 is not a complete statement of the circumstances in which the FWA and the instruments made under it are intended to apply to the exclusion of, or prevail over, laws of the States and Territories. That acknowledges the capacity for direct 'clash' between subsequent provisions of the FWA and State and Territory law. However, having stated with precision the areas which the Commonwealth intends to

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[36] *Explanatory Memorandum to the Fair Work Bill 2008* (Cth) (**Explanatory Memorandum**), Notes on clauses [127].

exhaustively regulate, and by retaining the capacity to insert additional areas by regulation, there is no reason to imply a greater negative proposition than is expressed in ss 26-29. Together, these provisions 'mark out'[37] the subject matters of the Commonwealth's exclusive law-making.

21. A 'State or Territory industrial law' is defined exhaustively in s 26(2) by reference to certain subjects. The Plaintiffs identify only s 26(2)(b)(ii) and (iii) as relevant candidates for indirect inconsistency: PS [30]. Those sub-paragraphs provide that a 'State or Territory industrial law' includes:

> 'an Act of a State or Territory that applies to employment generally and has one or more of the following as its main purpose or one or more of its main purposes:
>
> …
>
> (ii) providing for the establishment or enforcement of terms and conditions of employment;
>
> (iii) providing for the making and enforcement of agreements (including individual agreements and collective agreements), and other industrial instruments or orders, determining terms and conditions of employment'

22. ***Making and enforcement of agreements etc:*** Reliance on s 26(2)(b)(iii) may be dismissed immediately. That provision speaks of the 'making *and* enforcement' of certain industrial instruments and orders. The word 'and' in s 26(2)(b)(iii) is conjunctive[38], as is confirmed by its use in contradistinction to the disjunctive 'or' later in the paragraph ('instruments or orders') and elsewhere in s 26(2)(b): s 26(2)(b)(ii) ('establishment or enforcement'), (iv) ('membership or non-membership'), (vi) ('his or her'). There being no suggestion that the WTA provides for the 'making' of instruments determining terms and conditions of employment, s 26(2)(b)(iii) is not engaged.

23. ***Establishment and enforcement of terms and conditions:*** In order to fall within s 26(2)(b)(ii), the WTA must bear three characteristics. It must:

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37 *Tristar Steering and Suspension Ltd v Industrial Relations Commission of New South Wales* (2007) 158 FCR 104, [10] (Kiefel J), speaking of the predecessor s 16 of the *Workplace Relations Act 1996* (Cth).

38 *Minister for Immigration and Border Protection v CQW17* (2018) 264 FCR 249, [27] and [36] (the Court).

(a) apply to 'employment generally'[39];

(b) have a 'purpose' of 'providing for' the 'establishment or enforcement of terms and conditions of employment'; and

(c) have this as its 'main purpose' or 'one of its main purposes'.

24. Whether the WTA has that prescribed 'purpose' is a question of characterisation. As in other areas, a law's 'purpose' is the 'public interest sought to be protected and enhanced' by the law, as opposed to the 'mechanism' by which the law is designed to achieve that end.[40] That purpose is to be identified objectively from the law's text, subject-matter and likely operation and effect.

25. Here, the 'purpose' must be to 'provide for' a subject-matter, namely the 'establishment or enforcement of terms and conditions of employment'. A law will 'provide for' that subject-matter if it creates a means to achieve that end.[41] The WTA does not provide for the '*establishment*… of terms and conditions of employment', and the Plaintiffs do not contend to the contrary. Their focus is on 'enforcement' and processes anterior to it ('inspection' and 'compliance'): PS [31].

26. The proper construction of s 26(2)(b)(ii) of the FWA reveals that 'enforcement'refers to compelling the employee or employer in breach of the civil remedy provision to comply with the obligation imposed by that provision.

27. The ordinary meaning of 'enforcement' is 'the compelling of a law, obligations, etc'.[42] Correlatively, to 'enforce' is to 'compel obedience to' something.[43] Thus, in *Kunakool v Boys* (1987) 14 FCR 489, French J said that 'enforcement' is 'the action of compelling fulfilment of the law.'[44]

28. That directs attention to the 'obligation' or 'law' to be complied with. In the context of securities, the words 'enforce', 'enforceable' and 'enforcement' are 'properly

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39 See FWA, s 26(4). The Northern Territory adopts [42]-[48] of the joint submissions of the defendant and the Attorney-General for the State of Victoria (Intervening) (**Joint Submissions**) as to this requirement.

40 *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560, [101] (Gageler J). See also *Palmer v Western Australia* (2021) 272 CLR 505, [191] (Gordon J), [270] (Edelman J); *McCloy v New South Wales* (2015) 257 CLR 178, [132] (Gageler J); *Spence v Queensland* (2019) 93 ALJR 643, [60] (Kiefel CJ, Bell, Gageler and Keane JJ).

41 *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* (2005) 159 FCR 452, [42], [50] (the Court).

42 *The Shorter Oxford English Dictionary* (3rd edition), 'enforcement', sense 3.

43 *Macquarie Dictionary* (8th edition, 2020), 'enforce', sense 1.

44 *Kunakool v Boys* (1987) 14 FCR 489, 500 (French J). See also *R v Bates* [1982] 2 NSWLR 894, 895 (Samuels JA, Cantor and Enderby JJ agreeing 897); *Fraser v Commissioner of Taxation* (1996) 69 FCR 99, 111 (Beaumont J, Black CJ and Tamberlin J concurring 102,116).

applied to the exercise of any of the *remedies* which the security may give.'[45] So too, the *Restraint of Trade Act 1976* (NSW) is a law dealing with 'claims for *enforcement* of contract for employment' within the meaning of s 27(2)(o) of the FWA because it provides for the making of applications by a person subject to a restraint for orders that the restraint was invalid: s 4(3).[46] Likewise, the innocent party to a contractual breach can enforce the relevant term of the contract by injunction or damages.

29. For the purpose of s 26(2)(b)(ii), the 'obligations' to be enforced are the terms and conditions of employment between an employee and an employer. The main terms and conditions of employment are those set out in the National Employment Standards, a modern award, enterprise agreement or workplace determination that applies to an employee.[47] Those are private obligations, between private parties, which (as explained below) sound in civil remedies. The provision say nothing about the ordinary criminal law, enforceable by public actors with prosecutorial independence, breach of which sound in criminal sanctions, and which serve different purposes (punishment).

30. ***Scheme for the establishment and enforcement of terms and conditions:*** Chapter 2 is headed 'Terms and Conditions of employment' and provides for certain terms and conditions of employment, or a process for the creation of such terms and conditions, including (relevantly) terms and conditions set by modern awards. Modern awards (Pt 2-3) and the national employment standards (Pt 2-2) are intended to create a fair and relevant '*minimum* safety net of terms and conditions': s 134(1). A person must not contravene a term of a modern award: s 45. Like almost all norms in the FWA[48], s 45 is a civil remedy provision which can be 'enforced' under Pt 4-1.[49] The use of the words 'civil' and 'remedy' in the FWA when describing a right or obligation as a civil remedy provision is significant as is the use of 'obligation' and 'entitlement' in ss 46 and 51.

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45 *Bessemer v Owners of Strata Plan 6925/35054* [2018] NSWCA 57, [105] (McColl JA, Simpson JA and Sackville AJA agreeing 120, 121).

46 *HRX Holdings Pty Ltd v Pearson* (2012) 205 FCR 169, [46] (Buchanan J), appeal dismissed in *Pearson v HRX Holdings Pty Ltd* (2012) 205 FCR 187.

47 FWA, s 43(1). These are supplemented by the terms and conditions arising from a national minimum wage order, an equal remuneration order and any terms and conditions provided by Pt 2-9: FWA, s 43(2).

48 Criminal liability is only created by ss 536D, 536F, 536G, 674, 675, 676, 677, 678, and 702(5).

49 Explanatory Memorandum, Notes on clauses [182].

31. Chapter 4 is headed 'Compliance and enforcement' and provides for 'compliance with, *and enforcement of*', the FWA: s 7(1). It contains only two Parts: Pt 4-1, which concerns civil remedies, and Pt 4-2, which concerns the jurisdiction and powers of courts. Contravention of a 'civil remedy provision' is expressly not an offence and criminal procedures and evidentiary rules do not apply to proceedings for its enforcement: ss 549 and 551.

32. By s 539, an employee, employer, employee organisation, employer organisation or an 'inspector'[50] may apply to certain courts for orders in relation to a contravention, or proposed contravention, of s 45. An employee or employer is only entitled to make the application if they are affected by the contravention, and an employee or employer organisation may only apply in relation to an affected employee.[51] An inspector may also apply for an order in relation to an employer's contravention of certain terms and conditions, but only where the contravention is in relation to the employee: s 541(3)(b). The maximum penalty for the contravention is 600 penalty units for a 'serious contravention' (s 557A) or, otherwise, 60 penalty units. An application must be made within 6 years of the alleged contravention: s 544(a).

33. Enforcement proceedings may be brought in the Federal Court, the Federal Circuit and Family Court of Australia (Division 2) or an 'eligible State or Territory court'[52]. Federal courts may make any order they consider appropriate (s 545(1)), but not a penal order. The orders are directed towards civil ends: e.g. an injunction in relation to a breach ('to prevent, stop or remedy the effects of the contravention') or placing a person in the position they would have been in but for the breach ('compensation for loss' and 'reinstatement of a person'): s 545(1) and (2). A State or Territory court may order that an employer pay an employee an amount owing under the FWA: s 545(3). A Court under Pt 4-2 may also order a person pay a pecuniary penalty order to the Commonwealth, an organisation, or a particular person: s 546(3). Pre-judgment interest must generally be awarded for amounts payable other than as pecuniary penalties: s 547. A plaintiff may elect to pursue those claims by way of a small claims procedure: s 548.

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50 FWA, ss 12 ('inspector' and 'Fair Work Inspector'), 700 and 701.

51 FWA, s 540(1), (2) and (5).

52 Defined in s 12 to include District, County, Local and magistrates courts, the Industrial Courts of South Australia and New South Wales, and any other court prescribed by regulations.

34. As that analysis demonstrates, Ch 4 is directed not towards penal ends but to enforcing rights as between employer and employee so as to place the aggrieved party in the position they would have been in but for the contravention.

35. Even the pecuniary penalties available under s 547 have as their end the enforcement of those rights. The penalties are part of the civil remedy armory established by the FWA and they serve a fundamentally different purpose to punishment under the criminal law. As was recently confirmed by this Court, there are 'basic differences'[53] between criminal prosecutions and civil penalty proceedings. Civil penalty provisions have the 'statutory function of securing compliance with provisions of the [statutory] regime'.[54] Whereas 'criminal penalties import notions of retribution and rehabilitation, the purpose of a civil penalty… is primarily if not wholly protective in promoting the public interest *in compliance*'.[55] The 'principal, and… probably the only, object of penalties … is to put a price on contravention that is sufficiently high to *deter* repetition by the contravener and by others who might be tempted to contravene the Act'.[56] As such, principles of proportionately – the yardstick of criminal sentencing[57] – 'have no place'[58] in setting a pecuniary penalty.

36. ***Parallel general criminal laws:*** Having avoided the subject of criminality, the FWA contemplates that the power to make remedial orders in ss 545, 545A and 547 operates in parallel with the ordinary criminal law of the Commonwealth, States and Territories. Section 552 provides that a court must not make a pecuniary penalty order against a person for a contravention of a civil remedy provision if the person 'has been convicted of *an offence* constituted by conduct that is *substantially the same* as the conduct constitution the contravention.' By s 553(1), proceedings for a pecuniary penalty order against a person for a contravention of a civil remedy provision are stayed if 'criminal proceedings' are commenced for an offence

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53 *Australian Building and Construction Commission v Pattinson* (2022) 274 CLR 450 (***Pattinson***), [14] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), quoting from *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 (***Agreed Penalties Case***), [51] (French CJ, Kiefel, Bell, Nettle and Gordon JJ).

54 Ibid, [14], [15] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), quoting from *Agreed Penalties Case* (2015) 258 CLR 482, [24], [55] (French CJ, Kiefel, Bell, Nettle and Gordon JJ).

55 Ibid, [15] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), quoting from *Agreed Penalties Case* (2015) 258 CLR 482, [55] (French CJ, Kiefel, Bell, Nettle and Gordon JJ).

56 Ibid, [15] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

57 *Veen v The Queen (No. 2)* (1988) 164 CLR 465, 472 (Mason CJ, Brennan, Dawson and Toohey JJ), 485-486 (Wilson J), 490-491 (Deane J), 496 (Gaudron J).

58 *Pattinson* (2022) 274 CLR 450, [10] and [68] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

'constituted by conduct that is *substantially the same* as the conduct in relation to which the order would be made'. Section 554 clarifies that criminal proceedings may be commenced against a person for conduct that is '*substantially the same*' as conduct constituting a contravention of a civil remedy provision. Finally, evidence given in proceedings for a pecuniary penalty is not admissible in criminal proceedings concerning '*substantially the same*' conduct: s 555.

37. The effect of ss 552 and 553 is that a pecuniary penalty under s 546(1) of the FWA, even if viewed as punitive, cannot be imposed or sought where the person has been convicted or is being prosecuted for an offence under the other law. Further, and perhaps more importantly, the conviction or prosecution under the Commonwealth, State or Territory law does not prevent a court from making a remedial order under s 545 of the FWA.

38. As this Court has said on several occasions[59], provisions preventing double-jeopardy and related purposes proceed on the basis that a Commonwealth prohibition may not operate to the exclusion of ordinary State and Territory criminal laws.

39. The Plaintiffs seek to side-step these provisions by suggesting that they only apply to offences under the FWA or, more particularly, in relation to unlawful industrial action: PS [39]. That was not the view of the Parliament in 2022, when it said that there are '*existing provisions* that deal with the interaction between civil proceedings under the FW Act and criminal proceedings *under State, Territory or Commonwealth laws* (sections 552-556 of the FW Act)'.[60] Further, the Plaintiffs' submission does not cohere with the text, context, purpose or authority.

(a) ***Text:*** There is nothing in ss 552-555 which limits the word 'offence' to 'offences under the FWA'. The FWA frequently uses the phrase 'under this Act' to limit the ambit of statutory concepts.[61] If a similar limitation were intended, the same words would have been used.

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59 *Outback Ballooning* (2019) 266 CLR 428, [40] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); *Momcilovic* (2011) 245 CLR 1, [104] and [110] (French CJ), [269] (Gummow J, French CJ agreeing at [110], Bell J agreeing at [660]); *Gallagher* (1982) 152 CLR 211, 224 (Mason J); *McWaters v Day* (1989) 168 CLR 289, 296 (the Court).

60 Supplementary Explanatory Memorandum to the *Fair Work Legislation Amendment (Secure, Jobs, Better Pay) Bill 2022* (Cth), Notes on amendments [117].

61 In Ch 4 alone, see ss 542, 545(3)(a), 547(1), 548(1A)(a)(i), 559(1)(a), 562-567, 569, 569A, 571 and 572.

(b) ***Context:*** The immediately following provision (s 556) prevents civil double jeopardy to pay a pecuniary penalty 'under some other provision of a *law of the Commonwealth*'. That is not limited to the FWA.[62] Further, the *Explanatory Memorandum* said nothing to limit these provisions to unlawful industrial action or the FWA: cf PS [39].[63]

(c) ***Purpose:*** Sections 552, 553 and 555 contain important safeguards for those facing civil and criminal proceedings. They also ensure that those criminal proceedings may proceed without being stayed by reason of the concurrent or anterior civil proceedings. There is no reason why the FWA would address these effects only to offences under that Act and not (i) offences against other Commonwealth laws and (ii) offences against State and Territory laws.

(d) ***Authority:*** Prior cases have held that s 553 and its analogues are enlivened by the trial of State[64] or Territory[65] criminal laws and Commonwealth offences outside the FWA.[66]

40. Thus, ss 553-555 contemplate that the FWA operates against the background of general Commonwealth, State and Territory criminal law, despite the existence of civil remedy provisions. This explains why the Commonwealth's regulation of the 'enforcement' of the terms and conditions of employment is not inconsistent with State or Territory criminal laws that take those terms and conditions as one of their constituent elements. There is nothing in the FWA which indicates an intention to immunise employers and employees from these and other general criminal laws, merely because they may operate by reference to the terms and conditions of employment.

41. The Plaintiffs fasten on s 536C to say that ss 26(1) and (2) are otherwise intended to cover the subject-matter of industrial law offences: PS [16]-[17]. Section 536C provides for the concurrency of State and Territory criminal laws relating to

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62 Compare s 66K(a) ('this Act *and any other law of the Commonwealth*'). See also Explanatory Memorandum, Notes on clauses [2187], which described the protection as against a pecuniary penalty 'under *another* law of the Commonwealth relating to the same conduct.'

63 Explanatory Memorandum, Notes on clauses [2180]-[2187].

64 *Construction, Forestry, Mining and Energy Union v Director of Fair Work Building Industry Inspectorate* (2014) 225 FCR 210, [40]-[42] (the Court); *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* (2015) 323 ALR 294, [2], [5]-[13] (Mortimer J).

65 *Barkly Region Alcohol and Drug Abuse Advisory Group Aboriginal Corporation v Naylor* [2019] FCA 1292 (***BRADAAGAC***), [20] (Reeves J).

66 *Darafsheh v Candoo Australia Pty Ltd & Anor* [2020] FCCA 2686, [6] and [99(b)] (Mercuri J).

corrupting benefits offences even if those offences comprise different elements, and ascribe different penalties, to those under Pt 3-7 of the FWA. The Plaintiffs say the absence of a similar provision in s 45 points against any concurrent State criminal law connected to that subject matter. But the purpose of s 536C is to avoid any suggestion that Pt 3.7 itself, especially the offences in ss 536D, 536F and 536G, should be construed as evincing an intention to exclude State or Territory law[67], including those criminalising secret or corrupt commissions, corrupt benefits or rewards or bribes.[68] The provision does not control the scope of s 26(2)(b)(ii). The presence of s 536C(3) is explained by Pt 3-7 being one of the few places[69] within the FWA which creates criminal offences: ss 536D, 536F, 536G.

D. THE WTA REGULATES A DIFFERENT SUBJECT MATTER

42. The WTA is not inconsistent with the FWA because it is not one of its purposes – let alone its 'main purpose' – to provide for the 'enforcement' of terms and conditions of employment. The purpose of the WTA is, relevantly, to '*create offences* relating to non-payment of employee entitlements and the keeping of records relating to employee entitlements': s 1(a).

43. The WTA achieves that purpose principally through Pt 2, headed 'wage theft offences'. That Part prescribes criminal consequences to three forms of conduct which involve a mental element of wrongdoing justifying penal sanction. The first is s 6(1), which provides that an employer must not *dishonestly* withhold an employee entitlement or authorise or permit another person to do so. The second, s 7(1), makes it an offence for an employer to falsify (or authorise another person to falsify) an employee entitlement record with a view to *dishonestly* obtaining financial advantage or preventing the exposure of financial advantage. The third, s 8(1), prohibits an employer from failing to keep (or authorising another to fail to

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67 Section 527CA can be explained on the same basis (cf PS [17, n36]). However, it may here be noted that Pt II, Div 3AA of the *Industrial Relations Act 1979* (WA), being a 'general industrial law' under s 26(2)(a) of the FWA, concern workers that are bullied or sexually harassed at work, hence the reference to s 26 in s 527CA(4).

68 See Schedule 1 to the Explanatory Memorandum for the Fair Work Amendment (Corrupting Benefits) Bill 2017, Item 3 [12]-[17] and s 30 of the FWA.

69 The only other offences are under s 674 (offences in relation to the Fair Work Commission), 675 (contravening a Fair Work Commission order), 676 (intimidating witness to the Fair Work Commission), 677 (failing to attend the Fair Work Commission), 678 (giving false or misleading evidence to the Fair Work Commission), and 702(5) (failing to return an inspector's card). There is no reason to suppose that the States and Territories would pass concurrent criminal laws concerning the operation of those Commonwealth bodies. 'In a dual political system you do not expect to find either government legislating for the other': *In re Richard Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508, 529 (Dixon J).

keep) an employee entitlement record with a view to *dishonestly* obtaining financial advantage or preventing the exposure of a financial advantage.

44. The remainder of the WTA establishes systems for the investigation and prosecution of breaches of *those* penal norms. Part 3 establishes the Wage Inspectorate Victoria (**WIV**), the functions of which include promoting, monitoring and enforcing compliance with '*this Act'* and bringing prosecutions for offences under that Act: s 20(1)(b)-(d). The WIV may only investigate and prosecute 'employee entitlement offences' created under Pt 2: ss 32(1) and (3). In discharge of that function, the WIV has the standard discretions and independence of a modern prosecuting agency: ss 32(3) ('if the [WIV] considers it desirable to do so') and 24(1)(a). It does not commence proceedings for, on behalf of, or at the behest of an employee, but does so as the State for the purpose of punishment.

45. The orders that may be made consequent on a finding of guilt include the usual suite of criminal sanctions.[70] The purposes which those sentences may serve are statutorily limited to punishing an offender, deterring the offender or others, rehabilitating the offender, denouncing the conduct of the offender, and protecting the community from the offender.[71] Regardless of the order selected, their ultimate purpose is 'punishment'.[72]

46. As the above analysis demonstrates, the purpose of s 6 of the WTA, and the consequent orders that can be made, is the punishment of criminally dishonest non-payment of employee entitlements. That is a different purpose from the enforcement of those entitlements, which is not 'punitive'[73] and which is directed to enforcing civil obligations between the parties. This is underscored by five points.

47. *First*, the norms created by the FWA and the WTA are different. In a proceeding for contravention of s 45 of the FWA, it would be sufficient for a plaintiff to prove that an employer has not (for example) paid overtime loading in accordance with an award. However, the WIV could not secure a conviction under s 6(1) of the

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70 *Sentencing Act 1991* (Vic), s 7(1) and Part 3, Div 2 (custodial orders), Part 3A (community correction orders), Part 3B (fines), Part 3BA (other orders), Part 4, Div 1 (restitution) and Div 2 (compensation). However, it should be noted that s 84(4A)-(4C) allows the court to make an order requiring the employer to remedy an underpayment by paying the owed entitlement.

71 *Sentencing Act 1991* (Vic), s 5(1).

72 *Witham v Holloway* (1995) 183 CLR 525, 534 (Brennan, Deane, Toohey and Gaudron JJ).

73 *Agreed Penalties Case* (2015) 258 CLR 482, [101]-[102] (Keane J).

WTA merely because an employer has not complied with the terms and conditions of employment. At least two additional thresholds must be met:

(a) The withholding or authorisation referred to in s 6(1)(a) or (b) must be 'dishonest'. The standard of 'dishonesty' is that employed in the general criminal law.[74] 'Dishonest' means 'dishonest according to the standards of a reasonable person': s 6(11).

(b) An employer or officer will not be liable under s 6(1) or s 6(7) if the employer or officer exercised 'due diligence' to pay or attribute the employee entitlements to the employee: s 6(5)-(6) and (10).

10 48. The WTA cannot, therefore, be said to 'enforce' the terms and conditions of employment prescribed by and under the FWA, because non-compliance with those terms and conditions is not a sufficient condition for criminal liability. The WTA enforces different norms constituted by 'dishonesty' and 'lack of due diligence'.

49. *Secondly*, the 'entitlements' which may be enforced are different. In relation to a wages dispute, s 45 of the FWA only proscribes failure to pay wages up to the minimum safety net in the award: s 139(1)(a). It does not cover any amount payable under an individual contract that is above the award level. By contrast, 'employee entitlement' is defined in s 3 of the WTA to be the *greater* of the amount under a 'relevant law' (i.e. the award) or an employee's contract. Thus, there is no
20 necessary identity between the entitlement that would be the subject of a prosecution under the WTA and industrial action under the FWA.

50. Further, s 27(1)(c)-(d) and (2)(a) and (g) of the FWA provides that s 26 does not apply to laws dealing with superannuation and long-service leave, including laws dealing with 'rights or remedies incidental to' those matters. The Parliament of Victoria has passed laws on those subject matters.[75] The WTA operates in respect of entitlements created under those Acts.

51. *Thirdly*, the remedies available under the two schemes are different. As described above, the remedies available under the FWA are generally directed to ensuring the employee or employer receives his or her entitlements. Those are 'forwards-

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74 *Peters v The Queen* (1998) 192 CLR 493, [18] and [37] (Toohey and Gaudron JJ), referred to with approval in *Macleod v The Queen* (2003) 214 CLR 230, [36]-[37] (Gleeson CJ, Gummow and Hayne JJ).

75 See, e.g. *State Superannuation Act 1988* (Vic) and the *Long Service Leave Act 2018* (Vic).

looking' remedies which compel compliance with an employer's extant obligations. By contrast, the remedies under the WTA are 'backwards-looking' and punitive. It cannot be said that an employer has been 'compelled' to comply with their obligations under an employment contract through (for example) incarceration.[76]

52. *Fourthly*, the parties are different. In most cases, proceedings to enforce the terms and conditions of employment under the FWA must be instituted by a party to the contract, or an organisation authorised to act on their behalf, or an inspector acting in relation to an employee. That agrees with their essentially private character, and the notion that enforcement is for the benefit of the party who enjoys the obligation. By contrast, proceedings under the WTA are commenced by the WIV, who is not a party to the employment contract and does not act for or on behalf of any party to the contract.

53. *Fifthly*, the WTA applies beyond the constitutional limits of the FWA. As the Plaintiffs note, the FWA uses the concepts of 'national system employer' and 'national system employee' to define the outer limits of most of the FWA's operation: PS [18]. By contrast, the WTA applies to all employers and employees without those distinctions and to all employee entitlements, regardless of whether they concern referred or non-referred matters.

D. DIRECT INCONSISTENCY

54. If the WTA is not invalid for 'indirect' inconsistency, then it is not invalid for any 'direct' inconsistency. The Plaintiffs point to no 'direct' or 'textual' collision between the WTA and the FWA, in the sense that the laws impose duties incapable of simultaneous obedience. The laws are perfectly consistent in that respect.[77] Indeed, the purpose of the FWA is 'not only compatible with, but… aided by, the co-existence of'[78] State criminal norms concerning the dishonest non-payment of employment benefits: see [18] above.

55. The Plaintiffs' case on direct inconsistency is that the WTA undermines the FWA because it penalises that which the FWA does not penalise and duplicates systems of inspection, compliance and enforcement 'for the same subject matter': PS [34]-

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[76] And there is no provision for early release from incarceration where the relevant employee entitlement is honoured after sentence.

[77] The WTA picks up the terms and conditions of employment under the FWA by the references to 'relevant laws' in the definition of 'employee entitlement' in s 3(1).

[78] *Momcilovic* (2011) 245 CLR 1, [649] (Crennan and Kiefel JJ), quoting *The Kararikí* (1937) 58 CLR 618, 630 (Dixon J).

[35]. However, those arguments depend on the existence of the same premises as the Plaintiffs' case on indirect inconsistency: that the FWA discloses an intention to prescribe the system of industrial laws to the exclusion of general State and Territory criminal law. If that question is resolved against the Plaintiffs, there would similarly be no 'alteration or detraction from' the FWA.

56. In any event, the WTA does not 'undermine' the FWA because the WTA imposes *less stringent* norms of conduct by requiring (a) that an entitlement be withheld, (b) that the withholding was 'dishonest', and (c) that the employer did not exercise reasonable care and diligence, there being no requirement for dishonesty under the FWS. Further, the limitation periods in the WTA are shorter (3 years, as opposed to 6 years) and the WIV faces higher procedural and evidentiary burdens in prosecutions under the WTA than a plaintiff faces in seeking enforcement under the FWA. The WTA is therefore 'less stringent' than the FWA and the WTA does not 'close up' an area left deliberately at liberty by the FWA.[79]

E. DECLARATORY RELIEF

57. The Territory adopts [57]-[60] of the Joint Submissions.

Part IV: Estimate

58. The Territory estimates that no more than 15 minutes will be required for oral submissions.

Dated 1 September 2023

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[79] *Momcilovic* (2011) 245 CLR 1, [106] (French CJ) and [276] (Gummow J, Bell J agreeing [660]).

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

REHMAT & MEHAR PTY LTD
First Plaintiff

GAURAV SETIA
Second Plaintiff

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and

ROBERT HORTLE
Defendant

ANNEXURE TO THE SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE NORTHERN TERRITORY OF AUSTRALIA, INTERVENING

20 Pursuant to paragraph 3 of Practice Direction No 1 of 2019, the Attorney-General for the Northern Territory sets out below a list of the constitutional, statutory and statutory instrument provisions referred to in these submissions.

No.	Description	Version	Provisions
1.	*Constitution* (Cth)	Current	s 51(i), (xx), (xxxvii) s 109 s 122
2.	*Fair Work Act 2009* (Cth)	Current	s 3 s 4(3) s 12 s 26(2)(b)(ii) and (iii), (4) s 27(1)(c)-(d), (2)(a), (g), (o)

			s 26-30 Ch 1, Pt 1-3, Div 2 s 43 s 45 s 46 s 51 s 139(1)(a) Ch 2, Pt 2-2 and Pt 2-3 s 536C, 536D, 536F, 536G Ch 3, Pt 3-7 s 539 s 540(1), (2), (5) s 541-452 s 544(a) s 545(1), (2) and (3) s 545A s 546(1), (3) ss 547-549 s 551-556 s 557A s 559 s 565-567 s 569-569A s 571-572 Ch 4, Pt 4-1 and Pt 4-2 ss 674-678 ss 700-701 s 702(5)
3.	*Constitution Act 1975* (Vic)	As in force 17 March 2021	s 16

4.	*Sentencing Act 1991* (Vic)	Current	s 5(1) s 7(1) s 84(4A)-(4C) Part 3, Div 2 Part 3A Part 3B Part 3BA Part 4, Div 1 and Div 2
5.	*Wage Theft Act 2020* (Vic)	Current	s 1(a) s 6(1), (5)-(7), (10), (11) s 7(1) s 8(1) Pt 2 s 20(1)(b)-(d) Pt 3 s 24(1)(a) s 32(1) and (3)
6.	*Restraint of Trade Act 1976 (NSW)*	Current	[all]
7.	*Industrial Relations Act 1979* (WA)	Current	Pt II, Div 3AA