HIGH COURT OF AUSTRALIA

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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 THE STATE OF SOUTH AUSTRALIA (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 the State of South Australia (**South Australia**) intervenes in this matter pursuant to s 78A of the *Judiciary Act 1903* (Cth).

Part III: LEAVE TO INTERVENE

3. Not applicable.

Part IV: ARGUMENT

4. The central question arising in this proceeding is whether the *Wage Theft Act 2020* (Vic) (**WT Act**) is inconsistent with the *Fair Work Act 2009* (Cth) (**FW Act**) for the purposes of s 109 of the *Constitution*.

5. For the reasons advanced below, South Australia submits, in support of the Defendant and the Attorney-General for the State of Victoria (intervening) (**Victoria**), that the WT Act is not inconsistent with the FW Act.

The test of inconsistency

6. Section 109 of the *Constitution* provides that '[w]hen a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'.

7. Different approaches have been taken to the question of whether an inconsistency might be said to arise between State and Commonwealth laws.[1]

8. Direct inconsistency has been said to arise where a State law would 'alter, impair or detract from' the operation of a Commonwealth law.[2] Importantly, however, instances of direct inconsistency 'always depend on a conclusion that the Commonwealth requirement / authorisation / prohibition is intended to operate regardless of State law'.[3] By way of example, the direct inconsistency that was discerned in *Dickson v The Queen* rested upon a conclusion that 'the *Crimes Act* (Vic) render[ed] criminal conduct not caught by, and indeed deliberately excluded from, the conduct rendered criminal by … the *Criminal Code* (Cth)'.[4]

9. Indirect inconsistency has been said to arise where the Commonwealth law 'leaves no room for the operation of a State … law dealing with the same subject matter'.[5] Again, instances of indirect inconsistency have as their 'essential notion … that, upon its true construction, the federal law contains an implicit negative proposition that nothing other than what it provides with respect to a particular subject matter is to be the subject of legislation'.[6] By way of example, the indirect inconsistency identified in *Viskauskas v Niland* rested upon a conclusion that '[i]t appears from both the terms and the subject matter of the Commonwealth Act that it is intended as a complete statement of the law for Australia relating to racial discrimination'.[7]

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1 See, for example, *Work Health Authority v Outback Ballooning Ltd* (***Outback Ballooning***) (2019) 266 CLR 428, 446-448 [31]-[35] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

2 *Dickson v The Queen* (2010) 241 CLR 491, 504 [22] (the Court); *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (***Jemena***) (2011) 244 CLR 508, 524 [39] (the Court); *Outback Ballooning* (2019) 266 CLR 428, 447 [32] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

3 G Rumble, 'Manufacturing and Avoiding *Constitution* Section 109 Inconsistency: Law and Practice' (2010) 38 *Federal Law Review* 445, 458.

4 *Dickson v The Queen* (2010) 241 CLR 491, 504 [22] (the Court). The emphasis on discerning intention from the Commonwealth enactment is also apparent at 505 [24]-[25] and 507-508 [34].

5 *Outback Ballooning* (2019) 266 CLR 428, 447 [33] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

6 *Momcilovic v The Queen* (***Momcilovic***) (2011) 245 CLR 1, 111 [244] (Gummow J). Quoted with approval in *Outback Ballooning* (2019) 266 CLR 428, 448 [35] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

7 *Viskauskas v Niland* (1983) 153 CLR 280, 292 (the Court).

10. The common foundation of direct and indirect inconsistency was identified by Justice Aickin in the following passage from *Ansett Transport Industries (Operations) Pty Ltd v Wardley*:[8]

> The two different aspects of inconsistency are no more than a reflection of different ways in which the Parliament may manifest its intention that the federal law, whether wide or narrow in its operation, should be the exclusive regulation of the relevant conduct. Whether it be right or not to say that there are two kinds of inconsistency, the central question is the intention of a particular federal law.

11. Whilst the terms 'direct' and 'indirect' may usefully[9] describe how the question of inconsistency has been approached from case-to-case,[10] it would be conceptually problematic,[11] and misleading,[12] to go further and attribute different analytical tests to them. This is particularly so if the adoption of categories was to distract attention from 'the critical question',[13] namely the intention of the Commonwealth Parliament.[14] To use the labels of 'direct' and 'indirect' in that manner would be to introduce 'glosses on the constitutional notion of "inconsistency"'.[15]

12. Consistent with the above submissions, the test for determining whether a law of a State is inconsistent with a law of the Commonwealth for the purposes of s 109 should be understood to depend 'upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed'.[16]

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8 (1980) 142 CLR 237, 280 (see also, 248 (Stephen J)), referred to with approval in *Momcilovic* (2011) 245 CLR 1, 116 [261] (Gummow J); *Outback Ballooning* (2019) 266 CLR 428, 459 [71] (Gageler J), 472-473 [105] (Edelman J); G Rumble, 'The Nature of Inconsistency under Section 109 of the *Constitution*' (1980) 11 *Federal Law Review* 40, 81; G Lindell, 'Grappling with Inconsistency between Commonwealth and State Legislation and the Link with Statutory Interpretation' (2005) 8(2) *Constitutional Law and Policy Review* 25, 31. See also Submissions of the Defendant and the Attorney-General for the State of Victoria (**DS**), [9].

9 *Momcilovic* (2011) 245 CLR 1, 233-234 [630]-[631] (Crennan and Kiefel JJ).

10 *Outback Ballooning* (2019) 266 CLR 428, 472-473 [105] (Edelman J); G Rumble, 'Manufacturing and Avoiding *Constitution* Section 109 Inconsistency: Law and Practice' (2010) 38 *Federal Law Review* 445, 445; M Leeming, *Resolving Conflicts of Laws* (Federation Press, 2011), 141.

11 *Outback Ballooning* (2019) 266 CLR 428, 456-457 [67] (Gageler J). See also *Momcilovic* (2011) 245 CLR 1, 140-142 [339]-[342] (Hayne J).

12 *Outback Ballooning* (2019) 266 CLR 428, 472-473 [105] (Edelman J).

13 *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211, 235 (Wilson J).

14 *Momcilovic* (2011) 245 CLR 1, 112 [245], 116 [261] (Gummow J); G Rumble, 'The Nature of Inconsistency under Section 109 of the *Constitution*' (1980) 11 *Federal Law Review* 40, 72, 76; G Lindell, 'Grappling with Inconsistency between Commonwealth and State Legislation and the Link with Statutory Interpretation' (2005) 8(2) *Constitutional Law and Policy Review* 25, 28.

15 M Leeming, *Resolving Conflicts of Laws* (Federation Press, 2011) 18. See also, 141; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 426 [304] (Kirby J).

16 *Ex parte McLean* (1930) 43 CLR 472, 483 (Dixon J); *Outback Ballooning* (2019) 266 CLR 428, 456 [65] (Gageler J); G Lindell, 'Grappling with Inconsistency between Commonwealth and State Legislation and the Link with Statutory Interpretation' (2005) 8 *Constitutional Law and Policy Review* 25, 34.

13. The centrality of the legislative intention of the Commonwealth Parliament to s 109 analysis is significant to the resolution of the present proceedings for the following three reasons.

14. First, although the Plaintiffs may be correct that there is no interpretative presumption against a conflict between laws of the Commonwealth and the States,[17] Commonwealth laws are frequently enacted against a background of State laws which form the setting in which they are intended to operate.[18] It is, therefore, necessary to identify a 'clear indication in the [Commonwealth] legislation',[19] express or implied, that it intends to state exclusively what the relevant law should be before inconsistency may be discerned. Inconsistency should not be gleaned from 'speculative and uncertain grounds'.[20]

15. Second, the focus on legislative intention dictates the method by which the question of inconsistency is to be determined, namely by 'conventional processes of statutory construction'.[21] That undertaking requires 'a tight careful analysis'[22] which 'turns on nuances in the legislation being considered'.[23]

This understanding of s 109 inconsistency was expressed in Australia's constitutional development as early as 1902: '[t]he question in all such cases is one of interpretation, whether the paramount Legislature has in fact sufficiently expressed its exclusive intent. No universal rule can be laid down': H Moore, *The Constitution of The Commonwealth of Australia* (1st ed, 1902) 410 (citation omitted).

17 Plaintiffs' Submissions (**PS**), [13], citing *Butler v Attorney-General (Vic)* (1961) 106 CLR 268, 276 (Fullagar J). There, Justice Fullagar also expressed the view that equally there is no 'presumption' that the Commonwealth 'did … intend by its own Act to … preclude from operation a State Act' (at 276). Justice Leeming, writing extra-judicially, takes the matter further and suggests that concurrent operation may be taken to be a default operating assumption, such that the absence of an express displacing provision 'is an indicator, albeit one of relatively slight weight, against inconsistency': M Leeming, *Resolving Conflicts of Laws* (Federation Press, 2011) 181. This view may draw support from the context of s 109, located in Chapter V concerning the States, and immediately following s 107 (which saves the concurrent legislative power of the States) and s 108 (which saves State laws). It has some support in the United States: M Leeming, *Resolving Conflicts of Laws* (Federation Press, 2011), 181. Given that the FW Act contains an express displacement provision (s 26), it is unnecessary for the Court to rely upon Justice Leeming's '"default" position' for the purposes of resolving the present case.

18 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 426 [303] (Kirby J); *Outback Ballooning* (2019) 266 CLR 428, 449-450 [41] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

19 *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657, 673 (Latham CJ); M Coper, *Encounters with the Australian Constitution* (CCH Australia Ltd, 1988), 163.

20 M Coper, *Encounters with the Australian Constitution* (CCH Australia Ltd, 1988), 163.

21 *Momcilovic* (2011) 245 CLR 1, 74 [111] (French CJ). See also, 112 [245], 115-116 [258]-[261] (Gummow J); 141 [341] (Hayne J); *Dickson v The Queen* (2010) 241 CLR 491, 506-508 [32], [34] (the Court); *Western Australia v Commonwealth* (1995) 183 CLR 373, 466 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); G Lindell, 'Grappling with Inconsistency between Commonwealth and State Legislation and the Link with Statutory Interpretation' (2005) 8(2) *Constitutional Law and Policy Review* 25, 30; M Leeming, *Resolving Conflicts of Laws* (Federation Press, 2011) 176.

22 G Rumble, 'The Nature of Inconsistency under Section 109 of the *Constitution*' (1980) 11 *Federal Law Review* 40, 72.

23 M Leeming, *Resolving Conflicts of Laws* (Federation Press, 2011), 176.

16. Third, and consistent with the requirement to undertake a careful approach to construction of the Commonwealth statute in question, the terminology of 'cover the field', employed by the Plaintiffs,[24] should be avoided. This 'test' for inconsistency has been widely criticised.[25] As Justice Evatt said in *The Kakariki*, '[a]ny analogy between legislation with its infinite complexities and varieties and the picture of a two-dimensional field seems to me to be of little assistance'.[26] The metaphor has the potential to give rise to a misapprehension that an 'easy or mechanical' approach, which fails to grapple with the complexity and variety of Commonwealth legislation, may suffice.[27]

17. With respect, for the reasons that follow, South Australia submits that the Plaintiffs have not approached the task of construing the FW Act with the subtlety it requires.

The test of inconsistency applied

18. It can readily be accepted that significant areas within which the FW Act operates to the exclusion of State and Territory laws. Yet, this observation does little to assist in identifying where the limits of the exclusive operation of the FW Act lie. As noted above, those limits are to be discerned by a process of statutory construction.

19. In circumstances where the Commonwealth Parliament has stated its intention to exclude State and Territory laws in express terms, the relevant construction exercise should commence with the terms of s 26 of the FW Act. However, the exercise is not confined to the text of that provision. Rather, it requires consideration of any provision of the FW Act

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[24] PS, [12], [16], [18].

[25] *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657, 690 (Evatt J) ('hackneyed expression containing … dangers and ambiguities'); *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128, 147 (Evatt J) ('a *cliché*'); *Momcilovic* (2011) 245 CLR 1, 116-119 [262]-[265] (Gummow J) ('has served only to confuse what is a matter of statutory interpretation'); *Jemena* (2011) 244 CLR 508, 524 [40] (the Court) ('has not been free from criticism'); I Tammelo, 'The Tests of Inconsistency between Commonwealth and State Laws' (1957) 30 *Australian Law Journal* 496, 501 ('not been accepted with a general feeling of satisfaction'); G Craven, 'The Operation of Section 109 of the *Commonwealth Constitution*' in Proceedings of the Australian Constitutional Convention (v 2, 1985, Brisbane), 110 ('virtually unusable as a workable criterion'); M Leeming, *Resolving Conflicts of Laws* (Federation Press, 2011) 151-154 ('[an inapt] metaphor which leads to error').

[26] *Victoria v Commonwealth* (***The Kakariki***) (1937) 58 CLR 618, 634 (Evatt J), quoted with approval in *Momcilovic* (2011) 245 CLR 1, 118 [264] (Gummow J). A similar point was made in more fulsome terms by J Goldsworthy, The Language of Excluded Subject Matters in Australian Constitutional Law (unpublished thesis, Law Library, University of Adelaide, 1977), 7-8, quoted in G Craven, 'The Operation of Section 109 of the *Commonwealth Constitution*' in *Proceedings of the Australian Constitutional Convention* (v 2, 1985, Brisbane), 115: 'while a "field" may include a particular activity, it does so only from a certain "point of view"; its regulation of the activity is concerned only with some "aspects" of the activity. For the State law to invade a field it must do more than simply regulate the activity (which is also governed as part of the field): it must in doing so somehow touch the same "point of view" or "aspects" with which the Commonwealth in covering the subject-matter was concerned.'

[27] I Tammelo, 'The Test of Inconsistency between Commonwealth and State Laws' (1957) 30 *Australian Law Journal* 496, 501.

'which throws light on the intention of the statute to make exhaustive or exclusive provision on the subject with which it deals'.[28] It is only by undertaking this careful task that all relevant textual, contextual and purposive considerations, bearing on the true meaning of Parliament's statement of intent (here, s 26 of the FW Act), may be accounted for.

20. The Plaintiffs place primary reliance on the terms of ss 26(2)(b)(ii) and (iii), which adopt the notion of 'enforcement'.[29] In doing so, the Plaintiffs appear to contend that the term 'enforcement' bears a construction that includes enforcement of a rule (in this case, a term or condition of employment) by criminal proscription. That construction may be available if the word 'enforcement' was considered in isolation. However, the textual, contextual and purposive considerations support Victoria's contention[30] that the notion of 'enforcement' contained in s 26(2)(b) is focussed on the rules governing the relationship between *employers and employees*, rather than criminal sanction. In this way, the relevant notion of 'enforcement' should be understood to be non-punitive.

Textual considerations

21. The following textual indicia direct attention to the connection between 'enforcement' in s 26(2)(b) and the regulation of the employer-employee relationship.

    21.1. Section 26(2)(a) defines 'State or Territory industrial law' to include a 'general State industrial law', which is, in turn, defined by sub-s (3) to include those general laws enacted by the States, such as the *Fair Work Act 1994* (SA), that govern the relationship between employers and employees. This is confirmed by the definition of 'industrial law' found in s 12 of the FW Act, which includes any law of the Commonwealth that 'regulates the relationship between employers and employees'. The common feature of 'industrial laws', for the purposes of the FW Act, is that they regulate the employee-employer relationship.

    21.2. The relevant notion of 'enforcement' found in s 26(2)(b) is connected with the 'terms and conditions', thereby reinforcing the central notion of the employer-employee relationship.

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[28] *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation, Australia* (1977) 137 CLR 545, 562 (Mason J). See also *Outback Ballooning* (2019) 266 CLR 428, 447-448 [35] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

[29] For the reasons advanced by Victoria at DS, [33], it is only necessary to consider the terms of s 26(2)(b)(ii). However, given that the notion of 'enforcement' appears in both ss 26(2)(b)(ii) and (iii), the same reasoning would in any event be applicable to the construction of 'enforcement' s 26(2)(b)(iii).

[30] DS, [38].

21.3. In order to qualify as a State or Territory industrial law for the purposes of s 26(2)(b), that law must be an Act of a State or Territory that 'applies to employment generally'. The class of enactments captured by s 26(2)(b) are then limited by ss 26(4)(a) and (b) to include only Acts that apply to 'all employers and employees in the State or Territory'. This requirement again focusses attention on the relationship between employers and employees.[31]

21.4. The non-punitive construction of 'enforcement' draws some further support from the capacity for additional laws of a State or Territory to be prescribed by regulations to be 'State or Territory industrial laws' pursuant to s 26(2)(h), without the 'applies to employment generally' and 'main purpose' constraints that restrict the operation of s 26(2)(b).[32]

22. Importantly, the significance of s 26(4) (referred to above) travels beyond the proper construction of the term 'enforcement' found in s 26(2)(b). That is because the WT Act is not an Act that 'applies to' employees. By the imposition of criminal liability pursuant to ss 6(1), 7(1) and 8(1) the WT Act applies to 'employers' and by the imposition of criminal liability pursuant to ss 6(7), 7(2) and 8(2) it applies to 'officers of an employer'. The WT Act imposes no criminal liability on employees. Nor does the WT Act apply to employees in its practical operation; the securing of a conviction of an employer does not bear upon the rights or interests of an employee.[33] It follows that the WT Act is not an Act of a State or Territory that 'applies to employment generally' and cannot be a 'State or Territory industrial law' for the purposes of s 26(2)(b), irrespective of what the 'main purposes' of the WT Act may be. This reasoning provides a standalone basis on which the Court may conclude that the operation of the WT Act is not excluded by s 26 of the FW Act, in addition to the submission advanced by Victoria that the WT Act does not apply to employment generally for the purposes of s 26(4).[34]

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[31] Consistently with the examples in Explanatory Memorandum, Fair Work Bill 2008 (Cth), 20 [137]. See also, in relation to the predecessor of s 26 of the FW Act (ss 4 and 16 of the *Workplace Relations Act 1996* (Cth)), Explanatory Memorandum, Workplace Relations Amendment (Work Choices) Bill 2005 (Cth), 35 [10].

[32] See also the additional regulation-making power contained in s 28 of the FW Act.

[33] Whilst, as Victoria notes in its submissions (DS, [41] fn 48), a restitution order may be made for the benefit of an 'affected employee' following a finding of guilt or conviction of particular WT Act offences, that scheme is provided for by s 84 of the *Sentencing Act 1991* (Vic) and not the WT Act. Accordingly, that feature of the *Sentencing Act 1991* (Vic) does not alter the conclusion that the WT Act does not 'apply to' employees.

[34] DS, [42]-[48].

Contextual considerations

23. The meaning of the term 'enforcement' found in s 26(2)(b) of the FW Act is also informed by the nature of the enforcement mechanisms employed by the FW Act itself for the enforcement of terms and conditions of employment. The FW Act pursues this objective by providing for, among other things,[35] a regime of civil remedies (pecuniary penalties and court orders under ss 545-546). The relevant provisions[36] concerning for pecuniary penalties serve a purpose which is 'primarily if not wholly protective in promoting the public interest in compliance';[37] 'deterrence is "the principal and indeed only object" of the imposition of a civil penalty'.[38] And, the power in s 545(1) to make appropriate orders in relation to contravention are 'limited to making appropriate preventative, remedial and compensatory orders and as such does not include a power to make penal orders'.[39] Accordingly, in making provision for the enforcement of terms and conditions of employment, the FW Act, both in its operation and by its express terms,[40] eschews notions of punishment and criminality. As the Plaintiffs accept, it is 'precisely calculated' to avoid the notion of criminality.[41]

24. By contrast, the WT Act deploys a different legislative response, namely the criminal law. The purpose of enforcement by criminal proscription travels beyond deterrence. A finding of criminal guilt carries with it the opprobrium of denunciation, calls for rehabilitation, justifies retribution and may result in up to 10 years' imprisonment.[42] The purpose of enforcement pursued by the WT Act stands apart from the civil remedy scheme for which the FW Act provides[43] (in which '[r]etribution,

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35 The FW Act also provides for enforcement mechanisms, to provide an alternative regulatory option to civil remedy proceedings, including the issuance of compliance notices by inspectors and written enforceable undertaking from persons in relation to a contravention of a civil remedy provision in prescribed circumstances: FW Act, ss 715-716.

36 The effect of which has been detailed in PS, [21] and DS, [19]-[20].

37 *Commonwealth v Director, Fair Work Building Industry Inspectorate* (***Agreed Penalties Case***) (2015) 258 CLR 482, 506 [55] (French CJ, Kiefel, Bell, Nettle and Gordon JJ); *Australian Building and Construction Commissioner v Pattinson* (***Pattinson***) (2022) 274 CLR 450, 459 [15] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

38 *Pattinson* (2022) 274 CLR 450, 459-460 [16] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

39 *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157, 193 [110] (Keane, Nettle and Gordon JJ), see also 168-171 [23]-[32] (Kiefel CJ), 174-175 [51] (Gageler J).

40 FW Act, s 549.

41 PS, [35].

42 *Agreed Penalties Case* (2015) 258 CLR 482, 506 [55] (French CJ, Kiefel, Bell, Nettle and Gordon JJ); *Pattinson* (2022) 274 CLR 450, 459 [15] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

43 To so observe is not to suggest that there are bright lines which mark the criminal law apart from the civil law. Nonetheless, there are 'basic differences': *Pattinson* (2022) 274 CLR 450, 548 [14] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ). See also 469-470 [45].

denunciation and rehabilitation have no part to play').[44] That different purpose tends against exclusivity. In *McWaters v Day*, the Court considered different penalties in respect of substantially the same conduct under the *Traffic Act 1949* (Qld) and the *Defence Force Discipline Act 1982* (Cth). The Court unanimously considered that the Commonwealth Act there did not 'serve the same purpose as laws forming part of the ordinary criminal law', and that it was 'supplementary to, and not exclusive of, the ordinary criminal law'.[45]

25. The non-punitive construction of 'enforcement' in s 26(2)(b) is then further confirmed contextually by the suite of 'double jeopardy' provisions found in ss 552 to 555 of the FW Act.[46] These provisions[47] are not directed only to proceedings for contraventions of the FW Act (or indeed other Commonwealth laws). They apprehend the possibility that proceedings (including a prosecution of an offence under a State law)[48] and civil remedy proceedings under the FW Act may be taken in respect of substantially the same conduct. In response to that apprehension, the Commonwealth Parliament has 'accommodat[ed] federal diversity falling short of invalidating inconsistency'.[49] Provisions such as ss 552 to 555 operate, of course, in circumstances where the relevant State law is not inoperative under s 109.[50] Nonetheless, they remain relevant during the anterior stage[51] of examining the meaning of s 26, and in turn Parliament's intention 'to make exhaustive or exclusive provision on the subject matter with which it deals'.[52]

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44 *Pattinson* (2022) 274 CLR 450, 459-460 [16] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

45 *McWaters v Day* (1989) 168 CLR 289, 299 (the Court).

46 *Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate* (2014) 225 FCR 210, 218-219 [32] (the Court). The Full Court, attributing a 'double jeopardy' purpose to those provisions, acknowledged that '[t]he double jeopardy principle has almost universal support but does not always have a single meaning' and that 'double jeopardy can be and is spoken of at different stages of the process of criminal justice' (at 219 [33]).

47 The effect of which has been detailed in DS, [21]-[22].

48 Other provisions of the FW Act also contemplate such proceedings in providing for the referral of matters to relevant authorities (s 682(1)(e)) and authorising information disclosure for State law enforcement purposes (ss 655 and 718(1)-(2)).

49 *Momcilovic* (2011) 245 CLR 1, 74 [110] (French CJ). To invoke the logic of Justice Mason in *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211, 224, approved in *Momcilovic* (2011) 245 CLR 1, 236 [643] (Crennan and Kiefel JJ), there is no prima facie presumption that the FW Act, by making particular acts civil remedy provisions, evinces an intention to deal with those acts to the exclusion of any other law.

50 *Dickson v The Queen* (2010) 241 CLR 491, 504 [21] (the Court); *Momcilovic* (2011) 245 CLR 1, 74 [110] (French CJ).

51 *Momcilovic* (2011) 245 CLR 1, 71-72 [104], see also 74 [110] (French CJ), 119-120 [268] (Gummow J, Bell J relevantly agreeing at 240-241 [660]), 236-237 [643]-[647] (Crennan and Kiefel JJ). Cf PS, [39].

52 *Outback Ballooning* (2019) 266 CLR 428, 447-448 [35] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

Purposive considerations

26. This Court has recognised in a series of s 109 cases, that the pursuit by a Commonwealth law of a beneficial purpose will be a factor that tends against an intention to exclude a State law with a complementary or otherwise compatible purpose.[53] Such reasoning supports the non-punitive construction of 'enforcement' found in s 26(2)(b) of the FW Act. The purpose of enforcing terms and conditions of employment is beneficial and therefore may be more readily understood as accommodating the concurrent operation of State law that pursues a compatible purpose.

27. It is plain that the civil remedy scheme of enforcement of the terms and conditions of employment pursues a beneficial purpose. This is apparent not only from the operation of the relevant civil remedy provisions themselves, but also from the legislative history of the FW Act.[54]

28. The explanatory materials to the Bill introducing the FW Act emphasised the over-arching purpose of establishing a scheme that is 'fair to working people'.[55] More recently, specific amendments to the FW Act were introduced for the complimentary, more targeted purpose of 'deter[ring] unscrupulous employers who exploit vulnerable workers'.[56] This purpose was effected by the addition of a 'serious contravention' of a civil remedy provision, applicable where a person knowingly contravenes the provision as part of a systematic pattern of conduct.[57] The maximum penalty for such a contravention is 10 times a standard contravention.[58] Those amendments 'respond[ed] to a growing body of evidence that the laws need to be strengthened',[59]

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53 *The Kakariki* (1937) 58 CLR 618, 630 (Dixon J); *Momcilovic* (2011) 245 CLR 1, 237-238 [649]-[652] (Crennan and Kiefel JJ); *Jemena* (2011) 244 CLR 508, 528 [57] (the Court).

54 For completeness, South Australia notes that in 2021 the Commonwealth Parliament considered, but ultimately rejected, an amendment to s 26 of the FW Act to introduce express statements that the FW Act was intended to apply to the exclusion of certain State offences 'relating to underpaying an employee' and 'relating to an employee record that is required to be made or kept': Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (Cth) (as introduced), Sch 5 cl 43. Various reasons were advanced for the inclusion and subsequent rejection of that clause: Revised Explanatory Memorandum, Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (Cth) 74 [394]-[396]; Commonwealth, *Parliamentary Debates*, Senate, 17 March 2021, 2036 (Jess Walsh), 2061 (Anthony Chisholm); Commonwealth, *Parliamentary Debates*, Senate, 18 March 2021, 2201 (Raff Ciccone), 2239-2243 (in committee).

55 Explanatory Memorandum, Fair Work Bill 2008 (Cth), i.

56 Explanatory Memorandum, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (Cth), ii.

57 *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth), Sch 1 cl 13; FW Act s 557A(1).

58 *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth), Sch 1 cll 3-12; FW Act s 539(2).

59 Explanatory Memorandum, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (Cth), i. (However, the amendments did not change the character of the enforcement regime under the

including the report by the Senate Education and Employment References Committee entitled 'A National Disgrace: The Exploitation of Temporary Work Visa Holders' which comprehensively detailed a range of problems associated with vulnerable workers, including underpayment of wages.[60]

29. It is immediately apparent that the purpose of the WT Act is entirely complementary to that pursued by the FW Act in this regard. One of the express objects of the WT Act is to 'create new wage theft offences, targeting employers who steal pay and other employee entitlements, or engage in efforts to obscure wage theft through dishonest record keeping practices'.[61] As in *The Kakariki*, *Jemena* and *Momcilovic*, the State law in question is not only compatible with the co-existence of, but indeed enhances, the purpose pursued by the Commonwealth law.

Conclusions on inconsistency

30. South Australia submits that the FW Act does not intend to apply to the exclusion of the WT Act because the WT Act is not 'a State or Territory industrial law' for the purposes of s 26(1). That conclusion is supported by two independent, but complementary, reasons. First, when the notion of 'enforcement' in s 26(2)(b) of the FW Act is properly construed, such that it does not extend to enforcement by punitive means, the WT Act is not 'an Act of a State or Territory that … has … as its main purpose … enforcement of terms and conditions of employment'.[62] Second, the WT Act does not apply to employees, such that it is not an Act that 'applies … to all employers and employees in the State' for the purposes of s 26(4) and is, therefore, not 'an Act of a State or Territory that applies to employment generally' for the purposes of s 26(2)(b).[63]

31. The Plaintiffs have also mounted a 'direct inconsistency' case in support of which they venture beyond s 26 of the FW Act.[64] It is open to the Plaintiffs to do so because s 30 provides that Division 2, Part 1-3, Chapter 1 of the FW Act is 'not a complete statement

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Commonwealth Act; the increased penalties were 'set with a view to achieving the aim of deterrence, which is the principal purpose of the penalties': at 3 [12]).

60 Senate Education and Employment References Committee, 'A National Disgrace: The Exploitation of Temporary Work Visa Holders' (Report, March 2016). That Report was referred to in the Explanatory Memorandum, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (Cth), i, 6.

61 Victoria, *Parliamentary Debates*, Legislative Assembly, 19 March 2020, 1097 (Jill Hennessy). See also WT Act s 1(a).

62 Paragraphs [21], [23]-[29] above.

63 Paragraph [22] above.

64 PS, [34]-[36].

of the circumstances in which this Act [is] … intended to apply to the exclusion of … law of the States'. Nonetheless, where the Parliament has delineated the intended exclusive operation of the FW Act with the exactness that characterises ss 26-29, the instances of inconsistency which s 30 contemplates would appear, at least predominantly, to be limited to those rare instances of inconsistency that arise where it is impossible to obey both laws. Even if greater scope for inconsistency than this is preserved by s 30 of the FW Act, the factors relied on and the type of inconsistency asserted by the Plaintiffs in this part of their case can more appropriately be accommodated within the construction of s 26, as demonstrated above. As noted by Victoria,[65] the adoption by the Plaintiffs of the labels of 'direct' and 'indirect' inconsistency is misplaced. The present case is one where the utility of distinguishing between these approaches is, at best, unclear.

Part V: ESTIMATED TIME FOR ORAL ARGUMENT

32. It is estimated that up to 20 minutes will be required for the presentation of South Australia's oral argument.

Dated: 1 September 2023

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[65] DS, [51], fn 51.

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 ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA'S SUBMISSIONS

Pursuant to paragraph 3 of *Practice Direction No 1 of 2019*, South Australia sets out below a list of the particular constitutional provisions and statutes referred to in submissions.

No.	Description	Provisions	Version
1.	*Constitution*	ss 107, 108, 109	current (compilation no. 6)
Commonwealth statutes			
2.	*Fair Work Act 2009* (Cth)	Part 1-2: s 12 Part 1-3: ss 26-30 Part 4-1: ss 539, 545, 546, 549, 552-55, 557A Part 5-1: s 655 Part 5-2: ss 682, 715, 716, 718	current (compilation no. 51)
3.	*Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth)	Sch 1 Part 1	as made
4.	*Workplace Relations Act 1996* (Cth)	ss 4, 16	27 March 2006 compilation

No.	Description	Provisions	Version
State statutes			
5.	*Fair Work Act 1994* (SA)		current (1 July 2021 compilation)
6.	*Sentencing Act 1991* (Vic)	s 84	current (authorised version no. 223)
7.	*Wage Theft Act 2020* (Vic)	Part 1: s 1 Part 2: ss 6, 7, 8	current (authorised version no. 002)